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CUR-H06224-62-LP1988

INDIAN CASES

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OF

The **PRIVY COUNCIL**, the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON**,

the Courts of the Judicial Commissioners of

CENTRAL PROVINCES, OUDH,

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VOLUME 73, 1923.

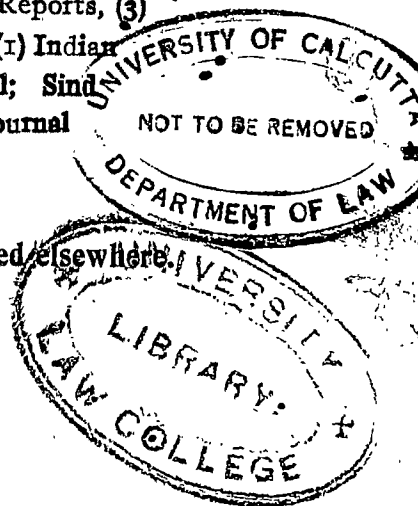
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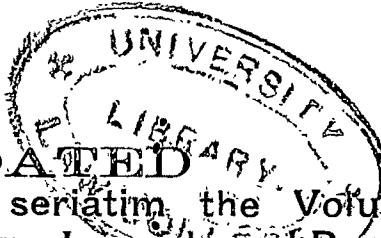
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PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

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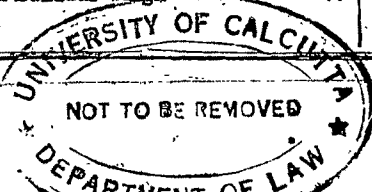
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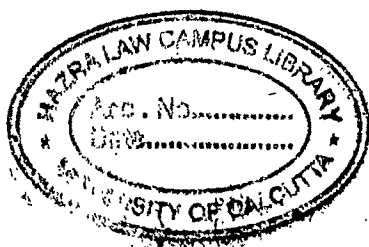
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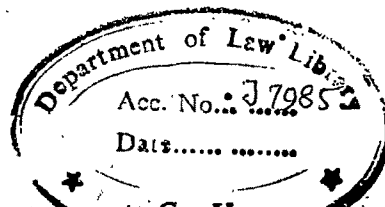


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529	Lal Baijnath Singh v. Chandrapal Singh	21 A. L. J. 457; (1923) A. I. R. (A.) 553.
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691	Emperor v. Sarwan Singh	..	(1923) A. I. R. (L.) 223; 5 L. L. J. 329; 24 Cr. L. J. 659.
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738	Ishar v. Hukam Singh	..	(1923) A. I. R. (L.) 485.
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773	Aziz Ahmad v. Buddhu Khan	..	21 A. L. J. 459; 24 Cr. L. J. 677; 45 A. 553.
773	Rahim Sheikh v. Emperor	..	37 C. L. J. 595; 24 Cr. L. J. 677; 50 C. 872.
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INDIAN CASES

1923.

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LAHORE HIGH COURT.

SECOND CIVIL, APPEAL No. 2007

OF 1920.

April 26, 1923.

Present :—Mr. Justice Abdul Raqof and
Mr. Justice Lumsden.

PARMESHRI DAS AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

PARAS RAM—PLAINTIFF, AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 7—
Punjab Courts Act (VI of 1918), s. 41 (3)—Pre-
emption suit—Appeal, second—Certificate, when
not necessary.*

Where a Court of first appeal fails to go into the question of custom and a second appeal is preferred with the object of having the question of custom tried, no certificate under section 41 (3) of the Punjab Courts Act is necessary for the validity of the appeal.

Second appeal from a decree of the District Judge, Karnal, dated the 5th May 1920, affirming that of the Subordinate Judge, Second Class, Rohtak, dated the 21st May 1915.

Mr. Shamair Chand and Lala Badri Das, R. B., for Appellants.

Mr. Manohar Lal, for the Respondents.

ORDER.—This second appeal arises out of a suit for pre-emption. One of the issues raised was framed in the following words:—

"Does the custom of pre-emption exist in Kalanaur?"

The Trial Court decided this issue in the affirmative and granted a decree to the plaintiff. On appeal the question was again raised before the lower Appellate Court. That Court recorded the following finding on that question:—

"The next point raised by the vendee-appellant is that there is no custom of pre-emption in Kalanaur. This contention is

untenable as, by Notification No. 677 of 10th November 1908, the Punjab Government included Kalanaur as a town for the purposes of Pre-emption Act."

It is clear from the judgment of the lower Appellate Court that the question as to the existence of custom was not decided on the merits. The decree of the Trial Court having been upheld by the lower Appellate Court the defendant preferred the present second appeal. A Division Bench of this Court, while admitting the appeal, made the following remarks:—

"The District Judge has not gone into the question of the existence of the custom of pre-emption in Kalanaur. The Notification does not conclude the question."

We have taken into consideration the provisions of the Act. All that the Notification could have declared was that Kalanaur was a town. It does not necessarily follow that the custom of pre-emption exists in a place which has been declared to be a town under the Notification. We are, therefore, constrained to remit the issue No. 2 for decision on the merits on the evidence on the record. On receipt of the finding ten days will be allowed to the parties to file objections.

We may mention that a preliminary objection was raised by Mr. Manohar Lal on behalf of the respondents to the hearing of the appeal on the ground that no certificate having been produced, as required by section 41 of the Punjab Courts Act, the appellants were not entitled to question the finding on custom. It is, however, clear from the judgment of the lower Appellate Court that the Judge has not gone into the question of custom at all.

MAKHAN LAL DE V. ARUN BALA DEVI.

The object of the appeal is to have the question of custom tried. We accordingly overruled the preliminary objection and proceeded to hear the appeal.

Z. K.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 2238 OF 1920.

July 21, 1922.

Present:—Justice Sir Asutosh Mukerjee,
Kt., and Mr. Justice Chotzner.

MAKHAN LAL DE—

DEFENDANT—APPELLANT

versus

Srimati ARUN BALA DEVI AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Tenancy, nature of—
Proof—Presumption.

Where the origin and the original purpose of a tenancy are not known, the facts that the rent has never changed, that there have been several devolutions by inheritance in the family of the tenant and that the land of the tenancy is used in part for dwelling purposes and in part as a garden, point to the conclusion that the tenancy is a non-agricultural permanent tenancy of a transferable character. [p. 4, cols. 1 & 2.]

Shoroshi Charan Ghose v. Bhagloo Sah, 37 Ind. Cas. 877; 32 C. L. J. 85, *Debendra Nath Das v. Bibudhendranath Mansingh Bhramarbar Roy*, 45 Ind. Cas. 411; 45 I. A. 67; 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 C. 805 (P. C.), *Afzal-un-nisa v. Abdul Karim*, 50 Ind. Cas. 749; 46 I. A. 131; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. R. (P. C.) 47; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919 (P. C.), *Surendra Nath Roy v. Dwarka Nath Chakravarty*, 50 Ind. Cas. 856; 24 C. W. N. 1; (1919) M. W. N. 811 (P. C.), *Ismail Khan Mahomed v. Jaigun Bibi*, 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374, *Caspersz v. Kedar Nath*, 28 C. 738; 5 C. W. N. 858 and *Rajani Kanta Ghose v. Secretary of State for India*, 51 Ind. Cas. 226; 45 I. A. 190; 23 C. W. N. 649; 46 C. 90 (P. C.), referred to.

When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and the acts and condition of the parties generally constitute the evidence, and may be the only evidence, available to prove the nature of the tenancy. [p. 3, col. 2.]

Moharam Sheikh Chaprasi v. Talemuddin Khan, 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220, followed.

The purpose of a tenancy may be altered by consent of the contracting parties, and when such alteration takes place the incidents of the tenancy may not be identical with those at its inception. [p. 3, col. 2.]

Appeal against a decree of the Additional District Judge, Howrah, at Hooghly, dated the 30th June 1920, affirming the decree of the Subordinate Judge, Howrah, dated the 31st March 1919.

Dr. Dwarka Nath Mitra (with him Babu Narendra Nath Chaudhury), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for ejectment. The case for the plaintiff was that the tenure was non-transferable and it having been sold to the defendant the latter is liable to ejectment. My defence was that the holding was *maurusi mokarrari* and is, therefore, transferable by law. Both Courts have decreed the suit. I submit there is nothing on the record to show that neither the origin of the tenancy nor the original purpose for which the tenancy was created, was proved. The findings which are in my favour are that the rent has remained uniform and that the land is used for dwelling and horticultural purposes. I submit these facts fully bear out our case that the tenancy was permanent, heritable and transferable. See *Moharam Sheikh Chaprasi v. Talemuddin Khan* (1), *Shoroshi Charan Ghose v. Bhagloo Sah* (2), *Debendra Nath Das v. Bibudhendranath Mansingh Bhramarbar Roy* (3), *Afzal-un-nissa v. Abdul Karim* (4), *Surendra Nath Roy v. Dwarka Nath Chakravarty* (5).

Babu Hira Lal Chakravarty, for the Respondents.—The sole question is whether the tenancy is governed by the provisions

(1) 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220.

(2) 57 Ind. Cas. 877; 32 C. L. J. 85.

(3) 45 Ind. Cas. 411; 45 I. A. 67; 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 C. 805 (P. C.).

(4) 50 Ind. Cas. 749; 46 I. A. 131; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. R. (P. C.) 47; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919 (P. C.).

(5) 50 Ind. Cas. 856; 24 C. W. N. 1; (1919) M. W. N. 811 (P. C.).

MAKHAN LAL DE V. ARUN BALA DEVI.

of the Transfer of Property Act or of the Bengal Tenancy Act. It has been found that the holding has been held by four members of the family of the original tenant. The question is for what purposes the tenancy was created. I submit there is evidence to show that the lands were let out for agricultural purposes. If the provisions of the Transfer of Property Act apply, then there is an end of the case. My suit has been brought on the footing that the lands were let out for agricultural purposes. I do not dispute that it is an old tenancy and that the rent has remained unchanged. But I do say that there has been neither any transfer of the holding nor any recognition by us of the transfer. The tenant never raised any substantial structures on the land which would have shown that the tenancy was of a permanent nature. See *Moharam Sheikh Chaprasi v. Talemuddin Khan* (1). In the present case the land has been sold away. I submit the lands being in the *Mofussil* it can be presumed that the lands were used for agricultural purposes.

Dr. Mitra, replied in brief.

JUDGMENT.—This is an appeal by the defendant in a suit for ejectment. The plaintiffs brought the action on the allegation that the disputed tenure was the non-transferable holding of their tenant Saroda Charan Ghose who conveyed it to the defendant on the 3rd May 1914, who is in occupation as a trespasser without title. The defendant contended that the tenancy was not an agricultural but a *maurusi mokarrari* holding which was transferable by law. The Courts below have on these pleadings considered the question whether the lease was under the Transfer of Property Act or under the Bengal Tenancy Act. They have concurrently come to the conclusion that the lease was under the Bengal Tenancy Act and the interest of the tenant was not transferable. In this view, the plaintiffs have been awarded a decree for ejectment.

In our opinion, it is plain that the Courts below did not consider the real question in controversy in this litigation. It has been found that the origin of the tenancy is not known, though it is stated that the vendor of the defendant was the fourth member of the family who had by inheritance

succeeded to the holding. It has also been found that the original purpose of the tenancy is not known. The evidence further established conclusively that the rent has never changed although there has been a proportionate reduction by reason of the acquisition of a part of the land for public purposes. The Courts below have finally held that the land is used and has been used for years past in part, for dwelling purposes and in part for horticultural purposes. There is a stray passage in the evidence which may indicate that a part of the land was previously under cultivation. But it is not clear that the distinction between agricultural and horticultural purposes was appreciated when this statement was made by the witness. In view of these facts, it is plain that the question does not arise whether the lease was under the Transfer of Property Act or under the Bengal Tenancy Act. It is not a lease under either of the two Statutes as neither Statute was in existence when the tenancy originated. The real question is, whether the tenancy is agricultural or non-agricultural.

As already stated, the original purpose of the tenancy is not known. Consequently, the principle enunciated in *Ismail Khan Mahomed v. Jaigun Bibi* (6) applies; namely, when the origin of the tenancy and the circumstances attending its creation, are not known, evidence of the mode of dealing with the land demised and the acts and condition of the parties generally constitute the evidence, and indeed may be the only evidence, available to prove the nature of the tenancy. In the case before us, a part of the land has been used for dwelling purposes and the remainder as a garden. It is not necessary to consider whether at any previous stage of its history, it was used in part also for agricultural purposes. For it is well settled that the purpose of a tenancy may be altered by consent of the contracting parties and when such alteration takes place the incidents of the tenancy may not be identical with those at its inception. As regards the nature of the tenancy at the present time, there is little doubt in view of the statement made by the landlord himself, on the 3rd July 1905,

(6) 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374.

SARFARAJ KHAN v. RAMCHANDRA.

in an apportionment proceeding under the Land Acquisition Act. It was then asserted that the tenant-mother of the transferor of the present defendants held the land for dwelling and other purposes. It is impossible for us to hold, in these circumstances, that the tenancy at the present time is agricultural or that the transferor was a *raiyat* with a right of occupancy or non-occupancy *raiyat*. He must be deemed to be a tenant of non-agricultural lands. This leads us to the question, what are the incidents of such a tenancy? Was the tenancy transferable?

The defendant has contended that the facts established justify the inference that the tenancy was of a permanent character and was transferable. In support of this view reliance has been placed upon the cases of *Moharam Sheikh Chaprasi v. Talemuddin Khan* (1) and *Shoroshi Charan Ghose v. Bhagloo Sah* (2). In the case of *Moharam Sheikh Chaprasi v. Talemuddin Khan* (1) the earlier authorities were reviewed and it was laid down that where the origin of the tenancy was unknown, but the original tenant and his successor had been in occupation of the land for over 60 years on payment of rent which was never varied, and the tenancy was treated by the landlord as heritable and the land was let out for residential purposes, the inference was that the tenancy was in its inception permanent. The presence of a permanent structure on the land was not essential to establish that the tenancy in its inception was of a permanent character. The proposition last mentioned was questioned in the case of *Shoroshi Charan Ghose v. Bhugloo Sah* (2) but was re-affirmed, and it was specifically laid down that a dwelling house need not be brick-built in order to indicate that the tenancy was intended in its inception to be of a permanent character. The principle deducible from these cases has been affirmed by the Judicial Committee in *Surendra Nath Roy v. Dwarka Nath Chakravarty* (5) and *Afzal-un-nissa v. Abdul Karim* (4) where the decision of this Court in *Caspersz v. Kedar Nath* (7) was followed and applied. It cannot be suggested, as was pointed out in the

(7) 28 C. 738; 5 C. W. N. 858.

case of *Moharam Sheikh Chaprasi v. Talemuddin Khan* (1), that the question involved is one of fact. The question is a mixed question of fact and law, and this accords with the decision of the Judicial Committee in *Debendra Nath Das v. Bibudhendhra Mansingh Bhramarbar Roy* (3) and *Rajani Kanta Ghose v. Secretary of State for India* (8). We are clearly of opinion that the facts found by the Courts below, which are accepted as the basis of our judgment, point to the conclusion that the disputed tenancy was a permanent tenancy of a transferable character and that the defendant-purchaser is not a trespasser as alleged by the plaintiffs.

The result is, that this appeal is allowed, and the suit is dismissed with costs in all the Courts.

B. N.

Appeal allowed.

(8) 51 Ind. Cas. 226; 45 I. A. 190; 23 C. W. N. 649; 46 C. 90 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 5-B.
OF 1922.

November 1, 1922.

Present :—Mr. Predeaux, A. J. C.

SARFARAJ KHAN—APPLICANT
versus

RAMCHANDRA AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 114—Change of law after passing of decree—Review.

The grounds for a review must be something which exist at the time of the decree sought to be reviewed: a review cannot be granted because of the happening of a subsequent event. Consequently, where there has been a change in the law subsequently to the passing of a decree, that is not a sufficient ground for review.

Application for review of the judgment passed in Second Appeal No. 82-B of 1920 by Mr. Dhobley, Additional Judicial Commissioner, Nagpur, dated the 19th October 1921.

MOORE V. GULAB CHAND.

ORDER.—This is an application for a review of Dhobley, A. J. C.'s judgment in Second Appeal No. 82-B of 1920 delivered on the 19th October last.

It is contended that, since the passing of that judgment a new law has come into force called "The Berar Alienated Villages Tenancy Law." That law has unquestionably been passed and came into force on the 1st of January this year, i.e., long subsequent to the passing of the judgment. But it is argued that as execution proceedings had not then commenced, the case must still be held to be pending at the commencement of this law. This may be so, and the arguments might be used in the Execution Court or before the Deputy Commissioner when applicant attempts to get himself recorded as a permanent tenant. But these reasons are of no weight in determining whether a review of this Court's judgment should be granted. For, it is settled law that the grounds for a review must be something which exist at the time of the decree and there is no authority that review can be granted because of the happening of some subsequent event. It may be that the decree of this Court upholding the decrees of the Courts below would have been different had the new law been in force. But it was not in force at the passing of the decree and, therefore, the decree was perfectly correct. As I have already stated, the new law can be urged in the Execution Court or in appeal from that Court or in an application to the Deputy Commissioner to be recorded as a permanent tenant.

It seems to me that this application for review does not lie and I dismiss the petition with costs. The applicant will pay the non-applicant's costs.

G. R. D.

*Petition dismissed.***PATNA HIGH COURT.**

FIRST CIVIL APPEAL No. 285 of 1921.

December 7, 1922.

Present :—Mr. Justice Das and
Justice Sir John Bucknill, Kt.E. A. MOORE AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Rai. Babu GULAB CHAND SAHIB—

PLAINTIFF—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 106—
Question of title between rival proprietors, decision of.
A Revenue Officer in deciding disputes between
rival proprietors under section 106 of the Bengal
Tenancy Act is confined to the question of possession
alone and is not competent to decide a question
of title. [p. 6, col. 2.]*

A Revenue Officer is competent to decide a question as to the relationship of landlord and tenant provided the question does not arise between the proprietors of neighbouring estates. [p. 7, col. 1.]

A certain plot of land was recorded in the Record of Rights as in the possession of plaintiff, who was the owner of an estate, as tenure-holder, while defendant, who was the owner of a neighbouring estate was recorded as the proprietor of the plot. Plaintiff brought a suit under section 106 of the Bengal Tenancy Act for a declaration that the plot was part of his estate and that he was in possession of it as proprietor and asking that the word "tenure-holder" appearing against his name in the Record of Rights in respect of the plot should be struck out:

Held, (1) that the suit raised a question of title between proprietors of neighbouring estates; [p. 7, col. 2.]

(2) that a Revenue Officer had no jurisdiction under section 106 of the Bengal Tenancy Act either to entertain the suit or to refer it to a competent Civil Court for trial. [p. 7, col. 2.]

Appeal against the decision of the Sub-Judge, Muzaffarpur, dated the 23rd August 1919.

Messrs. *Sushil Madhab Mullick and Nawal Kishore Prasad No. II*, for the Appellants.

Messrs. *S. P. Sen and Baikuntha Nath Mitter*, for the Respondent.

JUDGMENT.

Das, J.—The disputed lands having an area of 66 bighas 8 kattahs and 9 dhurs were recorded in the finally published Record of Rights as appertaining to *Mauza Bhagwanpur*. The Record of Rights further stated that the land was in the possession of the proprietor of *Mauza Manpurwa* as a tenure-holder. The plaintiff is the proprietor of *Mauza Manpurwa* and he instituted a suit under the provisions of

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section 106 of the Bengal Tenancy Act in the Court of the Settlement Officer of North Bihar for the following reliefs:—

(1) That it may be held that the 66 *bighas* 8 *kathas* and 9 *dhurs* of land in suit appertains to *Mauza* Manpurwa and it is, as *milik* (proprietary interest), in possession of the plaintiff. It bears *Khasra* Nos. 3, 26, 32, 2, 9, 1, 11, 11, 33, 14, 15, 4, 27, 38, 7, 29, 30, 31, 34, 36, 5, 12, 22, 23, 18, 19, 13, 28, 35, 24, 37, 6, 16, 17, 20, 21, 8 and 25.

(2) That it may be held that the defendants have no connection and concern whatever with the land in suit and that it does not appertain to Bhagwanpur.

(3) That it may be held that there is a custom prevailing in both the *Mauzas* and the neighbouring villages that whatever land accrues to whatever *Mauza* on account of (change of current of) the river Sikarahana is declared as appertaining to that *Mauza* and the other *Mauza* has no connection with the same.

(4) That the Court may be pleased to decide that the *maliks* of both the *Mauzas* have rights to fishery of the aforesaid river Sikarahana in shares of halves and it may be held that a red line (on a map) should be fixed in the middle of the said river Sikarahana so that the *maliks* of both the *Mauzas* may have their boundary limits fixed with respect to their shares of halves.

(5) That it may be held that the proprietor's *khewat* with respect to the aforesaid land in suit should be prepared in the name of the plaintiff and the entry made in the case under section 103 stating him (the plaintiff) as *raiyat* should be struck off.

(6) That a decree for the above (reliefs) may be passed and costs in Court, interest *pendente lite* and future interest up to the date of realization, may be awarded against the defendants.

The learned Settlement Officer before whom the suit came up for hearing thought that there was no question of possession raised in the suit, but that it involved a question of right and title. He considered that the question was important because it would affect other considerable areas in the locality. He accordingly, under section 106 of the Bengal Tenancy Act, read with r. 40 paragraph D. of the Govern-

ment Rules, directed that the record of the case be sent to the District Judge for trial by such competent Civil Court as he may direct. The learned District Judge directed that the suit should be heard by the Subordinate Judge of Muzaffarpur. The learned Subordinate Judge accordingly heard the suit. He considered that he had no jurisdiction to decide the question of title. But, nevertheless, he held that the disputed lands appertained to the plaintiff's village Manpurwa.

The defendants appeal to this Court and on their behalf it is argued by Mr. S. M. Mullick that the learned Subordinate Judge had no jurisdiction to take cognizance of the case or to decide the question at all. Section 106 of the Bengal Tenancy Act provides that a suit may be instituted before a Revenue Officer at any time within three months from the date of the final publication of the Record of Rights under sub-section (2) of section 103-A by presenting a plaint on a stamped paper for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from the record, whether such dispute be between landlords and tenants or between landlords of the same or neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent free is properly so held, or as to any other matter, and the Revenue Officer shall hear and decide dispute.

It is contended on behalf of the respondents that there was a dispute regarding an entry which was made by the Revenue Officer although it may be that the dispute was between the landlords of neighbouring estates. It was also contended that, in so far as the entry recorded the plaintiff as the tenant of the appellants, it was clearly within his power to maintain the suit under section 106 of the Bengal Tenancy Act which expressly authorises a suit raising a question whether the relationship of landlord and tenant exists. It has been held in numerous cases that a Revenue Officer in deciding disputes between rival proprietors under section 10 is confined to the question of possession alone and is not competent to decide the

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question of title. It is quite true that the Revenue Officer is competent to decide the question whether the relationship of landlord and tenant exists, but, in my opinion, he is only competent to decide that question provided the question is not between neighbouring estates. The question for our determination then is: does the suit raise a question of title between neighbouring proprietors? The learned Settlement Officer himself took the view that it raised the question of title and in that view, and in that view only, he has sent the case for trial to the Civil Court. A careful perusal of the plaint leaves no doubt whatever in my mind that the plaintiff in this suit raised a question of title for trial by the Settlement Court. In the first prayer he claims that he is in possession of the disputed land in proprietary interest. The Record of Rights shows that the proprietary interest was in the defendant and, in so far as he claims by prayer 1 that the proprietary interest is in himself, he has clearly raised the question of title as between him and the defendants. The second paragraph, in my opinion, raised the same question. He asks that it may be held that the defendants had no connection and no concern whatever with the land in suit. The Record of Rights shows that the defendants have connection and concern with the land in suit. In so far as he asked the Court to hold that the defendants had no connection or concern with the land in suit, he invited the Court to determine that the defendants had no title whatsoever. The third prayer invited the Court to hold that there is a custom prevailing in the *Mauzas* and the neighbouring villages that whatsoever land accrues to whatever *Mauza* on account of the change of current of the river Sikarahana is declared as appertaining to that *Mauza* and the other *Mauza* has no connection with the same. He is in this paragraph inviting the Court to determine that the custom of the mid-stream prevails in the *Mauzas*. That again can by no stretch of language be held to raise a question of possession and not a question of title. Mr. Sen, strongly relies upon the fifth prayer of his plaint. In that prayer he asks that it be held that the proprietor's *khwat* with respect to the

aforesaid land in suit should be prepared in the name of the plaintiff and the entry made in the case under section 103 stating him (the plaintiff) as *raiyyat* should be struck off. I am unable to see how it can be said that this prayer raises a question of possession. Mr. Sen has insisted before us that all that he is asking the Court to do is to strike off the word "tenure-holder" appearing as against his name but if the Court strikes off the word "tenure-holder" it is obliged to record the plaintiff either as a proprietor or something else. In asking the Court to determine that he ought to be recorded not as a tenure-holder but as a proprietor and that the proprietor's *khwat* with respect of the aforesaid land should be prepared in his name, he is definitely asking the Court to decide a question of title as between him and the defendants. In my opinion, it is impossible to contend that the suit does not raise a question of title as between rival proprietors. I hold that the Settlement Officer had no jurisdiction to entertain this suit. That being so, he has no jurisdiction to make any order under section 106 transferring the case to a competent Civil Court for trial. The Civil Court accordingly had no jurisdiction to try the suit.

I must allow this appeal and set aside the judgment and the decree of the Court below and dismiss the suit. I would make no order as to costs.

Buckmill, J.—I agree.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 117 OF 1922.

November 30, 1922.

Present:—Mr. Hallifax, A. J. C.

PURANLAL, AND ANOTHER—PLAINTIFFS
APPLICANTS

versus

CHIRKUTYA MALI—DEFENDANT—
NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Demand note for rent, suit on—Jurisdiction of Court of Small Causes.

MEGHRAJ V. KESHEO RAO.

A suit based on a demand note executed for the satisfaction of rent for a field is triable by a Court of Small Causes.

Revision of the order of the Small Cause Court Judge, Nagpur, dated the 31st March 1922, in Civil Suit No. 2060 of 1921.

Mr. K. P. Vaidya, for the Applicants.

Mr. M. D. Khândikar, for the Non-Applicant.

JUDGMENT.—The defendant took a lease of a field for Rs. 150 for a year from the plaintiffs, and at the beginning of the year paid Rs. 75 in cash and executed a demand note for the remaining Rs. 75 promising to pay interest on it. The plaintiffs sued on the demand note in the Small Cause Court, and it has been held that the suit is one for the rent and is, therefore, not triable in that Court. The learned Judge distinguishes the ruling in *Govind Vishnu Kukde v. Maroti Narayan Joshi* (1) where the matter is very clearly explained by saying that the demand note was executed for "prospective rent" and "this amount cannot be called arrears of rent." There is no mention of arrears or of "prospective rent" in Art. 8 of the Schedule of the Small Cause Courts Act, which speaks only of "rent other than house rent." The matter is very simple. At the beginning of the year the defendant paid the whole of his rent partly in cash and partly by executing the note. He owes no rent to the plaintiff now, but he does owe him what he promised to pay him on the note. A demand note or a bond does not cease to be an ordinary demand note or bond just because a part of the whole of its consideration is made up of rent whether in arrears or in advance. The order of the lower Court that the plaint should be returned for presentation to another Court is set aside. The plaint will be returned to that Court and will be re-admitted and the suit will be properly tried out.

The whole costs of these proceedings, in which Rs. 15 will be allowed as Pleader's fee, must be paid by the defendant non-applicant.

N. K.

Order set aside.

(1) 15 C. P. L. R. 52.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 250 OF 1922.

March 24, 1923.

Present :—Mr. Hallifax, A. J. C.

MEGHRAJ—AUCTION-PURCHASER

—APPELLANT

versus

KESHEO RAO AND OTHERS—

DECREE-HOLDERS—RESPONDENTS.

Transfer of Property Act (I V of 1882), s. 91 (f)—*Civil Procedure Code* (Act V of 1908), O. XXXIV, r. 1—*Mortgage suit*—Attaching creditor, whether necessary party—Omission to implead—Right of redemption whether affected.

A creditor, attaching mortgaged property in execution of his money-decree who is given a right to redeem by section 91 (f) of the *Transfer of Property Act* is a person having an interest in the right of redemption and is thereby entitled under O. XXXIV, r. 1 of the *Civil Procedure Code* to be joined as a defendant in a suit on the mortgage. If he is not so impleaded, his right to redeem cannot be affected by a decree in that suit.

Appeal from the decree of the Additional District Judge, Nagpur, dated the 10th April 1922, in Civil Appeal No. 174 of 1921.

Mr. V. Bose, for the Appellant.

Mr. M. R. Indurkar, for the Respondent.

JUDGMENT.—The parties have agreed that the only matter now in dispute between them is the question whether the appellant has a right of redemption or not, and that that question shall be decided in this appeal. The property in dispute is a house which was attached on the 10th of December 1915 by the appellant in execution of a money-decree. On the 7th of November 1917 the respondent's predecessor-in-title instituted a suit for sale of the house under a mortgage. About a month later, on the 11th of December 1917, the house was sold by auction under the appellant's decree, and he bought it himself and subsequently obtained possession. The father of the respondents, who has died during the course of this suit, obtained a final decree for sale in his mortgage suit on the 6th of December 1919, and similarly bought the house himself at the sale, which was held on the 10th of March 1920. These proceedings have arisen out of his application for possession which is resisted by the appellant.

2. The learned Counsel for the appellant argued that he is entitled to redeem the mortgage, and it is hard to see

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how his argument can be effectively met. It was this. He was a person entitled under clause (f) of section 91 of the Transfer of Property Act to "redeem or institute a suit for redemption" at the time the respondent instituted his mortgage suit; he was, therefore, a "person having an interest in the right of redemption" even if he had none in the mortgage security, and had to be impleaded in the respondent's mortgage-suit under r. 1 of O. XXXIV of the Civil Procedure Code as he was not so impleaded his right to redeem cannot be affected by the decree in that suit.

3. The rulings cited for the appellant were the Allahabad case of *Ghulam Hussain v. Dina Nath* (1) and the Madras case of *Titali Venkata Seetharamaya v. Vedula Venkataramaya* (2). The learned Pleader for the respondents cited the ruling of the Calcutta High Court in *Shananda Chandra Pal v. Sri Nath Roy Chowdhury* (3) and the two later Madras rulings in *Veyindramuthu Pillai v. Maya Nadan* (4) and *Chamiyappa Tharakan v. Rama Iyer* (5). Every one of these, except the first of the two Madras cases quoted for the respondents, was concerned with the period prior to the passing of the Civil Procedure Code of 1908, and in that one case the attaching creditor's right to redeem was admitted, but it was held that it could be enforced only by a separate suit and not in proceedings under section 47 of the Civil Procedure Code, the right to succeed in the present proceeding with the certainty of having a regular suit filed against him has been waived by the respondents. In *Chamiyappa Tharakan v. Rama Iyer* (5), the latest of the Madras cases mentioned, the second sale of the property under the mortgage took place in 1906, and the matter for decision was only whether a person mentioned in clause (f) of section 91 of the Transfer of Property Act was included among those mentioned in section 85 of the same Act. I cannot see that the learned Judges did actually hold that such a person is not among those

mentioned in r. 1 of O. XXXIV of the Civil Procedure Code, but if they did the remarks would clearly be *obiter dicta*.

4. Such conflict as there is in all the rulings cited seems to me to be on the question whether an attaching creditor, who is given a right to redeem by clause (f) of section 91 of the Transfer of Property Act has any interest in the mortgaged property and is thereby entitled, under section 85 of the Transfer of Property Act, to be joined as a defendant in a suit on the mortgage. The question appears to have been completely set at rest by the amendment of section 85 of the Transfer of Property Act by the substitution for it of r. 1 of O. XXXIV of the Civil Procedure Code, whereby the interest of those to be joined in a mortgage-suit is no longer restricted to an interest in the property but is stated to be "an interest either in the mortgage security or in the right of redemption." These words cannot possibly exclude any person of any of the clauses mentioned in section 91 of the Transfer of Property Act, whether the words of section 85 of the Transfer of Property Act did so or not.

5. I find, accordingly, that the appellant is entitled to redeem the respondent's mortgage. It was agreed between the parties that, in the event of that being the decision the price of redemption should be the amount awarded by the respondent's decree with interest thereon at 6 per cent. per annum from the date of the decree (6th December 1919) to 8th March 1923. The appellant certainly did refuse in the beginning to redeem the mortgage, insisting on his right to remain in possession without any payment; the question of the right to redeem was raised and the offer to do so was made for the first time in this Court. Each party must, therefore, pay its own costs in all three Courts. A decree will issue in the form of a decree for foreclosure in default of the payment of the sum mentioned above within one month from this date.

N. K.

Appeal allowed.

(1) 23 A. 467; A. W. N. (1901) 143.

(2) 15 Ind. Cas. 334; 37 M. 418.

(3) 17 Ind. Cas. 432; 17 C. W. N. 871.

(4) 58 Ind. Cas. 501; 43 M. 696; (1920) M. W. N. 299; 39 M. L. J. 456; 28 M. L. T. 312.

(5) 62 Ind. Cas. 121; 44 M. 232; 40 M. L. J. 51 (1921) M. W. N. 53.

KALIPADA DAS V. DURGA DAS ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1353
OF 1920.

May 26, 1922.

Present.—Justice Sir Asutosh Mukerjee, Kt.,
and Mr. Justice Chotzner.

KALIPADA DAS AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

DURGA DAS ROY—DEFENDANT

—RESPONDENT.

*Legal Practitioners Act (XVIII of 1879),
s. 28—Pleader, professional services by—Suit for
recovery of remuneration, maintainability of.*

The Court is reluctant to restrict the provisions of section 28 of the Legal Practitioners Act by placing a narrow and restricted interpretation thereon. [p. 11, col. 2.]

Sib Kishore Ghosh v. Manik Chandra Nath, 29 Ind. Cas. 453; 21 C. L. J. 618 at p. 620, *Kamini Debi v. Khettra Mohan Ganguli*, 11 Ind. Cas. 382; 15 C. L. J. 690; 15 C. W. N. 681, *Ishan Chandra Kar v. Ram Charan Pal*, 26 Ind. Cas. 960; 20 C. L. J. 445, and *Mohendra Lal v. Akhil Chandra Pakrashi*, 20 Ind. Cas. 47; 20 C. L. J. 424, followed.

Where there is no agreement between a Pleader and his client, the Pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties such contract to be enforceable must fulfil the requirements of section 28 of the Legal Practitioners Act, namely, the contract must be in writing and the writing must be deposited in Court within the prescribed period. [p. 11, col. 2.]

Plaintiff, a legal practitioner, rendered certain professional services to the defendant. There was an agreement between the parties as to the remuneration to be paid to the plaintiff but it was not filed in Court. On accounts being adjusted between the parties a certain sum was found due to the plaintiff on the basis of the agreement. He sued to recover this amount:

Held, that the suit was in its essence to enforce the agreement and was not maintainable on account of failure to comply with the provisions of section 28 of the Legal Practitioners Act. [p. 11, col. 2.]

Kamini Debi v. Khettra Mohan Ganguli, 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45, *Krishnasami v. Kesava*, 14 M. 63; 5 Ind. Dec. (N. S.) 45 and *Anantayya v. Padmayya*, 16 M. 278; 2 M. L. J. 247; 5 Ind. Dec. (N. S.) 900, relied upon.

Appeal against a decree of the District Judge, Midnapore, dated the 17th February 1920, affirming that of the Subordinate Judge, Third Court of that District, dated the 28th December 1918.

Babu Mahendra Nath Roy (with him Babu Gopendra Nath Das), for the Appel-

lants.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of money (Rs. 5,000) due on adjustment of accounts. The plaintiff acted as the legal adviser of the father and the paternal grandmother of the defendant. My allegation is that an account was taken of the sums due to me for my services and that after deducting the sums paid and the amounts relinquished an amicable settlement was made on 11th April 1914 and it was found and settled that Rs. 5,000 was due to me from the defendant's estate. The defendant is a Ward of Court. The defence was that the suit was barred under section 28 of the Legal Practitioners Act. The Courts below have given effect to the contention of the defendant.

My submission is that the words of section 28 of the Legal Practitioners Act should be liberally construed. The learned Subordinate Judge has found that the agreement was not evaded. Refers to *Sib Kishore Ghosh v. Manik Chandra Nath* (1). The present case is distinguishable. Section 28 of the Legal Practitioners Act does not cover a case based upon an adjustment of accounts. I am undoubtedly entitled to reasonable compensation to be measured on the basis of the adjustment. I do not base my case upon section 70 of the Indian Contract Act.

Babu Dwarka Nath Chakravarty, Senior Government Pleader, (with him Babu Surendra Nath Guha), for the Respondent.—In the present case the original consideration is barred. The debts are barred and, therefore, there could not be any acknowledgment of the barred debt under section 19 of the Indian Limitation Act. The suit was brought within three years of the draft receipt dated 11th April 1914. All works done by the plaintiff must have been long before done. The draft receipt cannot be treated as a mere acknowledgment of liability. Section 28 of the Legal Practitioners Act is comprehensive enough to include every adjustment. See *Kamini Debi v. Khettra Mohan Ganguli* (2), *Ishan Chandra Kar v. Ram Charan Pal*

(1) 29 Ind. Cas. 453; 21 C. L. J. 618 at p. 620.

(2) 11 Ind. Cas. 382; 15 C. L. J. 690; 15 C. W. N. 681.

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(3), and *Mohendra Lal v. Akhil Chandra Pakrashi* (4).

Babu Mahendra Nath Roy in reply.—The so-called adjustment is not based on any agreement. The suit is not for the enforcement of the original contract. Section 28 of the Legal Practitioners Act would not, therefore, apply. Assuming that it is based on the original agreement, section 25 (2) of the Indian Contract Act would save it. Section 29 of the Legal Practitioners Act would apply in all cases. See *Sib Kishore Ghosh v. Manick Chandra Nath* (1) and *Kamini Debi v. Khettra Mohan Ganguli* (2).

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of money due on adjustment of accounts, the plaintiff who is a Pleader acted as the legal adviser of the father of the defendant as also of his paternal grandmother. It was agreed between the parties that the plaintiff would receive his legal fees, if so desired, or that the plaintiff would get Rs. 32 per diem in contested suits, Rs. 16 per diem in *ex parte* suits, Rs. 6 for filing petitions and for appearing, Rs. 4 for accepting *vakalatnamah* and Rs. 16 to Rs. 32 for drafting plaint and written statement, as the case might be. The plaintiff alleges that an account was taken of the sums due to him for his service, and that after deduction of the amounts paid and of the amount relinquished on amicable settlement, it was found on the 11th April 1914 that a sum of Rs. 5,000 was due to him. On the 10th April 1917, the plaintiff instituted the present suit to recover the sum thus found due to him on adjustment of accounts. The defendant is a minor under the Court of Wards and the Manager of the Court of Wards on his behalf took the defence that the suit was barred under section 28 of the Legal Practitioners Act. This defence has prevailed in both the Courts below and the suit has accordingly been dismissed.

Section 28 of the Legal Practitioners Act is in these terms: "No agreement entered into by any Pleader.. with any person retaining or employing him, respecting the amount and manner of payment for the

whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such Pleader..shall be valid unless it is made in writing signed by such person, and is, within 15 days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done."

The true scope of this section formed the subject of discussion in the cases of *Kamini Moni Debi v. Khettra Mohan Ganguli* (5), *Kamini Debi v. Khettra Mohan Ganguli* (2), *Ishan Chandra Kar v. Ram Charan Pal* (3), *Mohendra Lal v. Akhil Chandra Pakrashi* (4) and *Sib Kishore Ghosh v. Manik Chandra Nath* (1). These decisions show that the Court is reluctant to restrict the provision of section 28 by placing a narrow and restricted interpretation thereon. It may be conceded that where there is no agreement between the Pleader and his client, the Pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties such contract to be enforceable must fulfil the requirements of section 28, namely, that the contract must be in writing and the writing must be deposited in Court within the prescribed period. In the case before us, the plaint shows that there was an agreement between the Pleader and his client, that agreement was admittedly not deposited in Court and consequently was not enforceable under section 28. Subsequently, an adjustment was made and a sum was found due to the plaintiff. The question is whether a suit on the basis of this adjusted account is in essence a suit to enforce an agreement which does not comply with the requirements of section 28. In our opinion the answer must be in affirmative. A similar point arose before Mr. Justice Muthusami Ayyar in *Krisnasami v. Kcsava* (6). There the client delivered to his Pleader a promissory-note for the amount of his dues. The note was not filed in Court. In a suit to enforce the promissory-note the Court held that the note was invalid, as executed in respect of business done by

(3) 26 Ind. Cas. 960; 20 C. L. J. 445.

(4) 20 Ind. Cas. 471 20 C. L. J. 424.

(5) 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45.

(6) 14 M. 631 & Ind. Dec. (N. S.) 45.

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the plaintiff as Pleader of the defendant within the meaning of section 28. The point arose again in *Anantayya v. Padmayya* (7) where Mr. Justice Muthusami Ayyar followed his previous decision in *Krisnasami v. Kesava* (6). In that case the suit was brought on a note which had been given in substitution for another note for which the consideration was fee payable by the client to the Pleader. It was held that the note was invalid and could not be enforced under section 28. The matter was fully discussed by Mr. Justice Subramaniya Ayyar and Mr. Justice Bhashyam Ayyangar in the case of *Subba Pillai v. Ramasami Ayyar* (8). In that case the Pleader had incurred expenses in connection with law suits conducted by him for his client and a promissory-note had been given by the client to recover the sum due. It was ruled that the promissory-note was, within the meaning of section 28, an agreement respecting the amount of payment for charges incurred or disbursements made by the Pleader in respect of the suits in which he had been retained, it was invalid as it had not been filed in Court as required by the section. These decisions were reviewed by Mr. Justice Kumaraswami Sastry in the case of *Natesa Mooppan v. Ramachandra Iyer* (9). It was held that a promissory-note given in such circumstances must be treated as embodying an agreement by a client with his Pleader to pay his fees and was consequently not valid unless it fulfilled the requirements of section 28. We are of opinion that in the present case the suit is not maintainable on the basis of the adjusted accounts.

It has been finally urged that the case may be brought within the scope of section 25 of the Indian Contract Act. The agreement may be treated as a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor. The answer is that the services rendered by the Pleader were not voluntary. They were rendered on request, in pursuance of an agreement to pay a certain remuneration. We have examined the plaint with a view to consider

whether the suit can be treated not as a suit on the adjusted accounts but as a suit to recover a reasonable remuneration for services rendered. But the allegations in the plaint leave no room for doubt that the suit cannot be so treated. No details are furnished as to the services rendered; and even if the details were available, a question of limitation would arise. The adjustment was made nearly three years before the suit and long after the services had been rendered, a claim founded on the original cause of action would be plainly barred by limitation.

The result is that the decree made by the Court below is affirmed and this appeal dismissed with costs.

B. N. & Z. K.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 336 OF 1922.

February 27, 1923.

Present :—Justice Sir John Bucknill, Kt.
KUNJA SINGH—DECREE-HOLDER—
PETITIONER

versus

BARHO RAY—OPPOSITE-PARTY.

*Bengal Tenancy Act (VIII of 1885), s. 170—
Application for leave to deposit decretal amount—
Notice—Procedure.*

When an application is made for permission to deposit the amount of a decree under section 170 of the Bengal Tenancy Act, notice must be given to the judgment-creditor and to the judgment-debtor of the application, and a definite adjudication must be given as to whether the deposit can or cannot be made by the person who desires to make it. [p. 13, col. 1.]

Application against a decision of the Munsif, Second Court, Pegusarai, dated the 18th July 1922.

Mr. Nawal Kishore Prasad No. II, for the Petitioner.

Mr. Satyadeva Sahay, for the Opposite Party.

JUDGMENT.—This was an application in Civil Revisional Jurisdiction. It is a very simple matter. The applicant was a lessee of certain property from one Babu Sukhraj Ray of a *Mauza* called Pipria. On this property there was a tenant named

(7) 16 M. 278; 2 M. L. J. 247; 5 In d. Dec. (N. S.) 900.

(8) 27 M. 512; 14 M. L. J. 274.

(9) 27 Ind. Cas. 116; 27 M. L. J. 728; 1 L. W. 1070.

SURJA U. BIJAI BAHADUR SINGH:

Babu Hira Lal Singh, who was recorded in the recent Survey Record of Rights as the occupancy tenant. The applicant brought a rent suit against this man and obtained a rent-decree in 1921. He executed this decree and the 18th July last was the date fixed for sale. On the 17th of that month a petition was filed on behalf of two persons named Barhamdeo Ray and Sita Ram for permission to deposit the decretal amount on the ground that they, by a compromise effected in connection with some litigation with Babu Hira Lal Singh, had obtained a transfer from him to them of his holding. Now, no authority is, I think, really needed, although as a matter of fact, there is ample authority to that effect, for the proposition that in circumstances such as these it is necessary that notice must be given to the judgment-creditor and to the judgment-debtor of an application of this nature, and further that a definite adjudication must be given, as to whether the deposit can or cannot be made by those who desire to make it. Now, the Munsif of 2nd Court of Begusarai seems to have dealt with this matter on the 18th July last year. But it is now common ground and admitted, both by the learned Vakil for the respondents here as well as by the learned Vakil for the applicants, that it would appear that the Munsif dealt with the matter *ex parte*. His order simply reads:—

"Barhamdeo Ray and Sita Ram Ray alleging themselves to be interested persons apply for permission to deposit the decretal amount. Heard Pleader, ordered permitted to deposit."

No notice seems to have been given either to the applicant or to the judgment-debtor and certainly no adjudication has been made as to whether it was proper that the deposit of this decretal amount should be accepted. As a matter of fact, a very serious question is in issue as to whether the holding was transferable by custom or not. Under these circumstances, obviously, the only course open to me is to send the matter back to the Munsif. The necessary notices must be given and the matter must be investigated and adjudicated upon in accordance with law. The order of the Munsif of the 18th July 1922 will be set

aside. The costs of this case will abide the result of the investigation.

Rule made absolute.

Case remanded.

Z. K.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 158 OF 1922.

December 6, 1922.

Present :—Mr. Daniels, A. J. C.

Musammat SURJA—DEFENDANT

—APPELLANT

versus

BIJAI BAHADUR SINGH AND

ANOTHER—PLAINTIFFS—RESPONDENTS.

Registration—Mortgage-deed—Fraud—Presumption—Burden of proof.

Where the party attacking a mortgage-deed relating to several properties on the ground of fraud in registration, shows that the property in virtue of which registration was effected either did not exist or that the mortgagor never had any title thereto, the burden of showing that no fraud had been committed is thrown on the other side. The fact that such property was entered in the deed is in itself sufficient to raise a presumption that a fraud was intended. [p. 14, col. 2; p. 15, col. 1.]

Harendra Lal Rby v. Hari Dasi Debi, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. J. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 18 Bom. L. R. 490; 41 I. A. 110 (P. C.) and *Jadunath Kunwar v. Dharam Narain*, 55 Ind. Cas. 511; 23 O. C. 38; 7 O. L. J. 36; 2 U. P. L. R. (O.) 37, followed.

Biswanath Prasad v. Chandra Narayan Chowdhury, 63 Ind. Cas. 770; 48 I. A. 127; 48 C. 509 (P. C.), explained.

Pahladi Lal v. Laraiti, 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871 and *Ram Dai v. Ram Chandrabali Debi*, 52 Ind. Cas. 446; 4 P. L. J. 433, distinguished.

Appeal against a decree and order of the District Judge, Rae Bareilly, dated the 1st February 1922, upholding the decree of the Subordinate Judge, Partabgarh, dated the 4th August 1921.

Mr. Har Dhan Chandra, for the Appellant.

Messrs. Radha Krishna and P. D. Upadhiya, for the Respondents.

SURJA V. BIJAI BAHADUR SINGH.

JUDGMENT.—This is an appeal by defendant in the suit in which the sons of Bisheshar Singh, deceased, asked for a declaration that a mortgage-deed passed against their father on a deed executed by him is not binding on them. The mortgage was in favour of one Sheo Narain, now deceased, and the appellant, *Musamat Surja*, is his widow. The principal plea on which the case has been decided in the plaintiffs' favour is, that the mortgage-deed was invalid for failure to comply with the law of registration. The facts are not in dispute. The share mortgaged was situated in the Patti Tehsil of the Partabgarh District. The deed was actually registered not at the Patti Sub-Registration Office but at Partabgarh. In order to enable this to be done two plots in the village of Sansarpur, situated within the limits of the Partabgarh Registration Circle, were inserted in the deed. It has been found, and is not disputed, that Bisheshar Singh never at any time had any interest in these two plots. The learned Subordinate Judge held that these facts amounted to a fraud on the Registration Officer and invalidated the registration of the deed. In appeal before the learned District Judge it was contended that, even if there was a fraud on the registration it was not shown that the mortgagee was a party to it. The learned District Judge dealt with this question and decided, on the basis of the Privy Council ruling in *Biswanath Prasad v. Chandra Narayan Chowdhury* (1), that it was immaterial whether the mortgagee was a party to the fraud or not. I can find nothing in the Privy Council judgment to support the rule laid down by the learned District Judge and it is not argued before me that any such rule has been laid down. The question has been argued in this Court mainly on the question of burden of proof. The appellant contends that it lay on the plaintiffs to show by positive evidence that a fraud was committed and that the mortgagee was a party to it, and that as there is no evidence to this effect on the record the suit should have been dismissed. In support of this contention I have been referred to the decision of the

Allahabad High Court in *Pahladi Lal v. Laraiti* (2) and to a decision of the Patna High Court reported as *Ram Dai v. Ram Chandrabali Debi* (3) as well as two Privy Council judgments dealing with this matter. The Patna case is hardly in point as there was a definite finding that the transferor, though he had ceased to have an interest in the property in dispute, acted in perfect good faith. The Allahabad case was considered and distinguished by the Judicial Commissioner in the case of *Jadunath Kunwar v. Dharam Narain* (4) in the course of a carefully reasoned judgment which contains an elaborate analysis of the Privy Council judgment in *Harendra Lal Roy v. Hari Dasi Bebi* (5). That was a case in which a piece of property which had no existence was inserted in a registration deed for the purpose of enabling registration to be effected at Calcutta. The party supporting the deed asserted that this house, 25, Guru Das Street, had been inserted by mistake for another property described as 25, Asutosh Dey Lane. The latter property really existed but it was proved that the mortgagor had never any title to it. The question of the burden of proof arose in that case and their Lordships say in a passage which the Judicial Commissioner quotes:

"The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in parcel 28 was the property of strangers in which the mortgagor had not and never had any interest, had proved all that was necessary to throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry."

The passage fully supports the contention of the respondents, that when the party attacking a deed has shown that the plot in virtue of which registration was effected was one which either did not exist or to

(2) 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871.

(3) 52 Ind. Cas. 446; 4 P. L. J. 433.

(4) 55 Ind. Cas. 511; 23 O. C. 38; 7 O. L. J. 36; 2 U. P. L. R. (O.) 37.

(5) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 18 Bom. L. R. 490; 41 I. A. 110 (P. C.).

(1) 63 Ind. Cas. 770; 48 I. A. 127; 48 C. 509 (P. C.).

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which the plaintiff never had any title, the burden of showing that no fraud had been committed is thrown on the other side. It was argued before the Judicial Commissioner that the case of a non-existent property and the case of a property to which the plaintiff never had any title stood on a different footing. The Judicial Commissioner rejected this contention and the correctness of this reasoning has been affirmed by their Lordships of the Privy Council in the case of *Biswanath Prasad v. Chandra Narayan Chowdhury* (1). In the course of their judgment their Lordships say:

"In the case just mentioned the property was non-existent. In the present case, though the Kolhua Mouza existed mortgagor had no interest in it and the parties to mortgage never intended that it should form part of the security. The two cases stand on the same basis for the purposes of the Registration Act."

The appellant has attempted to distinguish this latter case on the ground that there was a definite finding that a fraud had been committed by both parties to the deed. An examination of the judgment shows that this finding was an inference drawn from the circumstances already mentioned. The only direct evidence referred to in the judgment is evidence by which it was attempted to support the registration. A witness was put forward to prove that he had sold the mortgagor the minute share in the Kolhua property in virtue of which registration was effected. It was found that no sale-deed was executed and there was no delivery of possession. Their Lordships held that this evidence was false and that the parties supporting the deed had failed to rebut the inference of fraud which arose from the circumstances. They remark that the case differs *toto caelo* from the case suggested in argument to a mere failure to make a good title to property dealt with by the instrument which both parties had intended should form part of the security. The fact that property was inserted in the deed which did not belong and never had belonged, to the mortgagor is in itself sufficient to raise a presumption that a fraud was intended.

It has been, however, argued by the appellant that, even if the burden of proof lay on her, she has discharged it. In sup-

port of this argument I am referred to a sentence in the evidence of one of the attesting witnesses, D.W. No. 5, to the effect that Bisheshar Singh said that he held two plots in Sansarpur and showed a piece of paper containing the numbers of the plots. He was cross-examined about this point and stated that Sheo Narain asked the mortgagor no question whatever about this property in his presence. This witness is not specifically referred to in the judgment of the Trial Court, but the Court was evidently not impressed with his evidence, for the learned Subordinate Judge says, in referring to the evidence produced by the plaintiffs to show that the mortgagor had no title to these Sansarpur plots:

"Defendant No. 1 has not rebutted this evidence at all nor shown that entry of these plots in the deed was not fictitious."

In face of this finding I am not prepared to rely on the evidence of this witness, which is, on the face of it, highly suspicious. I hold this issue has been rightly decided by the Courts below.

The only other point pressed is that, because the mortgagee got a decree on the mortgage against Bisheshar Singh, the father of the plaintiffs, the latter are precluded from questioning the validity of the deed. No authority has been shown me in support of this proposition and, on principle, I see no reason that the plaintiffs who claim under an independent title could be bound by the decree in a suit to which they were not parties.

The result is, that the appeal fails and it is accordingly dismissed with costs.

W. C. A. .

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 231 OF 1922.

April 4, 1923.

Present :—Mr. Batten, J. C.

GOPALA AND OTHERS—DEFENDANTS

APPELLANTS

versus

SAKHARAM—PLAINTIFFS.

RESPONDENT—

Landlord and tenant—Surrender of tenancy—Sub-tenancy determination of—C. P. Tenancy Act (XI of 1898), ss. 47, 95—C. P. Tenancy Act (I of 1920),

GOPALA V. SAKHARAM.

ss. 13, 105—*Suit to eject sub-tenant after surrender of tenancy—Jurisdiction of Civil Courts:*

If a tenant surrenders his holding, the sub-tenancy created by him is also determined.

Bhopal Singh v. Thakur Borelal, 6 C. P. L. R. 74, relied on.

A Civil Court has jurisdiction to try a suit to eject a sub-tenant after a surrender of the tenancy by the tenant. Such a suit is not between a landlord and a tenant but, between a landlord and a trespasser.

Ganesh Das v. Shankar, 13 Ind. Cas. 909; 8 N. L. R. 22, distinguished.

Appeal from the decree of the District Judge, Nimar, dated the 3rd March 1922, in Civil Appeal No. 4 of 1922.

Mr. S. Y. Deshmukh, for the Appellants.
Mr. M. Gupta, for the Respondents.

JUDGMENT.—The plaintiff, as *Lambardari* sued to recover possession of the suit land from the defendants alleging that the tenant, Kalu, had actually surrendered the land to him on 18th June 1918 and put him in possession. On 1st July 1920 the defendants took wrongful possession. The defendants pleaded that they were in possession under an agreement dated 25th December 1907 executed by Kalu in favour of their father. They denied the surrender and pleaded that the suit was not tenable under section 47 of the old Central Provinces Tenancy Act and under section 13 of the new Tenancy Act, and that the suit was not triable by a Civil Court. It was also contended that the suit is barred by limitation.

The First Court, Munsif of Khandwa, found that Kalu did execute the deed of surrender, but plaintiff was never put in possession and that the defendants came into possession on 25th December 1907 and they have not dispossessed the plaintiff as alleged. It further held that the agreement is a mortgage and if it is illegal for want of registration the defendants' possession is adverse. They have no right of ownership but only cultivating right. The tenancy right in the land did not come to an end. If Kalu's right did come to an end it is by reason of the defendants' adverse possession. The suit was dismissed.

On appeal this decree was reversed by the District Judge, Nimar, who held that the deed of surrender was not a mortgage but a sub-lease. There was no question of adverse possession. The tenancy of Kalu ceased, and the questions of apply-

ing section 47 of the Tenancy Act and the suit being time-barred did not arise. The claim for possession was allowed with mesne profits.

The defendants filed this second appeal against that decision on the ground that as Kalu put the defendants in possession under the agreement dated the 25th December 1907 and as Kalu was not in possession on the date of surrender the lower Appellate Court erred in law in holding that the plaintiff was put in possession of the field in dispute and as such the plaintiff could not acquire a legal title under his surrender, that it should have been held that as defendants were in possession of the land since 1907 they acquired a legal right against the plaintiff and their possession should not have been disturbed and as plaintiff did not file an application under section 47 of the Tenancy Act within two years his suit is time-barred.

Exhibit D-14 is clearly a sub-lease and not a mortgage under section 59 of the old Tenancy Act. When Kalu surrendered his tenancy, the sub-tenancy was determined also, as was held in *Bhopal Singh v. Thakur Borelal* (1). As to the argument that a Civil Court has no jurisdiction to try this case under section 95 of the Tenancy Act, it is sufficient to say that this is not a case between landlord and tenant but between landlord and trespassers. No doubt, if the plaintiff wanted to apply to the Revenue Court under section 47 of the Tenancy Act to set aside the deed his right to do so may have become barred, but that is a state of things which has now ceased to exist since the surrender of Kalu.

The defendants are no longer sub-tenants. *Ganeshdas v. Shankar* (2) has no application to the facts of the case. No question of adverse possession arises. The possession of defendants could not be adverse until the surrender of Kalu. The lower Appellate Court finds that the plaintiff was not in possession since 1920. The finding of the lower Appellate Court is, therefore, correct. The decree is confirmed and the appeal is dismissed with costs.

N. H.

Appeal dismissed.

(1) 6 C. P. L. R. 74.

(2) 13 Ind. Cas. 909; 8 N. L. R. 22.

MAHAMMAD MAZHARAL AHAD V. MAHAMMAD AZIMUDDIN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 87
OF 1921.

November 14, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Rankin.

MAHAMMAD MAZHARAL AHAD

—DEFENDANT—APPELLANT

versus

MAHAMMAD AZIMUDDIN BHUIAN

—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 103, 104, 116, applicability of—Dower-debt, suit for recovery of, nature of—Registered dower-deed—Limitation—"Compensation," meaning of—Legislative recognition of judicial construction.

Article 116 of the First Sch. to the Limitation Act is applicable to all cases where the position can be reasonably maintained that the claim sought to be enforced is a claim for compensation for the breach of a contract in writing registered. [p. 19, col. 1.]

(Case-law considered.)

A suit for recovery of dower-debt when there is a registered dower-deed is governed by Art. 116 of the First Sch. to the Limitation Act, although Arts. 103 and 104 of the Sch. would apply when there was no such registered instrument. [p. 23, col. 2.]

Ful. Chand Bibee v. Nawab Ali Chowdhury, 1 Ind. Cas. 740; 36 C. 184; 9 C. L. J. 105; 13 C. W. N. 134, *Aisatulla v. Danes Mohammad*, 70 Ind. Cas. 169; 36 C. L. J. 379, (1922) A. I. R. (C.) 152, relied on.

A suit to recover a dower-debt is a suit to enforce a simple money claim founded solely on the contract entered into by the husband. It is, moreover, a suit to recover compensation within the meaning of Art. 116 of Sch. I to the Limitation Act. [p. 23, col. 1.]

Wafeah v. Sahseba, 8 W. R. 307, *Janee Khanum v. Amatool Fatima*, 8 W. R. 51, *Mahabubibi v. Amina*, 10 B. H. C. R. 430. *Ranee Khajooronissa v. Ranee Ryeesoornissa*, 21 A. 235; 24 W. R. 163; 15 B. L. R. 306; 5 Sar. P. C. 3. 526 (P. C.), *Hamira Bibi v. Zubaida Bibi*, 36 Ind. Cas. 87; 43 I. A. 294; 38 A. 581; 25 C. L. J. 517; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517 (P. C.), *Nurunnissa Khanum v. Muhammad Sakru*, 56 Ind. Cas. 8; 47 C. 537; 31 C. L. J. 14; 24 C. W. N. 335, relied on.

The term "compensation" as used in Arts. 115 and 116 of the Sch. to the Limitation Act is not sufficiently precise, but the technical distinction between a debt and damages is too refined for the purpose. [p. 22, col. 2.]

Ordinarily, the term compensation is not used as equivalent to damages although compensation may often have to be measured by the same rule as damages in an action for the breach. It signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money

claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money of something lost or withheld. [p. 22, col. 1.]

The term compensation etymologically suggests the image of balancing one thing against another its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. [p. 22, col. 2.]

The Legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular Statutes. [p. 22, col. 1.]

Where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction. [p. 22, col. 1.]

Jogendra Chandra Roy v. Syam Das, 1 Ind. Cas. 168; 36 C. 543; 9 C. L. J. 271, *Kamini Debi v. Promotho Nath*, 10 Ind. Cas. 491; 39 C. 33; 13 C. L. J. 597 and *Nogendra Mohan Ray v. Pyari Mohan Saha*, 30 Ind. Cas. 420; 43 C. 103; 21 C. L. J. 605; 20 C. W. N. 319, relied on.

Appeal against the decree of the Additional District Judge, Dacca, dated the 5th October 1920, affirming that of the Subordinate Judge, Dacca, dated the 30th March 1917.

Babu Biraj Mohan Mojumdar (with him Babu Chandra Sekhar Sen), for the Appellant.

Babu Rajendra Chandra Guha, for the Respondent.

JUDGMENT.—The facts material for the determination of the question of limitation raised in this appeal are no longer in dispute and may be briefly recited. The plaintiff-respondent, a Muhammadan gentleman, gave his daughter in marriage to the defendant-appellant. At the time of the marriage, the defendant executed and registered in favour of his wife a dower-deed, on the 15th September 1908. The deed fixed the dower at Rs. 5,000; one half was prompt and payable on demand; the other half was deferred. The lady died on the 18th September 1909. On the 10th September 1915, the plaintiff, as one of the heirs-at-law of his daughter, instituted the present suit against the son-in-law for recovery of his one-third share of the dower-debt. The defendant pleaded, amongst other defences, the bar of limitation. The Court of first instance held that the suit was governed not by the three year's, but by the six years' rule of limitation and decreed the claim. On appeal, this decision has been affirmed by the District Judge. On the present

MAHAMMAD MAZAHARAL AHAD v. MAHAMMAD AZIMUDDIN.

appeal, that decree has been assailed on the ground that the suit is barred by the three years' rule of limitation. The respondent has urged that the six years' rule is applicable, as the dower was fixed by a registered document.

Article 103 of the Schedule to the Indian Limitation Act, 1908, provides as follows:—

"103. A suit by a Muhammadan for exigible dower shall be instituted within three years from the date when the dower is demanded and refused, or (where during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce."

Article 104 provides as follows:

"104. A suit by a Muhammadan for deferred dower shall be instituted within three years from the date when the marriage is dissolved by death or divorce."

In the case before us, as there was no demand and refusal during the continuance of the marriage, time ran, both as regards the prompt and the deferred dower, from the date when the marriage was dissolved by death. Consequently, the suit should have been, *prima facie*, instituted within three years from the 18th September 1909 when the lady died. But the plaintiff had urged—and his contention had been accepted by the Courts below—that as the dower-deed was registered, he is entitled to the benefit of Art. 116.

Article 116 provides as follows:

"116. A suit for compensation for the breach of a contract, in writing registered, shall be instituted within six years from the date when the period of limitation would begin to run against a suit brought on a similar contract not registered."

This plainly refers to Art. 115 which provides as follows:

"115. A suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein especially provided for, shall be instituted within three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases."

The appellant has contended that even if we assume that the present suit for recovery of the dower-debt may be treated

as a suit for compensation for the breach of a contract in writing registered within the meaning of Art. 116, that Article, which provides a general rule applicable to contracts in writing registered cannot be applied when there are special Articles namely, Arts. 103 and 104, which precisely cover the case. The appellant has, in fact, invoked the well-established principle that if there are two Articles in the Schedule to the Limitation Act, which may possibly govern a case, the one more general and the other more special, the more particular and specific Article should be regarded as the one governing the case. Illustrations of the application of this doctrine may be found in the cases of *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (1); *Sharooop Das v. Joggesur Roy Chowdhury* (2); *Netesan Chetti v. Soundararaja Ayyangar* (3); *Runchorda Vandravandas v. Parvalibai* (4); *Narmadabai v. Bhavanishankar* (5). The principle, *generalia specialibus non derogant, specialia derogant generalibus*, has been recognised elsewhere, and illustrations of the doctrine that general provisions do not derogate from special provisions, but that the latter do derogate from the former, are by no means rare; see *Hunter v. Nockolds* (6); *Churchill v. Crease* (7); *De Winton v. Brecon Corporation* (8); *Pretty v. Solly* (9). The respondent has not denied that this argument carries considerable weight; but he has urged that it is too late for this Court to depart from what has been recognised in a long line of cases as the true scope of Art. 116 including the decision of the Judicial Committee in *Tricomdas Cooverji*

- (1) 16 C. 25; 8 Ind. Dec. (N. S.) 17.
- (2) 26 C. 564; 3 C. W. N. 464; 13 Ind. Dec. (N. S.) 962.
- (3) 21 M. 141; 7 M. L. J. 275; 7 Ind. Dec. (N. S.) 456.
- (4) 23 B. 725; 26 I. A. 71; 1 Bom. L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485.
- (5) 26 B. 430; 4 Bom. L. R. 72.
- (6) (1850) 1 Mac. & G. 640; 1 H. & Tw. 644; 19 L. J. Ch. 177; 14 Jur. 256; 84 R. R. 217; 41 E. R. 1413.
- (7) (1828) 5 Bing. 177 at p. 180; 2 Moo. & P. 415; 7 L. J. (O. S.) C. P. 63; 130 E. R. 1028.
- (8) (1859) 26 Be v. 533 at p. 543; 28 L. J. Ch. 600; 6 Jm. (N. S.) 882; 53 E. R. 1004; 33 L. T. (G. S.) 296; 122 R. R. 229.
- (9) (1859) 26 Beav. 606 at p. 610; 53 E. R. 1032; 33 L. T. (O. S.) 72; 122 R. R. 203.

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Bhoja v. Gopinathji Thakur (10). As will presently appear, from an examination of numerous judicial decisions, Art. 116 has been held applicable, by reason of the existence of a written and registered contract, in classes of cases which are *prima facie* governed by special provision contained in the Schedule to the Indian Limitation Act.

Article 57 provides as follows:

"57. A suit for money payable for money lent shall be instituted within three years from the date when the loan is made." It has been repeatedly held that a suit on a registered bond for recovery of a specific sum of money is governed not by Art. 57 but by Art. 116; see *Nobocoomar Mookhopadhyaya v. Siru Mullick* (11); *Kalut Ram v. Lala Dhanunkdhari* (12); *Sham Charan Mal v. Chowdhury Debya Singh* (13); *Ethel Georgina Kerr v. Clara B. Ruxton* (14); *Nistarini Debi v. Chandi Dasi Debi* (15); *Ram Narain Singh v. Odindra Nath* (16); *Challaphroo v. Banga Behari Sen* (17); *Husain Ali Khan v. Hafiz Ali Khan* (18); *Khunni v. Nasiruddin* (19); *Sushil Chandra Das v. Gauri Shankar* (20); *Ganesh Krishn v. Madhavarao Ravji* (21); *Magaluri Garudiah v. Narayana Rungiah* (22); *Visvanatha Pandara Saunadhi v. South India Bank, Limited* (23).

Article 64 provides as follows:

"64. A suit for money payable to the plaintiff for money found to be due from (10) 39 Ind. Cas. 156; 44 I. A. 65; 44 C. 759; 25 C. L. J. 279; 1 P. L. J. 262; 15 A. L. J. 217; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450 (P. C.).

(11) 6 C. 94; 6 C. L. R. 579; 3 Ind. Dec. (N. S.) 61.

(12) 11 C. L. R. 361.

(13) 21 C. 872; 10 Ind. Dec. (N. S.) 1213.

(14) 4 C. L. J. 510.

(15) 8 Ind. Cas. 788; 12 C. L. J. 423.

(16) 13 Ind. Cas. 440; 15 C. L. J. 17; 17 C. W. N. 369.

(17) 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 408.

(18) 3 A. 600; A. W. N. (1881) 33; 6 Ind. Jur. 142; 2 Ind. Dec. (N. S.) 323.

(19) 4 A. 255; A. W. N. (1881) 159; 2 Ind. Dec. (N. S.) 747.

(20) 36 Ind. Cas. 371; 14 A. L. J. 873; 39 A. 81.

(21) 6 B. 75; 3 Ind. Dec. (N. S.) 507.

(22) 3 M. 35; 6 Ind. Jur. 24; 1 Ind. Dec. (N. S.) 805.

(23) 42 Ind. Cas. 609; (1917) M. W. N. 879; 6 L. W. 712.

the defendant to the plaintiff on accounts stated between them shall be instituted within three years from the date when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives."

Article 106 provides as follows:

"106. A suit for an account and a share of the profits of a dissolved partnership, shall be instituted within three years from the date of the dissolution."

With reference to these Articles, it was ruled in *Ranga Reddi v. Chinna Reddi* (24), that where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendant's share of the loss, on a settlement of accounts between the plaintiffs and the defendants, is governed, neither by Art. 64, nor by Art. 106, but by Art. 116. It is to be noted, however, that in *Vairavan Asari v. Ponnayya* (25) the Court expressed its unwillingness to hold that Art. 116 could be stretched to cover every case in which the suit might in its origin be referred to a contractual relationship expressed in a registered agreement.

Article 74 provides as follows:

"74. A suit on a promissory-note or bond payable by instalments shall be instituted within three years from the date of the expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment."

With reference to this provision, it has been ruled that if the instalment bond has been registered, the suit is governed not by Art. 74, but by Art. 116: *Din Dayal v. Gopal Sarun* (26); *Rup Narain v. Gopi Nath* (27).

Article 89 provides as follows:

"89. A suit by a principal against his agent for moveable property received by the latter and not accounted for, shall be instituted within three years from the date

(24) 14 M. 465; 1 M. L. J. 482; 5 Ind. Dec. (N. S.) 325.

(25) 22 M. 14; 8 M. L. J. 151; 8 Ind. Dec. (N. S.) 10.

(26) 18 C. 506; 9 Ind. Dec. (N. S.) 337.

(27) 11 C. W. N. 903.

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when the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates."

With reference to this Article, it was ruled in *Mali Lal Bose v. Amin Chand* (28), that a suit for an account, by a principal against his agent on the basis of a registered agreement, is governed, not by Art. 89 but by Art. 116, the cause of action arising from the date when the contract to render accounts is broken. This view is identical with that taken in *Harendra Kishore Singh v. Administrator-General of Bengal* (29) and was followed in *Easin Sarkar v. Barada Kishore Acharyya Chowdhury* (30); *Jogesh Chandra v. Benode Lal* (31) and *Bhagirath Samanta v. Prem Chand* (32). The current of judicial opinion, however upon this question has been by no means uniform; see *Debendra Nath Ghosh v. Sheikh Esha Huq* (33); *Shib Chandra Roy v. Chandra Narain Mukerjee* (34); *Madhusudan Sen v. Rakhal Chandra Das* (35); *Nobin Chandra v. Chandra Madhab* (36), modifying *Chandra Madhab v. Nabin Chandra* (37); *Bhabatarini Debi Chowdhuran v. Sheikh Bahadur Sarkar* (38); *Jogendra Nath Roy v. Deb Nath Chatterji* (39); *Hafezuddin Mandal v. Jadu Nath Sahu* (40); *Madhub Chunder v. Debendra Nath* (41); *Jhapajhanessa Bibee v. Rama Sundari* (42); and *Pranram Mookerjee v. Jagadish Nath Ray* (43). These cases, how-

ever, struggle, in most instances, to escape the application of Art. 116, not so much because the Article should not be applied to cases comprised within the scope of special Articles, but rather because a suit by a principal against an agent for the relief mentioned in Art. 89 cannot properly be regarded as a suit for compensation for the breach of a contract in writing registered. This, however, does not apply to the decision in *Pranram Mookerjee v. Jagadish Nath Ray* (43), where the twofold contention was accepted that (a) Art. 89 excludes the operation of Art. 115, which is applicable only to cases not specially provided for; and (b) Art. 116 must be read along with Art. 115 and be deemed restricted in operation in the same manner. This view, as will presently appear, is opposed to that indicated in *Vythilinga Pillai v. Thetchanamurti Pillai* (44); *Din Dayal v. Gopal Sarun* (26), and adopted by the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10). It will be observed that the expression "not herein specially provided for" which finds a place in the first column of Art. 115 does not reappear in the first column of Art. 116. But this plainly does not conclude the matter, and the expression "similar contract not registered" which finds a place in the third column of Art. 116 does require interpretation. Does it refer only to the first column of Art. 116 and consequently mean "a contract in writing not registered," or does it refer to the first column of Art. 115 and signify "a contract not in writing registered and not herein specially provided for?" The first alternative was adopted in *Vythilinga Pillai v. Thetchanamurti Pillai* (44) and *Din Dayal v. Gopal Sarun* (26), and apparently found favour with the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10). The second alternative was adopted in *Pranram Mookerjee v. Jagadish Nath Ray* (43). The conflict, consequently, is between two opposing views; one maintains that Art. 116, like Art. 115, applies where there is no special provision; the other maintains that Art. 116 supersedes all provisions, including those

- (28) 1 C. L. J. 211.
- (29) 12 C. 357; 6 Ind. Dec. (N. S.) 243.
- (30) 5 Ind. Cas. 186; 11 C. L. J. 43.
- (31) 5 Ind. Cas. 59; 14 C. W. N. 122.
- (32) 16 Ind. Cas. 852; 17 C. L. J. 20f.
- (33) 5 Ind. Cas. 58; 14 C. W. N. 121.
- (34) 32 C. 719; 1 C. L. J. 232.
- (35) 30 Ind. Cas. 697; 43 C. 248; 22 C. L. J. 552; 19 C. W. N. 1070.
- (36) 36 Ind. Cas. 1; 44 C. 1; 24 C. L. J. 509; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 886; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).
- (37) 18 Ind. Cas. 735; 40 C. 108; 17 C. L. J. 103.
- (38) 53 Ind. Cas. 675; 30 C. L. J. 90.
- (39) 8 C. W. N. 113.
- (40) 35 C. 298; 7 C. L. J. 279; 12 C. W. N. 820.
- (41) 1 C. L. J. 147.
- (42) 16 Ind. Cas. 414; 16 C. L. J. 288; 16 C. W. N. 1042.
- (43) 68 Ind. Cas. 562; 49 C. 250; 35 C. L. J. 26 C. W. N. 61; (1922) A. I. R. (C.) 355.

- (44) 3 M. 76; 5 Ind. Jur. 76; 1 Ind. Dec. (N. S.) 610.

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covered by special Articles unaffected by Art. 115. In this connection, reference may also be made to the decision in *Kandaswami Pillai v. Avayambal* (45), where it was ruled that a suit by an agent to recover money spent by him on account of his principal, is governed by Art. 61 and not by Art. 116, even though there was a registered contract of agency; the obligation was deemed as no part of the contract in writing registered, and the earlier decisions in *Krishnan Nambiar v. Kannan* (46); and *Seshachala Naickar v. Varada Chariar* (47), were distinguished, though they were clearly authorities for the proposition that obligations not expressed in writing, but imported by the law in the case of sales, might be treated as in writing, for purposes of limitation, when the sale was made by a written instrument.

Article 110 provided as follows:

"110. A suit for arrears of rent shall be instituted within three years from the date when the arrears become due."

It has been ruled in a long series of decisions that a suit for arrears of rent, based upon a registered lease, is governed, not by Art. 110 but by Art. 116: *Vythilinga Pillai v. Thetchanamurti Pillai* (44); *Umesh Chunder v. Adarmoni Dasi* (48); *Iswari Pershad v. Crowdy* (49); *Raniganj Coal Association Limited v. Judoonath Ghose* (50); *Umrao Bibi v. Mahomed Rojabi* (51); *Ambalavana Pandaram v. Vaguran* (52); *Chengiah v. Thimma Nayan* (53); *Sundaram Iyer v. Muthuganapathigal* (54); *Kannan Narayanan v. Muthulpurelath Ramunni* (55); *Mohamad Hanif v. Moorat Mahton* (56); *Mac-*

kenzie v. Rameshwar Singh (57); *Lalchand Manchand Gujar v. Narayan Hart* (58). The contrary view, adopted in *Ramaswami Chetti v. Sakanada Chetti* (59), and *Ram Narain v. Kamta Singh* (60), has now been expressly disapproved of by the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10). Suits for rent under the Bengal Tenancy Act have, however, escaped this fate; they have been held to be governed by the special rule contained in the Schedule to that Statute, which remains unaffected by Art. 110 and Art. 116; see the decision of the Full Bench in *Mackenzie v. Haji Syed Mahomed Ali Khan* (61).

We have not given above an exhaustive enumeration of all the judicial decisions relevant to the points mentioned; but we have stated enough to show that Art. 116 has been repeatedly interpreted, in the most diverse connections, as if it were a generalised exception engrafted upon all Articles which might, by stretch of language, be regarded as applicable to suits comprehended within the description of a suit for compensation for the breach of a contract." One of the earliest of these decisions: *Nobocomar Mookhopadkaya v. Siru Mullick* (11), goes back to 1880, and the judgment in that case, as also judgments delivered by the Full Bench in 1881 in *Husain Ali Khan v. Hafiz Ali Khan* (18), were based upon a historical review of the previous legislation on the subject; but it may be observed, parenthetically, that some of the judgments delivered by the Full Bench also referred to inadmissible materials, such as, what happened in the Legislative Council, *Administrator-General of Bengal v. Premlal Mullick* (62). Yet the construction then placed upon Art. 116 of the Limitation Act, 1877, must be taken to have found favour with the Legislature, as it has been reproduced without alteration in the Limi-

(45) 7 Ind. Cas. 399; 34 M. L. J. 167; (1910) M. W. N. 316; 8 M. L. T. 194; 20 M. L. J. 989.

(46) 21 M. 8; 7 Ind. Dec. (N. S.) 362.

(47) 25 M. 55; 11 M. L. J. 318.

(48) 15 C. 221; 7 Ind. Dec. (N. S.) 732.

(49) 17 C. 469; 8 Ind. Dec. (N. S.) 852.

(50) 19 C. 489; 9 Ind. Dec. (N. S.) 770.

(51) 27 C. 205; 4 C. W. N. 76; 14 Ind. Dec. (N. S.) 136.

(52) 19 M. 52; 5 M. L. J. 228; 6 Ind. Dec. (N. S.) 741.

(53) 6 Ind. Cas. 766; 7 M. L. T. 419; 20 M. L. J. 555.

(54) 14 Ind. Cas. 184; 11 M. L. T. 276; (1912) M. W. N. 652.

(55) 56 Ind. Cas. 241; 11 L. W. 328.

(56) 44 Ind. Cas. 153; 4 P. L. W. 146.

(57) 34 Ind. Cas. 754; 1 P. L. J. 37; 2 P. L. W. 446.

(58) 21 Ind. Cas. 315; 37 B. 656; 15 Bom. L. R. 836.

(59) (1891) 1 M. L. J. 737; 2 M. L. J. 69 notes.

(60) 26 A. 138; A. W. N. (1903) 210.

(61) 19 C. 1; 9 Ind. Dec. (N. S.) 447.

(62) 22 I. A. 107; 22 C. 788; 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522.

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tation Act, 1908. The Legislature is presumed to know not only the general principles of law, but also the construction which the Courts have put upon particular Statutes; where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a Legislative recognition of that construction: *Jogendra Chandra Ray v. Syam Das* (63); *Kamini Debi v. Promotho Nath* (64); *Nogendra Mohan Roy v. Pyari Mohan Saha* (65). The Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10), felt impressed by this consideration, and Lord Sumner emphasised the fact that when the Limitation Act of 1877 was replaced by the Limitation Act of 1908, the language and arrangement of the relevant Articles were left unaltered. In such circumstances, no useful purpose will be served by an attempt to examine the foundations of the long series of decisions which the Judicial Committee found themselves bound to recognise.

In answer to the contention that claims of this character sound in debt and not in damages, it may be pointed out, however, that the term used in Art. 115 and Art. 116 is not damages but compensation, which also occurs in section 73 of the Indian Contract Act. As Lord Esher observed in *Dixon v. Calcraft* (66), the expression compensation is not ordinarily used as an equivalent to damages although, as remarked by Fry, L.J., in *Skinner's Co. v. Knight* (67), compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation, as pointed out in the Oxford Dictionary, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury

sustained; the value estimated in money of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another, its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. The derivative meaning was familiar to the Roman Jurists and re-appears in the modern Codes founded on the Civil Law. (Sohm, Institutes of Roman Law, 3rd Edition, pp. 458-463).

The term compensation, as used in Arts. 115 and 116 is thus, perhaps, not sufficiently precise, while the technical distinction between debt and damages may be too refined for the purpose.

We must hold that the decision of the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10), though concerned directly with the applicability of Art. 110 and Art. 116 to a suit for arrears of rent, instituted upon a registered lease, must be regarded as of far-reaching application. We cannot ignore the principle which lies at the root of that decision and must govern the applicability of Art. 116 to cases other than those covered by Art. 110 wherever the position may reasonably be maintained that the claim sought to be enforced is a claim for compensation for breach of a contract in writing registered. We must consequently examine whether a claim for exigible dower and a claim for deferred dower fall within this category.

The nature of dower-debt was examined by this Court in the case of *Mir Mahar Ali v. Amani* (68), and it was ruled that, according to Muhammadan Law, when the heirs of a Muhammadan woman claim from her husband dower which was not due or payable until her death, their claim is a simple money claim, founded solely on the contract entered into by the husband. The Limitation Act then in force was Act XIV of 1859. Clause 9 of section 1 provided a period of three years for the institution of a suit brought to recover money lent or interest or for the breach of any contract. Clause 10 of section 1 provided a period of three years for a suit brought to recover money lent or interest or for the breach of any contract

(63) 1 Ind. Cas. 168; 36 C. 543; 9 C. L. J. 271.

(64) 10 Ind. Cas. 491; 39 C. 33, 13 C. L. J. 597.

(65) 30 Ind. Cas. 420; 43 C. 103; 21 C. L. J. 605; 22 C. W. N. 319.

(66) (1892) 1 Q. B. 458 at p. 463; 61 L. J. Q. B. 529; 66 L. T. 554; 40 W. R. 598; 7 Asp. M. C. 161; 56 J. P. 388.

(67) (1891) 2 Q. B. 542; 60 L. J. Q. B. 629; 65 L. T. 240; 40 W. R. 57; 56 J. P. 36.

(68) 2 B. L. R. A. C. J. 305; 11 W. R. 212; 1 Ind. Dec. (N. S.) 852.

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in a case in which there was a written engagement or contract and in which such engagement or contract could have been, but had not been registered within six months from the date thereof. Clause 16 of section 1 provided a period of six years for all suits for which no other limitation was expressly provided. The Court held that the suit for dower was a simple suit for the breach of a contract, within the meaning of clauses 9 and 10 of section 1. Reference was made to the decisions in *Shahazada Mahomed Fazz v. Shahazadee Oomdah Begum* (69), and *Woomatool Fatima Begum v. Meerunmunissa Khanum* (70), the first had been cited as an authority for the position that a suit for dower was not founded on the contract, but on the withholding of the widow's estate from the heirs. The second had been relied upon to support the contention that the claim to recover the dower-debt was in essence to enforce a lien upon the estate of the deceased as against those entitled as heirs. These *dicta* were explained away, and it was held that the dower, like any other debt, must be paid before the estate divisible among the heirs can be ascertained, and that the suit to recover the dower-debt is nothing more nor less than a suit to enforce a simple money claim founded solely on the contract entered into by the husband; see also *Wafeah v. Saheeba* (71); *Janee Khanum v. Amatool Fatima* (72), *Mahabubibi v. Amina* (73). The view taken in these cases is supported by the observation of Sir Montague Smith in *Ranee Khajooroonissa v. Ranee Ryeesoornissa* (74), namely, that prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, with the result that upon a clear and unambiguous demand and refusal, a cause of action would accrue and the Statute would begin to run. To the same effect is the remark of Lord Parker in *Hamira*

Bibi v. Zubaida Bibi (75), that the dower ranks as a debt, and the right of the wife is no greater than that of any other unsecured creditor of her husband, subject to the reservation that if she lawfully, with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession unless it is satisfied; see also *Nurunnessa Khanum v. Muhammad Sakru* (76), and *Abi Dhunimsa Bibi Ammal v. Muhammad Fathi Udini Sahib* (77). In view of the principles expounded and applied in the long series of decisions which have now met with the approval of the Judicial Committee in *Tricomdas Cooverji Bhoja v. Gopinathji Thakur* (10), there is thus no escape from the conclusion that Art. 116 applies to suits for recovery of dower-debt when there is a registered dower-deed, although Arts. 103 and 104 would apply when there is no such registered instrument. We are not unmindful that the contrary view was, without argument, assumed to be correct in *Ful Chand Bibee v. Nawab Ali Chowdhury* (78). The view which we are constrained to adopt coincides with that taken in the case of *Aisatulla v. Danes Mohammad* (79), which was brought to our notice after the arguments had been closed, and has been reported since then.

The result is that the decree made by the District Judge is affirmed and this appeal is dismissed with costs.

B. N. & N. H. *Appaal dismissed.*

(75) 36 Ind. Cas. 87; 43 L. A. 294; 38 A. 581; 25 C. L. J. 517; 14 A. L. J. 1055; 21 C. W. N. 1. 18 Bom. L. R. 999; 31 M. L. J. 799 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 5 51; 1 P. L. W. 57; 25 C. L. J. 517 (P. C.).

(76) 56 Ind. Cas. 8; 47 C. 537; 31 C. L. J. 14; 24 C. W. N. 335.

(77) 44 Ind. Cas. 293; 41 M. 1026; 23 M. L. T. 78; (1918) M. W. N. 246; 35 M. L. J. 468.

(78) 1 Ind. Cas. 740; 36 C. 184; 9 C. L. J. 105; 13 C. W. N. 134.

(79) 70 Ind. Cas. 169; 36 C. L. J. 379; (1923) A. I. R. (C.) 152.

(69) 6 W. R. 111.

(70) 9 W. R. 318.

(71) 8 W. R. 307.

(72) 8 W. R. 51.

(73) 10 B. H. C. R. 430.

(74) 2 I. A. 235; 24 W. R. 163; 15 B. L. R. 300

3 Sar. P. C. J. 526 (P. C.).

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 36-B OF 1922.

March 21, 1923.

Present:—Mr. Prideaux, A. J. C.

GOWARDHANDAS—APPELLANT

versus

WAHIDKHAN—RESPONDENT.

Landlord and tenant—Lease for specific purpose—Purpose not carried out—Lease, determination of—Perpetual lease—Lessee, death of, effect of.

Where a lease is granted for a specific purpose it lapses automatically, if the purpose is not carried out. [p. 26, col. 1.]

A perpetual lease is determined by the death of the lessee. Therefore, a lease of land to a Company for a specific purpose, whereby the Company is given the power of holding the land as long as it pleases, is determined as soon as the Company becomes defunct. [p. 26, cols. 1 & 2.]

Vaman Shripad v. Mahi, 4 B. 424; 2 Ind. Dec. (N. S.) 788, relied on.

Appeal against a decree of the Additional District Judge, Akola, in Civil Appeal No. 265 of 1921, dated the 24th October 1921.

Mr. M. Gupta, for the Appellant.

Sir B. K. Bose and Mr. M. B. Khinkhede, R. B., for the Respondents.

JUDGMENT.—The plaint on which this litigation arose states that Survey No. 679-1, area 4 acres and 25 *gunthas* rental Rs. 12 of *Kasba* Akot, belonged to one Sheikh Mantoo, son of Sheikh Rahim. He leased the same to a Company called the Ginning Company, Akot, of the shop of Maraoti Ganesh Asarkar, for the construction of a Ginning Factory. This lease is dated 4th June 1905 the lease money being Rs. 120. Sheikh Mantoo died about 1911 and after his death his heir, his wife Chotambi, became the owner of the property. She sold the land with other immoveable property on 5th March 1912 to Waheb Khan, the son of the present plaintiffs. Waheb Khan having died plaintiffs as his father and mother became the owners of the field. The Ginning Company has been dissolved and there is no Ginning Factory in the field now. The firm sold to one Mojumkhan who in turn has sold the weighing house and *phatak ghar* to defendant No. 1 and the Engineer's bungalow and two fitters' rooms to defendant No. 2. These defendants were served with notices to quit but none has done so. The plaintiffs

ask that it may be held that defendants have no rights whatever to the immoveable property and that they may be given possession and defendants should be ordered to remove the buildings standing on the immoveable property within two months' time.

The first rent-note executed in favour of the shop and Ginning Company is dated the 2nd August 1890. It states *inter alia*:—"Out of the field within the aforesaid boundaries land to the north of the road containing three mango trees has been given to you on rent for constructing a Ginning Factory and put in your possession from this year The period (in respect of) this field is at my will, or there is no necessity of fixing the period. You may, however, retain possession of this land as long as you like on an annual rent of Rs. 50 after the five years as stipulated above. As the aforesaid land is given to you for a period you like, I will never ask it back."

The following portions of the second rent-note dated 4th July 1905 are relevant:—"Under the rent-note dated 2nd August 1890, executed by my *dadi*, that is, my father's paternal uncle's wife, named Fundabi wife of Gul Ahmad, and registered as serial No. 972 of 1890 on page 70 of part 78 of book No. 1 (the land) is in your possession for the purpose of your Ginning Factory. That *khata*-holder died and by orders in Appeal No. 11 of 1904-1905 decided on 27th January 1905 the *khata* is transferred in my name as heir. Therefore, I have fixed the rent of the field which is given to you Fundabi for constructing a Ginning Factory and is in your possession, at Rs. 120 per annum, and given it to you in order that you may keep it in your possession as long as you please. The aforesaid land is given to you after fixing the rent at Rs. 120 per annum. You should always keep this land in your possession for the use of your Ginning Factory. I will not ask it back."

The case proceeded *ex parte* against the second defendant. The first defendant who has purchased apparently the whole of the plot *hissa* is the defendant contesting the defendant. Sheikh Mantoo's ownership over the land was admitted but it was urged that Chotambi is not the sole

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heir but that one Sheikh Mahbub, uncle of Sheikh Mantoo, is also an heir and that his share in the field was three-fourths. Chotambi could only sell her one-fourth share to the plaintiff's predecessor. The two deeds referred to above were admitted and it was contended that the lease was to terminate at the will of the lessee. It was stated that Maroti Ganesh Company sold the Factory and lease-hold rights to Mojam Khan & Co. on 26th September 1918 and on the next day the latter sold by a registered sale-deed the lease-hold rights and some buildings to defendants who thus stepped into the shoes of Maroti Ganesh Company, the original lessees. The lease was said to be perpetual and the plaintiffs could not claim to eject the defendants.

The following issues were framed:—

(1) Whether Sheikh Mahbub is related to Sheikh Mantoo as alleged? If so what is his share in the property in suit?

(2) Whether the lease dated the 2nd August 1890 was in perpetuity and was to terminate at the will of the lessee?

(3) Whether under the terms of the lease defendants are entitled to retain possession of the land in suit?

(4) Does mere intention on defendants' part to erect a Ginning Factory in future bar plaintiffs' suit?

(5) Is defendant No. 2 in possession of the Engineer's bungalow and Fitter's rooms?

(6) What is the effect of the payment of the lease money by Maroti Ganesh Company defendant No. 1's predecessor-in-title to plaintiff's predecessor-in-title, viz., Waheb Khan?

(7) Whether the buildings on the property in suit were constructed with the express permission or knowledge of the plaintiff's predecessors? If so, does it debar plaintiffs from suing for their removal and the possession of the sites as alleged?

(8) Whether the lease was granted for the specific purpose of erecting a Ginning Factory only and does the removal of the Ginning Factory give the plaintiffs a cause of action?

(9) To what relief is plaintiff entitled?

The findings of the Trial Court may be summarised thus. Sheikh Mahbub was the illegitimate son of Gul Mohammad

and had no share in the property in suit. Defendant No. 2 was in possession of the Engineer's bungalow and Fitter's rooms. The field was put in the lessees' possession for erecting and working a Ginning Factory and they were entitled to remain in possession as long as this object was fulfilled. The lease was terminable at the will of the lessor, as soon as the material portion of the contract was broken and as the Factory was dismantled and taken away the lease had come to an end and plaintiffs were entitled to what they asked. These findings have been confirmed in appeal, the lower Appellate Court further stating that the appellants are estopped from denying Sheikh Mantoo's title under section 116 of the Evidence Act.

It is here admitted that Maroti Ganesh is dead and that the firm which ran the Ginning Factory at the time of the lease is gone. But it is argued that the lease shows in clear and unambiguous terms that it was a perpetual lease. It is stated for the appellant that the lease was not a conditional one; it was not essential that the Factory should be erected and kept on the ground; that the purpose for which this lease was given was merely mentioned with the object that the lessor could not object to a permanent structure being built on the site under section 108 (b) of the Transfer of Property Act. The case of *Ramanadhan v. Zemindar of Ramnad* (1) was quoted in this connection. It was further stated that unless the lease contains a distinct stipulation of re-entry the lessor cannot demand it. The rulings quoted by the lower Appellate Court, namely, *Vaman Shripad v. Maki* (2) and *Ramabai Saheb Patwardhan v. Babaji* (3) are said to be distinguishable because in the present lease there is a further clause that the lessor could not take back the land. It is also argued that even if there was a condition that there must be a Factory upon the land, then this condition was so vague that no Court would enforce it. It is asked that, suppose the Factory had not been built for four or five years, could the

(1) 16 M. 407; 3 M. L. J. 185; 5 Ind. Dec. (N. S.)

989.

(2) 4 B. 424; 2 Ind. Dec. (N. S.) 788.

(3) 15 B. 704; 8 Ind. Dec. (N. S.) 476.

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lessor have claimed to get his land back? And it is stated that the present appellant does intend in the future to put up a small Factory.

For the respondents it is argued that whether we look to the first or to the second clause, it is clear that the purpose of granting the lease was the erection of a Ginning Factory and the land could not be diverted to any other purpose except with the owner's consent. Express consent would be required before that happened. The condition on which the land was granted, namely, that for a Factory, was carried out and the Factory was worked for some years. Then the Factory closed and the land was transferred to others who never thought of putting up a Ginning Factory until the suit was filed and defendant said he was going to do so though it has not yet been put up. It is stated that if the land was given for a special purpose and not applied to that purpose the lease automatically lapsed and the lessor would have a right of re-entry and the leasehold rights would come to an end.

It seems to me that the case has been rightly decided. If the first lease of 1890 was a perpetual lease, it is not quite clear why the second lease of 1905 was necessary. The rights of the parties are governed by the second lease and we must confine our attention to its four corners. It seems that the lease was to continue as long as the parties agreed to it and the right seems personal to the lessee. The terms of the second lease show that it was given for the purpose of erecting a Ginning Factory on the land leased. In fact it says so: "You should always keep this land in your possession for the use of your Ginning Factory. I will not take it back." It also states: "given it to you in order that you may keep it in your possession as long as you please." It was an agreement with a particular Company that they should hold the land as long as they liked. There is authority for the proposition that in the case of a perpetual lease it is determined by the death of the lessee: See *Vaman Shripad v. Maki* (2). The principle enunciated in that case would, it seems to me, equally apply to a case like the present when the Company to whom the land was given for a specified purpose is defunct. I do not think that

the lease was a perpetual one in the sense that the lessees could do what they liked with the land and that no diversion of use of the land from the purpose for which the lease was apparently granted would give the lessor a right of re-entry. He had leased his land for a specific purpose and if that condition is broken it seems to me the lessor had the right to claim his land back. That is what has happened here. There is nothing to show that the lease was transferable but the question whether if the Factory had been transferred plaintiff could claim possession does not arise, for as far as the present appellant is concerned the Factory was not transferred to him. The land was given for the purpose of having a Factory on it. It has no Factory now standing on it and it seems to me that plaintiff is entitled to possession.

For the above reasons, I find that the decision of the Courts below is correct and dismiss this appeal with costs. Appellants to pay the respondents' costs.

N. H.

Appeal dismissed.

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ODH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 314 OF 1922.

February 19, 1923.

Present:—Pandit Kanhaiya Lal, J. C.

GANGA BAKHSI SINGH AND AN-

OTHER—PLAINTIFFS—APPELLANTS

versus

RAGHUBAR SINGH AND ANOTHER

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage-decree against father—Sons, liability of.

In a joint Hindu family consisting of a father and his sons, the latter are not precluded from questioning a mortgage-decree obtained against their father, so long as the mortgaged property is still in possession of the family and no adverse proprietary rights have sprung up by a sale held in execution of the decree, and the onus is on the mortgagee decree-holder to show that the mortgage was made for payment of an antecedent debt or for a valid family necessity.

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I. A. 126; 15 A. L. J. 437; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), *Suraj Bansi Koer v. Sheo Persad Singh*, 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), *Chandardeo Singh v. Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, followed.

Sripat Singh Dugar v. Prodyat Kumar Tagore, 39 Ind. Cas. 252; 44 I. A. 1; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.), *Kalyan Singh v. Dharam Singh*, 68 Ind. Cas. 794; 20 A. L. J. 721; (1922) A. I. R. (A) 489, *Basdeo Lal v. Mahabir*, 59 Ind. Cas. 570; 8 O. L. J. 18; 23 O. C. 344; 3 U. P. L. R. (O.) 1, *Bhagbut Pershad v. Girja Koer*, 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.), distinguished.

Gur Narain v. Gulzari Lal, 25 Ind. Cas. 917; 17 O. C. 318; 1 O. L. J. 503, not followed.

Appeal against a decree of the District Judge, Hardoi, dated the 19th August 1922 confirming that of the Additional Sub-Judge, Hardoi, dated the 3rd December 1921.

Mr. A. P. Sen, for the Appellants.

Messrs. Niamatulla and Ghulam Hassan for Respondent No. 2.

ORDER.—The plaintiffs are the sons of Raghubar Singh, and seek to impeach certain mortgages effected by the latter in favour

of Brindaban, the contesting defendant-respondent. The allegation of the plaintiff was, that their father was extravagant, and addicted to drink and debauchery, and that the mortgages in question were executed for illegal and immoral purposes and for inadequate consideration and without any valid family necessity. The mortgagee, on the other hand, contended that the mortgages were made for the payment of antecedent debts and for legal necessity. He denied that the property mortgaged was ancestral. The learned Subordinate Judge found that the property mortgaged was ancestral property, belonging to a joint family, consisting of the plaintiffs and their father, Raghubar Singh, and that the mortgages in question had not been shown to have been made for the payment of antecedent debts and for family necessity. He, however, dismissed the claim, holding that the plaintiffs were bound by the decree obtained by defendant No. 2 against their father, because they had failed to establish that the loans in question had been taken for illegal or immoral purposes. The learned District Judge on appeal upheld that view.

The main question for consideration in this appeal is, whether the plaintiffs are precluded by force of the decree, obtained by the contesting defendant-respondent against their father, from contesting the validity of the mortgages in question. Those mortgages were made in 1906. A suit for sale was brought by the contesting defendant-respondent on foot thereof against Raghubar Singh; the father of the plaintiffs, and a decree was obtained on the 19th February 1918 without the plaintiffs, who were major at the time, being made parties thereto. There is nothing, in the decree or in the proceedings antecedent thereto, to show, that the suit was filed against Raghubar Singh as a manager of the joint family, or in a representative capacity. The main ground, on which the plaintiffs are sought to be made liable, is that, apart from the question of family necessity or antecedent debt, there was a pious obligation on the plaintiffs to pay the debts due by their father, which had matured into a decree, and that the

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entire interest of the family could be sold in satisfaction of the decree obtained for the payment of that debt; and in support of that contention reliance is placed on the decisions in *Gur Narain v. Gulzari Lal* (1) and *Sripat Singh Dugar v. Pradyot Kumar Tagore* (2).

The authority of the decision in the former case, so far as it lays down that a decree obtained against a Hindu father, upon a mortgage executed by him of joint family property, whether or no there had been a sale of the property in execution of a decree, was binding on his sons, unless they were prepared to show that the debt was contracted for an immoral or illegal purpose or was illusory, is somewhat shaken by the decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (3) where Lord Shaw, who delivered the judgment of their Lordships, explained the circumstances, in which a mortgage of the family property could be enforced against the sons of the mortgagor, and the equities which were imposed as an exception to the general rule for the protection of the rights of third parties, say, the purchasers thereof, who had taken their title for onerous consideration and in good faith. His Lordships there observed:—"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head." That the rights therein referred to are proprietary, is clear from the reference made

by Lord Shaw to the decision in *Suraj Bansi Koor v. Shree Persid Singh* (4) which lays down, that where joint ancestral property has passed out of the joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show, that the debts were contracted for immoral purposes, and that the purchasers, if strangers to the suit, had notice that they were so contracted. The mere existence of a decree has not been treated as sufficient to shift the onus unless it has resulted in a sale in execution of the decree and the passing out of the property from the family into the hands of a stranger, who had no notice that the debts represented by the decree had been contracted for immoral purposes. The onus of justifying the transaction by proof of valid family necessity rests on the mortgagee. In fact, a passage from the decision of Sir John Stanley in the case of *Chandardeo Singh v. Mata Prasad* (5) to which their Lordships of the Privy Council accorded their adhesion was cited to show that the true rule was, that except in cases where joint ancestral property had passed out of the joint family, either under a conveyance executed by the father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, and in no others the sons were not under an obligation to show, that the debts, represented by the mortgage, were debts contracted for immoral purposes. A decree unless it is binding on the sons, does not improve the position of the creditor, any more than a sale, which a father effects in order to pay a debt incurred by himself on the security of the mortgaged property. The exception to the general rule, that no manager, guardian or trustee can be entitled

(1) 25 Ind. Cas. 917; 17 O. C. 318; 1 O. L. J. 503.

(2) 39 Ind. Cas. 252; 44 I. A. 1; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.).

(3) 39 Ind. Cas. 280; 44 I. A. 126; 15 A. L. J. 437; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(4) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

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for his own purposes to dispose of the estate which is under his charge cannot be extended, where a liability under a mortgage merges into a decree, unless that decree can by any rule of law be held to be binding on the other members of the family, if a mortgage is not valid in so far as it purports to encumber the joint family property, it cannot become a just and legal consideration, if, in the absence of the sons of the mortgagor, a decree has been obtained on foot thereof against the mortgagor; otherwise the protection intended for the junior members of the family can in that way be easily circumvented and become illusory.

The decision in *Sripat Singh Dugar v. Prodyot Kumar Tagore* (2) deals with a set of circumstances similar to those above described. There a sale of certain family property had been effected in execution of decrees against the father without the sons having been made the parties thereto, but the order and notices provided for the sale of the right, title and interest of the judgment-debtor, after a contest had been entered into by the sons, and it was found established, that the intention was to sell the whole property over which the father had a disposing power. The decrees were those obtained for the recovery of the simple money-debts which were not shown to have been taken for immoral or illegal purposes.

A sale followed and the only question for consideration was whether it effected to convey the rights of the father alone or the entire interest over which he had a disposing power including that of his sons. A decree for sale obtained in enforcement of a mortgage does not, however, stand on the same footing. If the mortgage is invalid as against the interest claimed by the sons, it cannot be valid *qua* the interest of the father in the mortgaged property. A son can prevent his father from making a mortgage of the family property without valid necessity but he cannot prevent him from borrowing money irrespective of the credit obtainable on the security of the family property for his own purposes or otherwise. He can interfere against the enforcement of the mortgage in the same way as he can interfere with the sale of the family property in execution of decree for money obtained against his father

but he cannot prevent a decree being passed against the father for the money borrowed by him irrespective of the security afforded by the family property. The decisions in *Kalyan Singh v. Dharam Singh* (6) and *Basdeo Lal v. Mahabir* (7) do not apply, because in the former case the decree was a simple money decree and in the latter case the decree was one for foreclosure, by virtue of which the property had passed out of the family and adverse right had thus sprung up which could not have been displaced except by showing, that the debt represented by the decree was not one for which the sons could have been made liable. The decision in *Bhagbut Pershad Singh v. Girja Koer* (8) also does not apply, because in that case too, the property in dispute had passed out of the family by virtue of a sale held in execution of a decree.

As observed by Lord Shaw in *Sahu Ram Chandra v. Bhup Singh* (3), "the joint family estate in the hands of a father, acting as the manager of the family, is in the position; under his management he can neither obtain money for his own purposes for it, nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve, and this, in other words, would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust." The obtaining of a decree on foot of a mortgage, if invalid against the father, makes no real difference, so long as no adverse proprietary rights have sprung up with regard to the joint family property, for the protection of which the exceptions have been imposed.

The learned Counsel for the contesting defendant-respondents states, that no evidence was produced by him, because as his Counsel stated in the Trial Court, the onus had been placed by that Court on the plaintiffs. As the property is still in the possession of the family, and no sale has taken

(6) 168 Ind. Cas. 794; 20 A. L. J. 721; (1922) A. I. R. (A) 489.

(7) 59 Ind. Cas. 570; 8 O. L. J. 18; 23 O. C. 344; 3 U. P. L. R. (O.) 1.

(8) 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.).

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place, the onus of proving the validity of the mortgage ought to have been laid on the contesting defendant-respondent, and an opportunity should now be given to him of producing evidence in discharge of that burden. It will be open to the plaintiffs to produce evidence in rebuttal thereof.

The lower Appellate Court is, therefore, directed to determine after taking such relevant evidence as the parties may adduce:—

Whether the mortgages in question were made for to payment of the antecedent debts or for the valid family necessity, and if so, to what extent?

Three months time will be allowed for a return of the finding, and ten days from the date of the finding will be allowed to the parties for filing objections.

N. H.

Issue remitted.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 525
OF 1921.

February, 12, 1923.

Present:—Mr. Justice Ross.

RAM KISHUN MAHTO—DEFENDANT—
APPELLANT

versus

HARIHAR MAHTON—PLAINTIFF
—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 51—Sale, verbal—Consideration, payment of—Possession, delivery of—Registration not effected by vendor—Vendee right of—Equity, rule of.

A person sold a plot of land to the defendant and agreed to execute a deed of sale in respect of it. The latter paid the consideration and possession was delivered to him. The vendor failed

to perform his agreement and the sale was declared invalid for want of a registered deed. In appeal the vendee contended that the vendor could not oust him, as he had paid the consideration and obtained possession:

Held, that if the sale could not take effect as a sale for want of formality, it would have the effect of an agreement for sale with consequences in equity and that, therefore, the vendee obtained a good title in equity to the land in suit.

Puchha Lal v. Kunj Behari Lal, 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213, *Jnan Chandra Das v. Rajani Kania Pal*, 41 Ind. Cas. 850; 22 C. W. N. 522, *Maung Shwe Goh v. Maung Inn*, 38 Ind. Cas. 938; 44 C. 542; 21 C. W. N. 500; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.), relied on.

Appeal from a decision of the Subordinate Judge, Patna, dated the 17th September 1920, affirming that of the Munsif, Patna, dated the 31st October 1919.

Mr. A. K. Rai, for the Appellant.

Mr. N. N. Sen, for the Respondent.

JUDGMENT.—The plaintiff alleged that 115 acres of land was his *raiya* *kasht*; that one of the co-sharer landlords in execution of a money decree against him sold 56 acres which was purchased by the defendant on the 22nd January 1915; that thereafter by agreement between the parties they cultivated the entire plot in alternate years. A dispute arose which led to a case under section 145 of the Criminal Procedure Code as a result of which the defendant came into possession of the whole land. The plaintiff, therefore, sued for a declaration of his title to 59 acres and for partition and separate possession with mesne profits. The defence was that Rs. 150 was due to the defendant from the plaintiff and as the plaintiff could not arrange for payment of the money, in lieu thereof he gave 115 acres to the defendant who had been in possession of the entire plot as an absolute owner in lieu of that sum since the month of *Jeth* 1321. The plaintiff said that he would execute a deed of sale on the decision of the dispute between him and the landlord. Thereafter, the defendant, in order to protect his purchased property, bought 56 acres out of the said 115 acres at execution sale. But the entire plot has been in his possession in lieu of Rs. 150 by

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verbal purchase and 56 acres has been purchased at auction-sale and even after the auction-sale the remaining 59 acres has been in possession of the defendant in lieu of Rs. 150 by verbal purchase. After the purchase at the auction-sale it was settled between the parties that out of Rs. 150 the plaintiff would execute a deed of sale in respect of the remaining 59 acres for Rs. 100 and would return the balance of Rs. 50, but he had not performed his agreement. The Munsif held that the defence was true and that the defendant was put into possession of the entire Survey *Khata* No. 959 because the sum of Rs. 150 was due to him from the plaintiff on account of grain. But, although he accepted the testimony of the defendant and his witness, he found in view of the provisions of section 54 of the Transfer of Property Act that there had been no valid transfer of the land in suit because there was no registered document and he gave the plaintiff a decree for partition with mesne profits. The learned Subordinate Judge took the same view of the facts and of the law and dismissed the appeal. The defendant has now brought this second appeal.

The contention on his behalf is that this was not a verbal sale but a contract for sale; that the defendant has paid the consideration and has obtained possession and, therefore, the vendor, who is in a fiduciary relation, cannot oust him simply because he has failed to execute his part of the contract. It is pointed out that the defendant could sue for specific performance of the agreement. In reply, it is contended that this was not the defence but a verbal purchase of 56 acres in consideration Rs. 100 was pleaded; that even if it was an agreement for sale it created no interest in the land and the title is still in the plaintiff who can sue in ejectment; and, further, that even if the doctrine of part performance is accepted, the facts preclude its application in the present case because it is admitted that the agreement was subsequent to the auction-purchase and the defendant had been in possession from before the auction-purchase and he is, therefore, unable to show any act unequivocally referable to the agreement. It seems to me to be immaterial whether the transaction is described as sale by parol or an agreement

for sale. If the sale cannot take effect as a sale for want of formality, it would have the effect of an agreement for sale with its consequences in equity. Now, the question is whether as a result of the agreement for sale of the entire plot in consideration of an advance already made, followed by possession, the defendant obtained a good title in equity to the land in suit. If he did, then the subsequent auction purchase of a portion of the land the later agreement, the effect of which in substance was that the plaintiff should re-pay Rs. 50 to the defendant would not affect that title. The question in this suit is not as to the legal consequences, if any, of the later agreement, and the findings of fact of the Courts below relate to the original contract. The plaintiff relies on section 54 of the Transfer of Property Act which enacts that a contract for sale of immoveable property does not of itself create any interest in or charge on such property. Now the effect of this section has been considered in a number of cases: *Bapu Apaji Potdar v. Kashinath Sadoba Gulmire* (1), *Venkatesh Damodar Mokashi v. Mallappa Bhimappa Chikkalki* (2), *Puchha Lal v. Kunj Behary Lal* (3). In *Jnan Chandra Das v. Rajani Kanta Pal* (4) it was held that the view taken in the last mentioned decision was not overruled by the Privy Council in *Maung Shwe Goh v. Maung Inn* (5). The contrary view was taken in *Lalchand v. Lakshman* (6) and by the Full Bench of the Madras High Court in *Kurri Veerareddi v. Kurri Bapireddi* (7). In this state of the authorities this Court will follow the decisions of the Calcutta High Court where the equitable doctrine of part performance has been clearly recognised. That the facts come within the doctrine is clear. There was payment of money by the defendant to the plaintiff, or what

(1) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100.

(2) 66 Ind. Cas. 868; 24 Bom. L. R. 242; 46 R. 722; (1922) A. I. R. (B.) 9.

(3) 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213.

(4) 41 Ind. Cas. 850; 22 C. W. N. 522.

(5) 38 Ind. Cas. 938; 44 C. 542; 21 C. W. N. 500; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.).

(6) 28 B. 466; 6 Bom. L. R. 510.

(7) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.

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comes to the same thing, an acknowledgment of a debt owed by the plaintiff to the defendant, in lieu of which the possession of land was transferred under an agreement for sale. This satisfies the test laid down by Grant, Master of the Rolls, in *Fram v. Dawson* (8) that the act must be an act, unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. His Lordship observed "the principle of the cases is, that the act must be of such a nature, that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted; to show, what the agreement is." In view of these principles, I hold that the defendant has a good title to the land in suit and the appeal must be decreed with costs and the decrees of the Courts below set aside and the suit dismissed with costs throughout.

N. K.

Appeal dismissed.

(8) (1807) 14 Ves. 386; 9 R. R. 304; 33 E. R. 569.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 13-B OF 1922.

March 12, 1923.

Present.—Mr. Kotval, A. J. C.

BABOOJI—APPLICANT—APPELLANT

versus

RAMGOPAL AND ANOTHER—NON-APPLICANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Final decree, application for—Notice to judgment-debtor, necessity of.

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree-holder, but in practice it is given on the principle that it is just and proper to hear the opposite party. [p. 32, col. 2; p. 33, col. 1.]

Where a notice of an application by a decree-holder to make his decree final is duly served on the judgment-debtor but he fails to appear to show cause on the date fixed for the hearing, it may be reasonably inferred that he has nothing to say in answer to the application. If the first application is subsequently dismissed in default and the decree-holder applies again, a second notice is not required under the circumstances. [p. 33, col. 1.]

Appeal from a decree in Civil Suit No. 42 of 1919, in the Court of the Sub-Judge, Morsi, decided on the 27th February 1922.

Mr. S. C. Dutta Chowdhury, for the Appellant.

Mr. P. C. Dutt, for the Respondents.

JUDGMENT.—A preliminary decree for foreclosure was passed against the defendant-appellant Babooji on the 9th April 1920. An application for a final decree was made by the plaintiffs on the 15th January 1921. Notice of this application was served on Babooji on the 25th February 1921. On the 9th March 1921 the date fixed for hearing this application both parties were absent and the application was dismissed. On the 21st April 1921 a second application for a final decree was made. Notice of this application was affixed to Babooji's house on the 14th July 1921. The Mazkuri's report states that as Babooji was found on enquiry to have gone to Pandharpur the notice was affixed to his house. An *ex parte* final decree was then passed against Babooji. Babooji applied to have the *ex parte* final decree set aside on the ground that notice of neither application was served on him. The lower Court has held that, as notice of the first application was duly served, notice of the second application was not necessary. It has refused to set aside the *ex parte* decree. Babooji appeals.

I agree with the lower Court in holding that notice of the first application fixed for hearing on the 19th March 1921 was duly served on the defendant-appellant, Babooji. The endorsement on the notice and the evidence of P. W. No. 1 sufficiently proves this. The appellant refused to sign the acknowledgment and the notice was, therefore, affixed to his house. This application was, however, dismissed in default as neither party was present. The service of notice of the second application does not appear to have been in accordance with the provision of the Civil Procedure Code for though a copy of the notice was affixed to the appellant's house on the ground that he was absent from the village it seems that no due or reasonable diligence was used to find him.

Notice to the judgment-debtor is not prescribed by law before making a decree final

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on the application of the decree-holder but in practice it is given on the principle that it is just and proper to hear the opposite party. In the present case the principle *audi alteram partem* did not, in my opinion, require a notice of the second application. Notice of the first application was duly served and the appellant failed to appear to show cause on the day fixed for hearing. It may, therefore, be reasonably inferred that he had nothing to say and there was nothing for the Court to hear from him. A second notice under such circumstances was not required. I do not, therefore, think that the fact that the second notice was not duly served is a ground for setting aside the *ex parte* decree.

The order of the lower Court refusing to set aside the decree is correct. The appeal is dismissed with costs. Pleadings fee Rs. 30.

N. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL, REVISION PETITION NO. 295 OF 1922.

February 10, 1923.

Present:—Mr. Justice LeRossignol.

BIR SEN—PLAINTIFF—PETITIONER

versus

RAJA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 48, 49—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit to recover compensation for trees wrongfully cut and removed—Small Cause Court, jurisdiction of—Limitation.

Defendant sold certain standing trees to the plaintiff which were to be cut and removed by the latter. Subsequently, the defendant sold the land to a third person, who sold the trees which were cut and removed by the purchasers. Plaintiff sued to recover the trees or compensation for them.

Held, (1) that the suit fell within the purview of Art. 35 (ii) of Schedule II, to the Provincial Small Cause Courts Act, and was, therefore, not cognisable by a Court of Small Causes;

(2) that the suit was governed by Art. 48 or Art. 49 of Schedule I to the Limitation Act and that limitation began to run from the date on which the trees were cut and misappropriated.

Petition, under section 44 of Act VI of 1918, for revision of the decree of the District Judge, Karnal, dated the 9th January 1922, affirming that of the Munsif, First Class, Karnal, dated the 4th February 1921.

Mr. Shamair Chand, for the Petitioner.

Mr. Sagar Chand, for the Respondents.

JUDGMENT.—The principal defendant sold standing trees to plaintiff by registered deed for Rs. 200 and the covenant was that plaintiff should be at liberty to cut them and remove the timber within one year.

This sale was in 1915 but plaintiff did not cut within the year. Meanwhile, the land had been sold and was pre-empted and the pre-emptor sold the trees to third persons on 12th July 1917. These persons cut the trees and the plaintiff in 1920 sued for possession of the timber, or Rs. 400.

The lower Appellate Court has held the suit to be barred by time and has dismissed it applying Art. 62 of the Limitation Act.

The suit was for recovery of the timber or for compensation, and the act complained of is said to have been wrongful, so that Art. 48 or 49 applied, and the suit, if brought within 3 years of the cutting and misappropriation of the trees, was within time.

The sale was a sale of standing trees which were to be cut and converted into timber. This was a sale of moveable property.

The plaintiff, however, has produced evidence that his servants were prevented from cutting the trees four years before suit, so that the suit was too late, if Art. 48 or 49 apply.

I think Art. 48 or Art. 49 does apply for plaintiff does allege a transfer to him, then a wrongful transfer to third parties and he prays for delivery of the timber or compensation. The suit appears to be time-barred.

As it falls under Art. 35 (ii), of the Second Schedule of the Provincial Small Cause Courts Act, as amended by Act VI of 1914, it was excluded from the cognisance of a Court of Small Causes, and the appeal lay to the District Court.

On the merits, too, plaintiff has not much to complain about, his timber occupied the land for several years, and it might well be

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held that time was of the essence of the contract.

I dismiss the petition with costs.

Z. K.

Petition dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 905
OF 1922.

March 27, 1923.

Present.—Mr. Justice Scott-Smith.

NIHALA AND OTHERS—DEFENDANTS—

PETITIONERS

versus

KHAZAN SINGH—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 17—Service of summons—Substituted service, when to be made—Ex parte decrees, application to set aside—Limitation—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art. 164.

The mere temporary absence of the defendant from his house does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used.

Defendant, against whom an *ex parte* decree had been passed applied to set it aside. The application was made on the 37th day after the decree had been passed. The defendant led evidence to show that a summons was never sent to be served on him and there was no rebuttal.

Held, that under the circumstances the *onus* was upon the plaintiff to show that the defendant had knowledge of the decree more than thirty days before the date of his application.

Petition, under section 25 of Act IX of 1887, for revision of a decree of the Munsif, exercising the powers of a Judge, Small Cause Court, Hoshiarpur, dated the 7th January 1922.

Mr. Sagar Chand, for the Petitioners.

Mr. Cooper, for the Respondent.

JUDGMENT.—In my opinion the summons was not duly served upon the defendant. Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be

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used, and it cannot be said that this was done in the present case. The defendant led evidence to show that a summons was never sent to be served on him and there is no rebuttal. He made his application on the 37th day after the *ex parte* decree was passed, and, under the circumstances, I consider the *onus* was upon plaintiff to show that defendant had knowledge of the decree more than 30 days before date of his application.

I allow the revision and, setting aside the *ex parte* decree, remand the case for re-trial on merits.

Costs in this Court to follow the event.

Z. K.

*Revision allowed,
Decree set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 218
OF 1919.

August 16, 1922.

Present.—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

GOUR KRISHNA SIRCAR AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

NILMADHAB SAHA AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4, 5—Review, application for—Appeal, filing of, effect of—Procedure.

If an application for review is made in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal. That power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be prosecuted. On the other hand,

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if the application for review is successful and the judgment is vacated, the appeal directed against that judgment can no longer proceed. When a final decree is made after the review has been admitted that decree is, however, liable to be challenged in accordance with law. [p. 37, col. 2; p. 38, col. 1.]

Birjbasi Lal v. Salig Ram, 14 Ind. Cas. 472; 34 A. 282; 9 A. L. J. 183, *Kanhaiya Lal v. Baldeo Prasad*, 28 A. 240; A. W. N. (1905) 265, *Vadilal v. Fulchand*, 30 B. 56; 7 Bom. L. R. 664, *Nanhe v. Mangat Rai*, 20 Ind. Cas. 647, *Arayalpurath v. Cheekiladen Ahmad*, 2 Ind. Cas. 204 *Gour Sundar Bhowmik v. Rakhai Raj Bhowmik*, 34 Ind. Cas. 592; 27 C. L. J. 326; 20 C. W. N. 1165, *Mahsud Mali v. Secretary of State*, 9 Ind. Cas. 532, *Pyari Mohan Kundu v. Kaku Khan*, 41 Ind. Cas. 497; 44 C. 1011 and *Bhurrut Chunder Mojomondar v. Ram Gunga Sein*, B. L. R. Sup. Vol. 362; 5 W. R. 59, relied on.

The Court is competent to determine whether when a review is granted the case should be re-opened in part or in its entirety. When, however, on the grant of an application for review, no reservation is made, it may fairly be assumed that the entire case is intended to be re-opened. [p. 37, col. 2.]

Gour Sundar Bhowmik v. Rakhai Raj Bhowmik, 34 Ind. Cas. 592; 27 C. L. J. 326; 20 C. W. N. 1165, *Bhubaneshwari Koer v. Ajodhya Singh*, 11 Ind. Cas. 102; 15 C. L. J. 339, *Sadar-ud-Din v. Ekram-ud-Din*, 20 Ind. Cas. 670; 19 C. L. J. 225; 18 C. W. N. 22 and *Janaki Nath v. Prabhasini Dasi*, 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 178, relied on.

A review proceeding ordinarily commences with an *ex parte* application. The Court may then, either reject the application at once, or may grant a Rule calling on the other side to show cause why the review should not be granted. In the second stage, the Rule may be either admitted or rejected and it is obvious that the hearing of this Rule may involve to some extent an investigation into the merits. If the Rule is discharged, then the case ends. If, on the other hand, the Rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the Rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case the parties are relegated to and still rest on the old decree. Consequently, the order appropriate to a discharge of the Rule is the rejection of the application, an order so made terminates the second stage of the proceedings and there is no third stage for the re-hearing of the case. [p. 36, col. 2.]

Vadilal v. Fulchand, 30 B. 56; 7 Bom. L. R. 664 and *Nanhe v. Mangat Rai*, 20 Ind. Cas. 647, relied on.

Where an application for review is presented under O. XLVII, r. 5 of the Civil Procedure Code, in respect of a decree made by two Judges, if one of them is absent from the Court, the remaining Judge may deal with the matter in the first two stages, as mentioned above but not in the third. [p. 37, col. 1.]

Appeal against the decree of the District Judge, Nadia, reversing the decree of the Revenue Officer, Krishnagar, dated the 14th December 1916.

Babu Mahendra Nath Roy (with him Babu Baranasi Basi Mukerjee), for the Appellants:—The defendants are the appellants. The appeal arises out of proceedings under section 105 of the Bengal Tenancy Act. The question is, whether a tenure which has been sub-divided, upon proof of payment of uniform rent for 20 years, the presumption under section 50 of the Bengal Tenancy Act would arise. But there is an initial difficulty in the present appeal, which is this. After the judgment of the Special Judge we applied for a review. Then we filed the present appeal. Meanwhile, the review application was granted and the original judgment was modified to the extent of the assessment of rent. A new decree has since been drawn up.

Babu Ram Chandra Mazumdar (with him Babu Amarendra Nath Bose), for the Respondent:—I submit that as soon as the application for review was granted the decree was vacated. The decree passed on review would be a new decree even though the original decree may be modified as to a portion. In this case the whole appeal was reviewed. See *Birjbasi Lal v. Salig Ram* (1) and *Kanhaiya Lal v. Baldeo Prasad* (2).

[MOOKERJEE, J.—If an appeal is re-opened in part does that mean that the entire appeal is re-opened?]

Not necessarily. That is also contemplated by the Legislature.

[MOOKERJEE, J.—Would there then be two decrees?]

The decree on review would be final and appealable. There would be two decrees if they are separable. In this particular case, the whole case was re-opened. Therefore, I would contend that the present appeal is infructuous.

Babu Mahendra Nath Roy in reply:—There was no proper re-hearing at all. On my presenting the application, notice

(1) 14 Ind. Cas. 472; 34 A. 282; 9 A. L. J. 183.

(2) 28 A. 240; A. W. N. (1905) 265.

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was served on the other side. He did not say that the application was granted. On the other side appearing the application was heard and the judgment was reserved. Then followed the judgment. The Judge did not follow the proper procedure. I submit without granting my application for review the previous decree was not vacated. He has made a decree which being without jurisdiction is a nullity. I would ask permission to file an appeal from the decree on review. The new decree was signed on 25th April 1919. The present appeal was admitted under O. XLI, r. 11, Civil Procedure Code, on 8th May 1919.

JUDGMENT.—This is an appeal by the tenants-defendants in a proceeding instituted by the landlords-respondents under section 105 of the Bengal Tenancy Act for the settlement of fair and equitable rent in respect of the lands in their possession.

An objection has been taken by the respondents on the ground that the appeal has become infructuous, as the decree which is assailed has been vacated by the lower Appellate Court as the result of an application for review of judgment presented by the tenants. It appears that the judgment of the lower Appellate Court was pronounced on the 6th May 1918. On the 18th July 1918 the tenants made an application for review of judgment. The Court thereupon directed notice to be served on the landlords as required by O. XLVI, r. (2) (a), Civil Procedure Code. On the 14th November 1918, during the pendency of the application for review of judgment, the tenants lodged in this Court the appeal now before us, which is directed against the decree of the lower Appellate Court made in pursuance of the judgment of the 6th May 1918. The application for review was heard by the lower Appellate Court, in the presence of the tenants and landlords, on the 2nd April 1919, and judgment was reserved. On the 5th April 1919, the review was granted in part and the decree originally made was modified. A new decree was then drawn up and was signed by the Judge on the 20th April 1919. The appeal lodged in this Court, which had been adjourned from time to time, was thereafter heard under

O. XLI, r. 11 of the Civil Procedure Code on the 8th May 1919 and notices were directed to issue on the landlords-respondents. The appeal has now been placed before us for final disposal. The respondents urged that, in these circumstances, the decree made by the lower Appellate Court on the basis of the judgment of the 6th May 1918 must be deemed to have been vacated when the application for review was granted on the 5th April 1919 and that the appeal has consequently become abortive. In support of this position reliance has been placed upon the decisions in *Kanhaiya Lal v. Baldeo Prasad* (2) and *Birjbasi Lal v. Salig Ram* (1).

The procedure adopted in the lower Appellate Court seems to indicate that the various stages through which an application for review may pass was, perhaps, not clearly appreciated. The matter commences, ordinarily, as is clear from O. XLVII of the Civil Procedure Code, with an *ex parte* application. The Court then may either reject the application at once or may grant a Rule calling on the other side to show cause why the review should not be granted. In the second stage, the Rule may either be admitted or rejected, and it is obvious that the hearing of this Rule may involve to some extent an investigation into the merits. If the Rule is discharged, then the case ends. If, on the other hand, the Rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one aspect, the result is the same, whether the Rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. Consequently, the order appropriate to a discharge of the Rule is the rejection of the application; an order so made terminates the second stage of the proceedings, and there is no third stage for the re-hearing of the case. This analysis of the successive stages of a proceeding for review of judgment, which was given by Sir Law:

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rence Jenkins, C. J. in *Vadilal v. Fulchand* (3) and was adopted by Sir Henry Richards, C. J., in *Nanhe v. Mangat Rai* (4) is of fundamental importance. The failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrassment of litigants in many instances. This has happened specially in the class of cases contemplated in O. XLVII, r. 5, where an application for review is presented in respect of a decree made by two Judges; if one of them is absent from the Court, the remaining Judge may deal with the matter in the first two stages but not in the third. An illustration is afforded by the case of *Hari Charan Saha v. Baran Khan* (5). There an appeal from appellate decree was heard in the first instance by Mitra and Carnduff, J.J. After the retirement of Mitra, J., the respondent who had been unsuccessful, applied for review of judgment. This application was heard by Carnduff, J., alone, who directed a Rule to issue. The Rule was heard and made absolute, and the review was admitted. Carnduff, J., then proceeded to re-hear the appeal and repeated the decision he had previously passed in concurrence with Mitra, J. The respondent preferred an appeal against the decision of Carnduff, J., and urged that he had no jurisdiction to re-hear the appeal, that as soon as the review was admitted, the original decree was in law vacated, and that thereupon the appeal stood revived, to be heard only by the Division Bench authorised to deal with that description of cases by the Chief Justice. This contention was upheld by Jenkins, C. J., and the restored appeal was re-heard by a Special Bench constituted for the purpose. The error thus rectified had its parallel in the cases of *Arayalpurath v. Cheekiladen Ahmad* (6) and *Gour Sundar Bhoumik v. Rakhal Raj Bhoumik* (7), but was avoided in *Maksud Mahi v. Secretary of State* (8).

These decisions are authorities for the proposition that, when the application for review is granted, the decree previously made is vacated. We are not now concerned with the question whether when the application for review is granted the decree is vacated in its entirety or only in part. The decisions in *Bhubaneshwari Koer v. Ajo-dhya Singh* (9), *Sadar-ud-din v. Ekram-ud-din* (10), *Janaki Nath v. Prabhasini Dasi* (11) and *Gour Sundar Bhoumik v. Rakhal Raj Bhoumik* (7) indicate that the Court is competent to determine whether when a review is granted, the case should be re-opened in part or in its entirety, and that the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be re-opened and re-considered. When, however, on the grant of an application for review, no reservation is made, it may fairly be assumed that the entire case is intended to be re-opened.

The principle recognised in these cases justifies the view adopted by Sir John Stanley, C. J., in *Kanhaiya Lal v. Baldeo Prasad* (2), that when an application for review has been granted, the original decree ceases to exist, with the consequence that an appeal preferred against that decree can no longer be prosecuted. This view is identical with that adopted by Sir John Edge, C. J. in *Kuar Sen v. Ganga Ram* (12) and was subsequently approved in *Birj-basi Lal v. Salig Ram* (1) and *Chenna Reddi v. Pedda Obi Reddi* (13). It was pointed out in *Pyari Mohan Kundu v. Kalu Khan* (14), where reference is made to the decision of the Full Bench in *Bhurrut Chunder Mojoomdar v. Ram Gunga Sein* (15), that if a review be applied for

(3) 30 B. 56; 7 Bom. L. R. 664.

(4) 20 Ind. Cas. 647.

(5) 25 Ind. Cas. 903; 41 C. 746.

(6) 2 Ind. Cas. 204.

(7) 34 Ind. Cas. 592; 27 C. L. J. 326; 20 C. W. N. 1165.

(8) 9 Ind. Cas. 532.

(9) 11 Ind. Cas. 102; 15 C. L. J. 339.

(10) 20 Ind. Cas. 670; 19 C. L. J. 225; 18 C. W. N. 22.

(11) 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 178.

(12) A. W. N. (1890) 144.

(13) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 135; 19 M. L. J. 388.

(14) 41 Ind. Cas. 497; 44 C. 1011.

(15) B. L. R. Sup. Vol. 362; 5 W. R. 59.

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in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal. That power exists so long as the appeal is not heard, because once the appeal is heard the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be prosecuted. On the other hand, if the application for review is successful and the judgment is vacated the appeal directed against that judgment can no longer proceed. When a final decree is made after the review has been admitted, that decree is, however, liable to be challenged in accordance with law.

What then is the position of the parties tested in the light of these principles? An application for review was presented to the Judge. The application was not summarily rejected, but notice was ordered to issue upon the opposite party. The application was then heard and the review granted, though no separate order appears to have been recorded at this stage. The Court forthwith proceeded to re-consider the case on the merits and reserved judgment. The judgment subsequently delivered states at the outset that the review had been granted on the ground (1) that in calculating the rent payable by the tenure-holder, no allowance had been made for profits and cost of collection as required by section 7 of the Bengal Tenancy Act, and (2) that the enhancement, which had worked out to about seven times the original rental was not fair and equitable. The Judge next proceeds to discuss these points which are decided in favour of the tenants. He then deals with the contention that the rent was not enhanceable at all, as by virtue of the presumption embodied in section 50 of the Bengal Tenancy Act, the tenure must be deemed to have existed from before the time of the Permanent Settlement. He overrules this contention and then makes an order for "modification of the decrees as noted above." A decree was in pursuance of this order drawn up in modification of the decree previously made.

Three points now require to be emphasised. In the first place, when the Judge

decided to grant the application for review, he should have recorded an order to that effect, and a note thereof should have been made in the register under O. XLVII, r. 8.; the order should have stated clearly whether the decree was vacated in its entirety or not. In the second place, the decree in the present case must have been set aside in its entirety, though the judgment states that the review was granted on two specified grounds. There were two points in controversy, namely, first, whether the rent of the tenure was enhanceable and secondly, if enhanceable, how should fair and equitable rent be assessed. Though the ground for granting the review as specified in the judgment, relates only to the second of these points, it is clear that the first question also was re-investigated. Such re-consideration would be permissible only if the original decision had been vacated in its entirety. In the third place, the judgment concludes with an order for modification of the decree, and this language is reproduced in the decree subsequently drawn up. But, plainly, there was no decree to modify. The original decree had ceased to exist as the result of the decision of the Judge to grant the application for review. The appeal was, in fact, restored and re-opened, and if the Judge arrived at a conclusion different from what he had reached at the original hearing, the decree made was a new decree. Indeed, as pointed out by Sir Lawrence Jenkins, C. J., in *Vadial v. Fulchand* (3), even if the Judge had adhered to his former opinion, the final decree after review would have been a new decree. We are consequently of opinion that the decree made by the lower Appellate Court on the basis of the judgment dated the 6th May 1918 was vacated when the application for review was granted on the 2nd April 1919, and that the decree prepared on the 29th April 1919 pursuant to the judgment delivered on the 5th April 1919 was a new decree. The appeal now before us has thus become infructuous and must be dismissed with costs on that ground. The hearing fee will be assessed at one gold *mohur*.

B. N. & N. K.

Appeal dismissed.

SHIRAM MOTI RAM v. SHAIKH AHMAD

NAGPUR JUDICIAL COMMISSIONER'S COURT.SECOND CIVIL APPEAL NO. 324-B OF 1921.
December 14, 1922.*Present.*—Mr. Kotwal, A. J. C.

SHIRAM MOTI RAM—PLAINTIFF

—APPELLANT

versus

SHAIKH AHMAD AND OTHERS—

—DEFENDANTS—RESPONDENTS.

Tort—Report by Municipal Sub-Committee—Privileged communication—Defamation.

A report made to the Chairman by members of a Sub-Committee of a Municipality in discharge of their duty and on a subject in which they are interested as members, is privileged and no action for damages for defamation would lie unless malice was proved against the members.

Appeal from the decree of the District Judge, East Berar, dated the 30th August 1921, in Civil Appeal No. 86 of 1921.

Mr. G. L. Subhedar, for the Appellants.

Mr. R. R. Jaiwant, for the Respondents.

JUDGMENT.—The defamatory statements complained of are contained in Exhibit D-12, a report made by the defendants to the Chairman of the Water Works Sub-Committee, of which they were members. The lower Appellate Court has found that the statements made in this report are substantially true and that they were made in discharge of the defendants' duty and on a privileged occasion.

It is first urged that it was not sufficient for the lower Appellate Court to find that the report was substantially true. It is pointed out that it contains defamatory statement; attributing misconduct to the plaintiff on four separate occasions. The first of these is a threat at 8 p. m. on the day of the report to Ramavatar to compel him to open the pipe. I do not think that the report can be interpreted to mean that the threat was given just before the opening of the pipe at 8 p. m. The threat may be one given long before. The next statement is that before the date of the report the appellant habitually threatened the line coolie and compelled him through fear to open the line connection to his house. The lower Appellate Court has accepted the evidence of D. Ws. Nos. 15, 16 and 17 and their evidence proves, as it has found, that threats were used by the appellant towards the Municipal employees. The third and fourth statements are said to be contained in para-

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graph 3 of the report and to refer to threats given on two other distinct occasions, but I think they are no more than repetition of the statement about the threats generally. The report contains substantially one statement that the appellant used by threatening Municipal servants to get water at times other than those sanctioned by the Municipality and this statement has been found to be true. The defendants were members of the Water Works Committee and were interested in the regulation of the water supply, and their report, which was addressed to the Chairman of the Water Works Committee, was privileged. It does not matter that only one of them was in charge of the section of the city in which the plaintiff's house is situated for the purpose of supervising the distribution of the water. The statement is both justified and privileged, and no malice is proved. No action for damages, therefore, lies. The appeal is dismissed with costs.

N. K.

*Appeal dismissed.***POUDH JUDICIAL COMMISSIONER'S COURT.**MISCELLANEOUS APPEAL NO. 14
OF 1923.

March 20, 1923.

Present.—Mr. Kanhaiya Lal, J. C.

MURLI DHAR—PLAINTIFF—

APPELLANT

versus

MOOL CHAND AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Arbitration—Private reference—Partition of joint family property—Powers of arbitrators—Mother's share, declaration of—Consent of parties to reference, effect of.

MURLI DHAR V. MOOL CHAND:

Where on a reference to arbitration by brothers forming a joint Hindu family for partition of family property, a provision for the maintenance of their widowed mother and sister is made with their consent, they cannot resile from the arrangement subsequently, even though the original terms of reference contained no provision entitling the arbitrators to provide for such maintenance. [p. 41, col. 1.]

Obiter.—In the case of a reference to arbitration by members of a joint Hindu family for partition of family property, the arbitrators have an authority to determine anything incidental or consequential to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded.

Shyam Lal v. Parshottam Dass, 58 Ind. Cas. 585; 42 A. 277; 18 A. L. J. 241; 2 U. P. L. R. (A.) 104, referred to.

Appeal against the decree of the Subordinate Judge, Hardoi, dated 20th June 1923.

Messrs. Gokaran Nath Misra and K. P. Misra, for the Appellant.

JUDGMENT.—This is an appeal from an order refusing to file an award made on a private reference to arbitration. It appears that Dulichand was possessed of certain landed property, a house and shops. He left three sons, Mool Chand, Bansidhar and Murlidhar. He also left a widow, *Musammāt Ganesha*, who is their mother, and a widowed daughter, *Musammāt Champa*. *Musammāt Champa* is deaf and has been dependent on her brothers for her livelihood, owing to her having lost her husband at an early age. By a family arrangement *Musammāt Ganesha* and *Musammāt Champa* were allowed to hold certain shops yielding a rental of Rs. 120 per year as a provision for their maintenance. Bansidhar died leaving a son, Parmeshri Dayal.

On the 16th October 1922, Mool Chand, Parmeshri Dayal and Murlidhar appointed three persons as arbitrators to divide the family property. In the agreement of reference there was no provision empowering the arbitrators to provide for the maintenance of *Musammāt Ganesha* and *Musammāt Champa*; but during the course of the arbitration proceeding, *Musammāt Ganesha* appeared and stated that the rent yielded by the shops was not sufficient for her maintenance and that of her widowed daughter *Musammāt Champa*, that for the preceding four months, no rent had been realized from the shops and that as she did not trust

that her sons or grandsons would do anything to maintain them the partition of the property should be stayed. The arbitrators thereupon asked Mool Chand, Parmeshri Dayal and Murlidhar what they had to say in the matter. These persons replied that they would agree to anything which the arbitrators might decide about the same. The arbitrators divided the property in dispute between the three branches of the family, and with regard to the objection of *Musammāt Ganesha* they decided that *Musammāt Ganesha* and *Musammāt Champa* shall be allowed to hold certain groves and plots situated in the villages Gunga Rampur and Shiampur and three shops situated in the village Bhagwant Nagar for their maintenance; but the three branches aforesaid shall occupy the same as tenants on their behalf so long as they were alive, and pay them a rental of Rs. 90 per year for the groves and plots, and Rs. 30 per year for the shops aforesaid. The arbitrators mentioned that they had made that arrangement with the consent of the parties to the reference. In fact, all of them had signed the award in token thereof.

On an application being made by Murlidhar to file the award and have a decree passed in accordance therewith, an objection was made by the other parties that the provision made by the arbitrators for the maintenance of *Musammāt Ganesha* and *Musammāt Champa* was *ultra vires*. The Court below accepted that contention and refused to file the award.

The proceedings of the arbitrators show, that they had been empowered to determine the objection filed by *Musammāt Ganesha* in such a manner as they thought proper. Even if the parties had not said so, the arbitrators had full authority in a reference of that character to make a provision for the maintenance of such members of the family as were entitled to a share or partition or to maintenance. A female member of a joint Hindu family has no right to claim a partition; but if she happens to be a mother and a partition is made at the instance of one of her sons, she is entitled to a share equal to that of each of her sons as a necessary corollary to such a partition. In the present case, the parties accepted the arrangement by which certain groves, land and shops were awarded to *Musammāt*

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Ganesha and Musammat Champa in lieu of the one-fourth share to which the former was entitled and agreed to hold the same as tenants for the lifetime of Musammat Ganesha and Musammat Champa and to pay rent therefor at the rate of Rs. 120 per year.

Mool Chand is present and states that he is willing to accept the award and has no objection to a decree being passed in accordance therewith. Parmeshari Dayal is also present. He describes himself as nineteen years old. His objection is that no provision ought to have been made by the arbitrators for the maintenance of Musammat Ganesha and Musammat Champa, but he admits having signed the award and consented to the same when it was made. His objection is obviously an afterthought and entitled to no weight. As observed in *Shyam Lal v. Parshottam Dass* (1), if the arbitrators have an authority to make a partition, they have an authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. A provision for the maintenance of Musammat Ganesha and Musammat Champa was made with the consent of the parties, and it is not open to them to resile from the arrangement to which they had agreed when the award was made.

The appeal is, therefore, allowed, and the decree of the Court below set aside, the result being that the award will be filed and a decree passed in accordance therewith. The plaintiff-appellant will get his cost here and hitherto from the defendant-respondents.

G. H. & N. H.

Appeal allowed.

(1) 58 Ind. Cas. 585; 42 A. 277; 18 A. L. J. 241; 2 U. P. L. R. (A) 104.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 522
OF 1921.

February 15, 1923.

Present :—Mr. Justice Ross.

GAYANI SAHU—DEFENDANT—FIRST
PARTY—APPELLANT

versus

BALCHAND SAHU AND OTHERS—PLAINT-
IFFS AND BAKTU SAHU AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 115—
Suit, disposal of, on point not raised by parties
—Substantial error or defect of procedure—Revision
—Limitation Act (IX of 1908), Sch. I, Art. 142—
Suit for possession—Gift set up by defendant
—Failure to establish gift—Possession of defendant,
adverse or permissive.*

Where a Court disposes of a suit on a point not raised by the parties and to which evidence has not been directed, there is a substantial error or defect of procedure and a revision against the decision is competent. [p. 42, col. 2.]

Shivabasa v. Sangappa, 29 B. 1; 1 A. L. J. 637; 8 C. W. N. 865; 6 Bom. L. R. 770; 8 Sar. P. C. J. 720; 31 I. A. 154 (P. C.), relied on.

In a suit for recovery of possession of a certain plot of land, if the defendant bases his possession on a deed of gift which he fails to prove, the conclusion is, not that his possession is permissive but that it is that of a trespasser. Such a suit is governed by Art. 142 of Schedule I to the Limitation Act and the plaintiff must prove possession within 12 years. [p. 42, col. 2.]

Sambu Hanmantar Kopal v. Nama Narayan Naikde, 12 Ind. Cas. 362; 35 B. 438; 13 Bom. L. R. 867, relied on.

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 18th November 1920, modifying a decision of the Munsif, Motihari, dated the 17th July 1920.

Mr. Sivanarain Bose, for the Appellant.

Mr. Sambhu Saran, for the Respondents.

JUDGMENT.—This is an appeal by defendant first party against the decree of the Subordinate Judge of Muzaffarpur reversing so much of the decree of the Munsif of Motihari as dismissed the suit of the plaintiffs against the defendant No. 1. The suit as first framed was a suit for a declaration of plaintiff's title to certain plots of land in Khata No. 153 of the Record of Rights of Mauza Patora. One Gudari Sahu had three sons and one daughter. The plaintiffs represent two of the sons, the defendant second party the third sons, and defendant first party is the daughter's son. The plaintiffs alleged that the land in suit was the joint property of themselves and de-

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fendant second party and had been wrongly recorded in the Record of Rights as being in possession of defendant No. 1 who had no concern with it. A Criminal case about one of the plots having been decided against the plaintiffs, they brought the suit for a declaration that the defendant first party had no connection with the land in suit which belonged to the plaintiffs and defendant second party and that the entry in the Record of Rights was wrong. The defence of defendant No. 1 was that the suit was barred by 12 years' limitation as the plaintiffs had not been in possession for more than several 12 years. It was also barred by section 42 of the Specific Relief Act and by estoppel. The land had been given to defendant first party by his maternal uncles after the death, and by the direction of his maternal grandfather Gudari Sahu about 20 years ago. Fifteen or 16 years ago he had separated from the others. *Tawan* was paid separately to the Motihari Concern for this land by the defendant No. 1 and he was separately recorded for it by the landlord and he had in any case acquired title by 12 years' adverse possession. To meet the objection about section 42 of the Specific Relief Act the plaint was amended and the plaintiffs prayed for recovery of possession. The Record of Rights showed *Khata* No. 153 as part of the joint holding of plaintiffs and defendant second party but in possession of defendant No. 1. The Munsif on a consideration of the evidence held that this entry was correct and that the plaintiffs had failed to prove possession within 12 years and dismissed the suit. The Subordinate Judge came to no decision as to possession. He held that the gift alleged by the defendant was invalid for want of a registered document and for want of evidence of consent of all the members of the family. If, therefore, the defendant was in possession, his possession in the absence of a gift must be held to be permissive and on this ground he decreed the suit. In this view the learned Subordinate Judge was clearly wrong. It is nowhere pleaded by the plaintiffs that the defendant's possession was permissive, it was simply denied. At the time of the amendment of the plaint by the addition of the prayer for recovery of possession, no amendment of the body of the plaint seems to have been

made and there is no allegation of possession by defendant No. 1 except possibly as to Plot No. 445. Permissive possession is not the case of either party and, so far as can be seen from the judgment, there was no evidence of it. One of the plaintiff's witnesses seemed to support the story of gift as found by the Munsif. The Subordinate Judge was, therefore, not entitled to decree the suit on a purely hypothetical explanation of the defendant's possession. Thus, in *Shivabasava v. Sangappa* (1), the Judicial Committee held that where the Court disposed of a suit on a case not raised by the parties and to which evidence had not been directed, there was a substantial error or defect of procedure. Moreover, when the defendant failed to prove the gift the conclusion to be drawn was not that his possession was permissive but that it was that of trespasser—*Sambu Hanmanta Kobal v. Nama Narayan Nalkde* (2). The result of this error is that the Subordinate Judge has not properly considered whether the defence evidence amounts to proof of title by adverse possession. A further consequence is that he has not considered at all whether the plaintiffs have proved possession within 12 years as they were clearly bound to do, the suit being a suit for recovery of possession and governed by Art. 142 of the Limitation Act.

In my opinion, therefore, there has been no proper trial of this appeal. The present appeal is decreed and the decree of the Subordinate Judge is set aside and the appeal remanded for re-hearing. Costs will abide the result.

N. H.

Appeal allowed.

(1) 29 B. 1; 1 A. L. J. 637; 8 C. W. N. 865; 6 Bom. L. R. 770; 8 Sar. P. C. J. 720; 31 I. A. 154 (P. C.).

(2) 12 Ind. Cas. 362; 35 B. 438; 13 Bom. L. R. 867.

RAMSEKHAR PRASAD SINGH V. SHEONANDAN DUBEY.

PATNA HIGH COURT.

SECOND CIVIL, APPEAL, NO. 1136 OF 1922.

August 1, 1922.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Justice Sir B. K.
Mullick, Kt.

RAMSEKHAR PRASAD SINGH AND
OTHERS—DEFENDANTS—APPELLANTS

versus

SHEONANDAN DUBEY AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Court-Fees Act (VII of 1870), ss. 5, 7 (iv)
(c)—*Suit for declaration and confirmation of possession, nature of—Consequential relief—Valuation—Court-fees—Taxing Officer, decision of—High Court, whether can interfere.*

In a suit falling under section 7 (iv) (c) of the Court-Fees Act it is not open to the plaintiff to put an arbitrary and incorrect valuation on the relief sought. In such a case the valuation for the purposes of Court-fees must, in the first instance, be made by the plaintiff but is finally determinable by the Court. The valuation must be fixed with reference to the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiff apprehends. [p. 46, cols. 1 & 2.] (Case-law discussed.)

A prayer for confirmation of possession includes a prayer for recovery of possession if the Court thinks the plaintiff is out of possession and amounts to consequential relief within the meaning of section 7 (iv) (c) of the Court-Fees Act. [p. 44, col. 2.]

Bohuroonissa Bibee v. Kuweemoonissa Khatoon, 19 W. R. 18, *Jhumak Karti v. Debu Lal Singh*, 16 Ind. Cas. 898; 22 C. L. J. 415, *Dina Nath Das v. Rama Nath Das*, 34 Ind. Cas. 702; 23 C. L. J. 561, followed.

A suit for declaration and confirmation of possession must, therefore, be valued for purposes of Court-fees according to the value of the land in dispute. [p. 46, col. 2.]

Under section 5 of the Court-Fees Act the Taxing Officer has jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellant on the relief sought is incorrect he has jurisdiction to correct it. His decision as to the amount of fee payable is final, and the High Court has no jurisdiction to interfere with it, even if he has done something which the law does not allow him to do. [p. 44, col. 1.]

Balkaran Rai v. Gobind Nath Tewari, 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831, *Karan Singh v. Gopal Rai*, 4 Ind. Cas. 123; 32 A. 59; 6 A. L. J. 972, *Lagan Barat Kuar v. Khakhan Singh*, 43 Ind. Cas. 521; 3 P. L. J. 92, *Chanderbati Kuer v. Gorey Lal Singh*, 52 Ind. Cas. 508; 4 P. L. J. 700, followed.

Appeal from the decision of the Subordinate Judge, Shahabad.

Mr. Atul Krishna Ray, for the Appellants.

JUDGMENT.

Mullick, J.—The plaintiffs allege that they held under the proprietor defendants Nos. 4 to 18 a holding of 11 *bighas* 3 *kathas*,

which, by private partition, has been split up into three sets of parcels, Survey plots Nos. 253 and 72 being allotted to defendants Nos. 4 to 14, survey plots Nos. 253-1136 and 263 to defendants Nos. 15 to 17 and plot No. 177 to defendant No. 18. The rent of plot No. 253 is shown in the Record of Rights as Rs. 4-2-0, whereas the plaintiffs state that it is Rs. 1-13-6 and plot No. 712 is shown as *kabil lagan* whereas the plaintiff states that it is part and parcel of plot No. 253.

The plaintiffs also allege that the defendants have conspired together and got the name of defendant No. 1 entered as a *raiya* of the entire 11 *bighas* 3 *kathas*, although he has no interest in the same. The plaintiffs accordingly pray for a declaration that the Record of Rights is wrong. In regard to possession they state that the defendants are resisting their possession and they, therefore, ask for confirmation of possession.

In the Court of the Munsif the land was valued at Rs. 100 evidently for the purpose of jurisdiction and a fee of Rs. 10 was paid upon the plaint upon the footing that the suit was for a declaration only. The Munsif dismissed the suit and the same amount of Court-fee was paid by the plaintiffs on their appeal to the Subordinate Judge.

The Subordinate Judge having decreed the suit, the defendants have preferred the present second appeal and have paid the same Court-fee as the plaintiffs did in the Courts below.

The Stamp Reporter, however, found that the market-value of the land affected was Rs. 1,239-10-6 and that an *ad valorem* fee was payable thereon, and as the appellants had paid Rs. 10 he claimed a deficit of Rs. 80. There being a difference of opinion between the Stamp Reporter and the appellants, the case was referred to the Taxing Officer who has affirmed the view of the Stamp Reporter and called upon the appellants to pay the deficit. As the appellants have refused to do so, the case has been sent up to this Bench in order that final orders may be passed on the appeal.

Now, the first question to be decided is, whether the Taxing Officer's decision as to the amount of the Court-fee due on the memorandum of appeal is final. Section

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5 of the Court Fees Act would seem to conclude the matter, but the learned Vakil for the appellants before us contends that as the case comes under section 7 (iv) (c) of the Act, the appellants are entitled to value the relief at their own figure, that in declining to accept their valuation the Taxing Officer has exceeded his jurisdiction, and that his decision can, therefore, be revised by the Court.

Now, it seems to me that the wording of section 5 is so explicit and general that it leaves the Court no option. The Taxing Officer has jurisdiction to fix the amount of fee payable and if he decides that the valuation put by the appellants upon the relief was incorrect he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no jurisdiction to interfere with his decision as to the amount of the fee.

This view is also completely covered by authority. In *Balkaran Rai v. Gobind Nath Tewari* (1), it was held that a decision under section 5 of the Court-Fees Act is not open to appeal, revision or review and is final for all purposes and that no means have been provided or suggested by the Legislature for questioning it. In *Karan Singh v. Gopal Rai* (2), it was held that the decision of a Taxing Officer as to the category within which a suit falls for the purpose of ascertaining the proper amount of Court-fees payable on a memorandum of appeal, as also his decision as to the amount of fee is final and binding upon the Court under section 5 of the Court Fees Act and that the Court cannot go behind the order of the Taxing Officer to examine the method which he adopted to arrive at his decision. This Court also has uniformly adopted this view of section 5 and I think it is too late for the appellants to attack the Taxing Officer's decision on the ground that he has illegally assumed jurisdiction. See *Lagan Barat Kuar v. Khakhān Singh* (3) and *Chanderbati Kuer v. Gorey Lal Singh* (4).

Then it is contended that the Taxing Officer has jurisdiction only to deal with fees payable under Chapter II and that as the fee now demanded is one payable under Schedule I of the Act, it is not a fee in respect of which his decision is final. The reply to this is that Schedule I is merely supplementary to section 7; it is a table provided for ready reckoning and indicates how the *ad valorem* fee prescribed by section 7 is to be calculated.

But apart from this preliminary point I think it is quite clear that the Taxing Officer's procedure was perfectly correct and that his decision must be affirmed.

The plaintiffs pray for a declaration and for confirmation of possession. It may be contended that the prayer for confirmation of possession is nothing more than a prayer that the fact of and his right to possession may be declared; but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession; and it is for this reason that for over half a century confirmation of possession has been held to be consequential relief within the meaning of section 7 (iv) (c) of the Court Fees Act. See *Bohur-oonissa Bibee v. Kureemdonnissa Khatoon* (5), *Jhuman Karti v. Debu Lal Singh* (6) and *Dina Nath Das v. Rama Nath Das* (7).

I have been unable to discover how and when his form of pleading originated but at the present time I think it is indisputable that though it may be often unnecessary to ask for it a prayer for confirmation of possession is added as an useful precaution against failure to prove possession up to the date of the suit. In the present case the plaintiff states in paragraph 13 of his plaint that, owing to the resistance of the defendants he is compelled to bring a regular suit. This is, therefore, in essence a suit for possession which is a form of consequential relief.

That being so, how is the consequential relief to be valued in this case. Are the plaintiffs entitled to put their own valuation or is the Court or, in a High Court, the

(1) 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831.

(2) 4 Ind. Cas. 123; 32 A. 59; 6 A. L. J. 972.

(3) 43 Ind. Cas. 521; 3 P. L. J. 92.

(4) 52 Ind. Cas. 508; 4 P. L. J. 700.

(5) 19 W. R. 18.

(6) 16 Ind. Cas. 898; 22 C. L. J. 415.

(7) 34 Ind. Cas. 702; 23 C. L. J. 561.

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Taxing Officer competent to correct such valuation?

The learned Vakil for the appellants relies upon various decisions in the High Courts of Bombay and Madras and of the Chief Court of the Punjab which, though affirming the principle that the plaintiffs' valuation must be accepted, do not seem really to cover the case now before us. I proceed to refer to these briefly.

(1) *Parathayi v. Sankumani* (8). In this case the plaintiff sought to set aside a deed of sale of which the consideration was Rs. 60,500. He paid a Court-fee of Rs. 10 only as on a declaratory suit but the Court held that he must pay *ad valorem* fee on the value of his interest on the document.

(2) *Samiya Mavali v. Minammal* (9). In this case the plaintiff sued to set aside a sale-deed and valued his relief at Rs. 800. The Trial Court assessed the value at Rs. 2,000, the amount mentioned in the sale-deed. The High Court on second appeal held that the plaintiffs' valuation should be accepted. The report does not show whether in the opinion of the Court that was the proper valuation of the relief.

(3) *Vachhani Keshabhai v. Vachhani Nanbha Bawaji* (10). The plaintiffs prayed for a declaration of title to certain lands, recovery of a sum of Rs. 637 being their share of the income for the years 1956-1960 *Sambat* and for an injunction. They valued the first relief at Rs. 130, the second at Rs. 637-8-0 and the third at Rs. 25. The High Court held that both for Court-fees and jurisdiction the plaintiffs' valuation must be accepted and that notwithstanding the defendants' objection that the property was worth Rs. 5,000, the suit was triable by a Second Class Subordinate Judge whose jurisdiction was confined to suit less than Rs. 5,000 in value.

Their Lordships, however, were of opinion that the valuation would be determinable by the Court if a claim for possession were made and on this ground they distinguished the previous ruling of their own Court in *Dayaram Jagjivan v. Gordhandas Dayaram* (11).

(8) 15 M. 294; 5 Ind. Dec. (N. S.) 556.

(9) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.

(10) 1 Ind. Cas. 108; 33 B. 307; 11 Bom. L. R. 30; 5 M. L. T. 230.

(11) 31 B. 73; 8 Bom. L. R. 885.

(4) *Sunderbai v. Collector of Belgaum* (12). This was a suit for a declaration and an injunction. Their Lordships of the Privy Council cited with approval the observation of the Bombay High Court that jurisdiction should be determined by the plaintiffs' valuation.

(5) *Barru v. Lachhman* (13). In this case the plaintiffs sought a declaration and an injunction and valued the relief at Rs. 130 for purposes of Court-fee and at Rs. 1,100 for purposes of jurisdiction though the value of the land was Rs. 73,192. A Full Bench of the Punjab Chief Court held that as the case fell within section 7 (iv) (c) of the Court Fees Act the valuation was proper.

(6) *Hari Sankar Dutt v. Kali Kumar Patra* (14). In this case the plaintiff sought a declaration of title to some jungle land, damages for the cutting of some trees and an injunction. He valued the declaration together with the injunction at Rs. 130 and the damages at Rs. 79. The High Court of Calcutta held that though the value of the whole jungle was Rs. 1,200, it was neither the duty nor within the power of the Court to ascertain the value of the property for purposes of jurisdiction.

It will be observed that none of the cases relate to possession. They would all seem to relate to claims in which the Court had no option but to accept the plaintiffs' valuation. No case has been shown to us where there was a claim for possession and where the plaintiff was allowed to put a valuation upon it which the Court knew to be false.

On the other hand, it was observed by Richards, C.J., in *Jageshra v. Durga Prashad Singh* (15), that section 7, clause (iv) (c) requires that the plaintiff shall truly state the value of his relief; to the same effect is *Umatul Batul v. Nanji Koer* (16), *Krishna Das Laha v. Harj Charan Banerjee* (17) and *Raj Krishna Dey*

(12) 52 Ind. Cas. 897; 43 B. 376; (1919) M. W. N. 254; 23 C. W. N. 753; 21 Bom. L. R. 1148; 46 I. A. 15 (P. C.).

(13) 22 Ind. Cas. 503; 228 P. W. R. 1913; 111 P. R. 1913; 23 P. L. R. 1914 (F. B.).

(14) 32 C. 734; 9 C. W. N. 690.

(15) 24 Ind. Cas. 679; 36 A. 500; 12 A. L. J. 844.

(16) 11 C. W. N. 705; 6 C. L. J. 427.

(17) 10 Ind. Cas. 865; 14 C. L. J. 47; 15 C. W. N. 823.

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v. *Bepin Behary Dey* (18) and in the High Court at Patna the authorities are unanimous that it is not open to the plaintiff to give an arbitrary and incorrect valuation. See *Brij Krishna Das v. Murli Rai* (19) and *Shama Pershad Sahi v. Sheoparsan Singh* (20)

In this state of the authorities I think the Taxing Officer was clearly right in following the practice prevailing in this Court.

Apart from authority, it is also quite clear that the interpretation put by the appellants on section 7 (iv) (c) cannot be accepted; for if pushed to its logical conclusion it would lead to manifest absurdities. It is admitted that a suit for declaration of title and recovery of possession is a suit for declaration with consequential relief. If the section is to be literally construed, then while a plaintiff suing simply for possession would under section 7 (iv) have to pay *ad valorem* fees on the value of the property, he would, by joining a prayer for declaration, pay an *ad valorem* fee on whatever smaller value he chose to put upon the consequential relief. Again, when a plaintiff had valued his prayer for consequential relief at a certain figure in his plaint and had failed in the Trial Court, it would be open to him in appeal to value the consequential relief at any lower figure he might choose. These inconsistencies and anomalies would not occur if the section were held to mean that the valuation for the purposes of Court-fee is to be made in the first instance by the party concerned but is finally determinable by the Court.

The next question is, what is the proper value of the consequential relief in this case. No rules have been made under sections 3 and 4 of the Suits Valuation Act in this Province for the valuation of an interest in land which is the subject-matter, of a suit under section 7, clause (iv) of the Court-Fees Act. Sections 3 and 4 of

the former Act provide for the valuation of land for the purposes of jurisdiction and under section 8 the value as determinable for the computation of Court-fees is to be the same as the value for the purposes of jurisdiction. No rules having been framed, we must look to the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiffs apprehend; and in this case we must follow the practice of this Court, and assess the value of the relief at the value of the 11 *bighas* 3 *kathas* in respect of which possession is claimed. The Taxing Officer finds that in 1910 the plaintiffs purchased the entire holding of 11 *bighas* 18 *kathas* at a Civil Court auction-sale for Rs. 1,323-10-6 and that the proportionate value of the 11 *bighas* 3 *kathas* is Rs. 1239-10-6. The *ad valorem* fee payable upon this sum is Rs. 90 and there is, therefore, a deficit of Rs. 80 in the present case. It may be that the value of the property at the time of the suit was less, though this is not probable, than its value 8 years earlier, but the appellants had an opportunity of proving its real value before the Taxing Officer and as no proof was given we are not in a position to say that the Taxing Officer's decision is incorrect. I think, therefore, that his decision must be affirmed.

The learned *Vakil* for the appellants desires two days' time to pay the deficit Court-fee. If the amount is not paid by the 3rd instant, the appeal will be dismissed without further reference to a Bench.

Miller, C. J.—I agree.

Z. K.

Order accordingly.

(18) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

(19) 56 Ind. Cas. 316; 4 P. L. J. 708.

(20) 41 Ind. Cas. 93; 2 P. L. W. 173; 5 P. L. J.

DAMANIA BROTHERS & CO. v. JORTON & CO..

CALCUTTA HIGH COURT.

CIVIL RULE No. 383 OF 1922.

November 21, 1922.

Present:—Mr. Justice C. C. Ghose
and Mr. Justice Panton.Messrs. DAMANIA BROTHERS
AND CO.—PETITIONERS

versus

Messrs. V. JORTON AND CO.—OPPOSITE
PARTY.*Calcutta Rent Act (III B. C. of 1920), s. 18—Rent-Controller fixing standard rent—Jurisdiction, wrong exercise of—Revision.*

Under section 18 of the Calcutta Rent Act a party aggrieved by an order of the Controller of Rent fixing a standard rent is entitled, by way of revision, to obtain a decision from the President of the Calcutta Improvement Tribunal as to whether or not the controller of Rent had jurisdiction to fix any standard rent in the case brought before him. The fact that the petitioner before the President of the Tribunal contends that the Controller had no jurisdiction in the matter, cannot be construed to be a point against the petitioner disentitling him to any relief at the hands of the President under section 18 of the Calcutta Rent Act.

Rule against an order of the Court of the President, Calcutta Improvement Tribunal, in Revision Case No. 246 of 1921.

Babu Mohendra Nath Roy (with him Babu Paresh Nath Mukerjee), for the Petitioners.—The petitioners are the lessees of premises No. 41, Strand Road, Calcutta. The opposite party are the tenants under them. The Rule is directed against an order dismissing our application for revision of the Rent Controller's order under section 15 fixing the standard rent. In August 1919 there was an agreement to let a portion of the godowns in premises No. 41, Strand Road, from 1st September 1919 at the rate of Rs. 70 per month. The agreement was dated the 29th August 1919. On the 29th of January 1920 there was an agreement by the opposite party to pay increased rent at Rs. 99. On 5th May 1920 the opposite party applied for standardisation of rent under section 15 of the Calcutta Rent Act. The Rent Controller took the godowns as part of the premises. We then moved the President of the Tribunal who has rejected our application. Our contention there was that the Rent Controller's order was bad as the premises were used as godowns which

were, therefore, exempted from the scope of the Act. See section 2 (e) of the Calcutta Rent Act; *Kali Dasi v. Kanai Lal* (1), *H. D. Chatterjee v. L. B. Tribedi* (2), *Allen Bros. & Co. v. Bando & Co.* (3).

The President holds that he had no jurisdiction to revise the order as no standard rent could be fixed in respect of the godowns under section 15 of the Calcutta Rent Act. See section 18. I submit the Controller had fixed the standard rent treating it as premises. My submission is that the landlord being aggrieved by the order has every right to apply under section 18 and show that the Controller is wrong. The President relied on section 24 of the Rent Act. I submit if the President's view be accepted no landlord would have any power to move under section 18 of the Act.

The Advocate General (with him Babu Narendranath Chowdhury), for the Opposite party.—The Act never intended that the President would have any power except in the matter of fixing of standard rent. In cases like the present the Controller is the proper authority to decide such questions. Refers to section 15. That section deals with the fixing of the standard rent. Section 18 specifically qualifies the decision of the Rent Controller as to the fixing of the standard rent of any premises. The question is fixation of rent which gives you the power to move the President under section 18 of the Act. Here the fixing of the standard rent was not questioned at all. They might have been relieved if they challenged the standard rent itself. They challenged simply the right of the Controller to fix the standard rent. The case in *H. D. Chatterjee v. L. B. Tribedi* (2) is distinguishable. There the standard rent was not fixed.

Babu Mohendra Nath Roy, replied in brief.

JUDGMENT.—The petitioners before us are lessees of certain premises in Calcutta, No. 40/1, Strand Road, and the opposite parties are sub-tenants under the petitioners occupying, to use a neutral expression, a certain room on the

(1) 64 Ind. Cas. 709; 26 C. W. N. 52.

(2) 68 Ind. Cas. 274; 26 C. W. N. 78; 49 C. 528; (1922) A. I. R. (C.) 427.

(3) 70 Ind. Cas. 371; 26 C. W. N. 845; 49 C. 931; (1923) A. I. R. (C.) 169.

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ground floor of the said premises. The petitioners allege that the room in question is a godown and that the opposite parties executed on the 29th August 1919 a letter of attornment in their favour whereby they agreed to pay rent at the rate of Rs. 70 a month to the petitioners. It is alleged that in the letter of attornment, the room was described by them as a godown on the ground floor of premises No. 40/1, Strand Road. It is further alleged by the petitioners that, on or about the 29th January 1920, the opposite parties agreed to pay enhanced rent at the rate of Rs. 99 per month from January 1920 in respect of the said godown. It appears that on the 31st of May 1920 the opposite parties filed an application before the Controller of Rents in Calcutta for fixing a standard rent of the said room, alleging that the room in question constituted an office and that the standard rent thereof could not be more than Rs. 77 per month. The petitioners on being served with notice of this application contended before the Controller of Rents that the subject-matter of the demise was a godown and not an office and that the same could not be described as "premises" within the meaning of the Calcutta Rent Act and that as such the application of the opposite parties before the Controller of Rents was incompetent. The Controller of Rents inspected the room in question and came to the conclusion that the same was an office, that it was used "as a shop, an office as well as for the purpose of storing goods for sale in a portion" and fixed the standard rent thereof at Rs. 70. The petitioners being dissatisfied with the order of the Controller of Rent fixing the standard rent of the said room at Rs. 70 applied to the learned President of the Calcutta Improvement Tribunal for revision of the order of the Controller of Rent, fixing the said standard rent, under section 18 of the Calcutta Rent Act. The learned President held that inasmuch as the petitioners before him had contended in their application for revision that the Controller of Rent had no jurisdiction whatsoever to fix a standard rent in respect of the subject-matter of the demise the same not being "premises" within the meaning of the Act, the petitioners on their own

showing were disentitled to any relief by way of revision under section 18 of the Act. The argument of the President is that, inasmuch as the Controller of Rents had, according to the petitioners, no jurisdiction to interfere in the matter, the President had equally no jurisdiction because, in his opinion, section 18 of the Calcutta Rent Act is only attracted to cases where admittedly the Controller has jurisdiction to fix a standard rent. We are unable to assent to this view of the matter. We are of opinion that under section 18 of the Calcutta Rent Act, the landlords, in this case the petitioners, were entitled to a decision from the President of the Calcutta Improvement Tribunal as to whether or not the Controller of Rent had jurisdiction to fix any standard rent in the case which was brought before him. In our opinion, the fact that the petitioners before the President of the Tribunal contended that the Controller had no jurisdiction in the matter, could not be construed to be a point against the petitioners disentitling them to any relief at the hands of the President under section 18 of the Calcutta Rent Act for revision of an order fixing a standard rent, because if that reasoning were held to be sound, then in no case of this description, could relief be given under section 18 of the Calcutta Rent Act. We think that the President has taken an unduly narrow view of section 18 of the Calcutta Rent Act. In this view of the matter, we set aside the order of the President of the Calcutta Improvement Tribunal and remit the case to him for consideration of the questions urged in the petition of the petitioners before us. There will be no order as regards the application under section 115 of the Code of Civil Procedure.

The petitioners will get their costs of the first Rule which we assess at three gold mohurs.

B. N.

Rule made absolute.

RAM ASRE v. EMPEROR.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL, NO. 214 OF 1922.

August 2, 1922.

Present:—Mr. Ashworth, J. C., and
Mr. Simpson, A. J. C.

RAM ASRE—PRISONER—APPELLANT

versus—

EMPEROR—COMPLAINANT—

RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 299, 300,
326—Murder—Intention—Wound causing death
—Grievous hurt.*

Section 300, paragraph 2, of the Penal Code is only intended to be invoked when some injury which would not in the ordinary course of nature cause death was known to be likely to cause death by the offender in consequence of the latter being aware of some abnormal condition of the deceased. [p. 51, col. 1.]

Section 300, paragraph 4 of the Penal Code can never be invoked in a case where there was an intention of causing specific bodily injury to a particular person; it only applies to a case of dangerous action without an intention to cause specific bodily injury to any person. As this paragraph is the most difficult paragraph in the section it is very undesirable to invoke it where it is not applicable. [p. 51, cols. 1 & 2.]

Rama Singh v. Emperor, 58 Ind. Cas. 463; 42 A. 302; 18 A. L. J. 224; 21 Cr. L. J. 783; 2 U. B. L. R. (A.) 407, dissented from.

The words "or with the knowledge that he is likely by such act to cause death" in section 299, of the Penal Code, must be read in the light of the language of section 300 of the Penal Code, and so read they are not applicable to a case where specific bodily injury is intentionally caused to a particular person. [p. 51, col. 1.]

In the absence of any evidence to indicate that a blow on a particular part of a person was intended to be a blow on a more vital part it must be held that the offender inflicted the blow where he intended. [p. 51, col. 1.]

The expression "I shall kill you," used by an assailant does not necessarily show an intention to commit murder.

Wounds which actually caused death must be held to have endangered life within the meaning of section 326 of the Penal Code. [p. 52, col. 1.]

Obiter.—If there was an intention to cause death and death was caused by a wound or wounds inflicted in pursuance of that intention, the case would be one of murder, even though none of the wounds which the accused inflicted were of a character which would, within the knowledge of the accused or in the ordinary course of nature, have proved fatal. [p. 50, col. 1.]

Appeal against an order of the Sessions Judge, Sitapur, dated the 1st July 1922.

Mr. St. G. Jackson, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—In this case Ram Asre Kurmi appeals from his conviction under

section 302, Indian Penal Code, on a charge of murdering Sheo Prasad Brahman. The case is also up before us for confirmation of sentence. The appellant and the deceased were both residents of village Ilahipur, the appellant being a cultivator there and the deceased a *Mukaddam* of the Raja Sahib of Muhamudabad whose duty was apparently to collect rents. Shortly before the murder, the deceased Sheo Prasad, along with others, put in an application, which is Exhibit A on the record, complaining that the appellant Ram Asre and six other persons were bad characters and possessed of spears and asking for an enquiry. This petition was put in before Zahir Husain, a servant of the Raja, who is prosecution witness No. 5. This witness says that he had intended to call up Ram Asre in respect of this charge but that Ram Asre presented himself of his own accord before he did so. He was warned and told that he should improve his conduct. In less than a week, that is to say, on 1st of April 1922, at about 9 A. M. in the morning, the appellant appeared at the field of the deceased. The deceased was superintending the cutting of a field, the cutting being done by four labourers, his two sons and four women. The appellant had with him a *lathi* and a weapon called a *banka*. The latter is a kind of sickle often attached to a long bamboo to cut leaves from high branches of trees for goats. The appellant charged the deceased with getting his name recorded as a bad character and aimed his *lathi* at him. The *lathi* was seized by the deceased whereupon the appellant left hold of it and shifting the *banka* from his left hand struck the deceased twice on the leg. The deceased fell to the ground and the appellant gave him a third blow on the corner of the shoulder. When the two sons of Sheo Prasad ran up, the accused ran off leaving his *lathi* behind him. The sons put their father on a bed and carried him to the *thana* six miles away which they reached at noon. After the recording of Sheo Prasad's report, (Exhibit B.) Sheo Prasad was sent on to the hospital at Muhamudabad but died on the way. The exact time of death it is difficult to state but from the fact that the Assistant Civil Surgeon states that he saw the body at 1 P. M. on the 2nd and that the probable time since death was 16 hours, we may take it that the hour of

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death was about 8 or 9 P. M. on the 1st. Thus, the deceased died about 12 hours after he was struck. The medical examination showed there were two wounds on the left leg 1½ and 2 inches in depth and a wound on the left shoulder-joint 6 inches long 2½ inches wide and 3 inches deep cutting into the joint and separating the head of the humerus. The Assistant Civil Surgeon stated that the probable cause of death was bleeding and shock from these wounds. The deceased, it appears, was a man of strong and healthy physique.

The Sessions Judge of Sitapur was not prepared to find that the appellant actually intended to cause death of the deceased, but holding it proved that the deceased died from wounds deliberately inflicted with a dangerous weapon by the appellant after the appellant had deliberately sought the deceased in order to inflict wounds, found that the appellant must have known that death was likely to ensue from the blows which he struck and has, consequently, found the accused guilty of murder and imposed the death sentence.

The learned Barrister for the appellant confines himself in this appeal to pleading that the offence proved on the evidence is not one of murder or even of culpable homicide but, at the most, only one of causing grievous hurt by use of a stabbing weapon. He also urges that this is not a case for extreme punishment inasmuch as there is good evidence to show that his client had grave provocation.

The Government Pleader in supporting the conviction of murder has rightly pointed out that, if there was an intention to cause death and death was caused by a wound or wounds inflicted in pursuance of that intention, the case would be one of murder, even though none of the wounds which the accused inflicted before being interrupted were of a character which would within the knowledge of the accused or in the ordinary course of nature have proved fatal. He would find evidence of the intention in the fact that, according to the statement of the deceased, Exhibit B, the accused prefaced the assault by saying, "Saraa, I shall kill you," and also in the fact that the accused brought with him a dangerous cutting weapon and, lastly, in the fact that the accus-

ed had a motive for killing the deceased. We are not prepared to hold that, even if the accused before he attacked the deceased did use the words "I shall kill you" this expression can be held to prove an intention to murder. They are words which might be used by an angry man whose only intention was to give a severe beating to his opponent. Apart from this, it may be mentioned that, although these words were mentioned by the deceased, the evidence of the witnesses present in the field does not corroborate the fact of their having been used. As to the use of the *banka* it is to be noted that it is clearly proved by the evidence that the appellant commenced the assault merely with his *lathi*. The *banka* was, at that time, in his left hand and it is in evidence that, owing to a stiffness of the elbow joint, the accused could not use his left hand. The *banka* was resorted to when the deceased disarmed the appellant of his *lathi*. It has been urged that the appellant intended to knock the deceased down with the *lathi* and then murder him on the ground with the *banka*. There is, however, a reason against holding that this was the case. It is proved that, after the deceased fell to the ground, the accused, so far from aiming at the head of the deceased or at any dangerous part of his person, confined himself to hitting him on the shoulder, and only struck one blow. It is true that the sons of the deceased ran up to assist their father but, if the appellants had come with the deliberate intention to murder the deceased it is probable that he would have had time to strike more than one blow. Again, if the intention of the accused was a deliberate one to murder the deceased we should not have expected the assault to have taken place on the deceased when he was within close distance of his sons and his labourers. As to motive, accepting the statement recorded in the note appended to the initial report that the real reason of the deceased complaining of the appellant being a bad character was that the appellant failed to pay his rent, we are unable to hold that the unfairness of making such an application would make the appellant determined to kill the deceased. His grievance might be satisfied by assaulting him without any such extreme intention. Considering these

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facts as a whole, we are unable to hold that any intention to cause death is proved and, consequently, the case will not fall within the first paragraph of section 300, Indian Penal Code. Nor, again, can the blow be said to have been struck with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. The proper question was not put to the medical witness. All he said was that the cause of death was probably shock and hæmorrhage. If the deceased died of shock it is impossible to predicate that death from shock twelve hours after the assault was a normal result of the three wounds. It is much more probable that the deceased died of hæmorrhage, but as 12 hours had elapsed since he was struck and the deceased had endured in the interval two journeys, one of six miles and the other apparently of some miles, it is probable that the hæmorrhage was at least caused as much by his being carried about as by the wound in itself. Death from hæmorrhage cannot, therefore, be said to have been a normal result of the wound. The case, therefore, does not fall within the third paragraph of section 300, Indian Penal Code. The Sessions Judge appears to have held that it fell under the second paragraph in that the offender intentionally caused bodily injury which he knew to be likely to cause the death of the person to whom the harm is caused. Illustration (b) to section 300 appears to indicate that this paragraph was only intended to be invoked when some injury which would not in the ordinary course of nature cause death was known to be likely to cause death by the offender in consequence of the latter being aware of some abnormal condition of the deceased. Even assuming, however, that the paragraph is not to have such a restricted meaning we are unable in this case to hold that the appellant could possibly have known that the wounds he inflicted were likely to cause death. We are not prepared to hold that the blow on the corner of the shoulder-blade was intended to be a blow on the neck. In the absence of any evidence to indicate that a blow on a particular part of a person was intended to be a blow on a more vital part, it must be held that the offender inflicted the blow where he intended. We hold, therefore, that the second

paragraph of section 300, Indian Penal Code, does not apply. The Government Pleader has invoked the fourth paragraph. In our opinion the fourth paragraph of section 300 can never be invoked in a case where there was intention of causing specific bodily injury to a particular person. Illustration (d) shows that it only applies to a case of dangerous action without an intention to cause specific bodily injury to any person. It is true that in the ruling *Rama Singh v. Emperor* (1) reference is made in the judgment by Piggott and Walsh, JJ., to the fourth clause of section 300 in a case where there was such an intention. We are of the opinion, however, that this was clearly wrong. A great deal of confusion results from failure to perceive that the fourth clause of section 300 never applies to a case where specific bodily injury has been intentionally caused to a particular person but only applies to very rare cases of the character shown in Illustration (d). As this clause is the most difficult clause in section 300 it is obviously very undesirable to invoke it where it is not applicable. Our conclusion, then, is that the offence does not fall under section 300, Indian Penal Code, and is not, therefore, one of murder. Nor, again, will it fall under section 299, Indian Penal Code, inasmuch as it cannot be said that the injuries were likely to cause death. It is to be regretted that the Assistant Civil Surgeon was not asked directly as to this and we have, therefore, had to supply this omission in the evidence by reference to medical authority. We are convinced that a wound on the shoulder by a weapon of this kind would not be likely to cause death. As it was, the wound went down 3 inches into the shoulder-blade without meeting a blood vessel or vein. As to the contention that the accused should be held to have had the knowledge that he was likely to cause death we are of the opinion that the words in section 299 "or with the knowledge that he is likely by such act to cause death" must be read in the light of the language of section 300, and so read they are not applicable to a case where specific bodily injury is intentionally caused to a par-

(1) 58 Ind. Cas. 463; 42 A. 302; 18 A. L. J. 224; 21 Cr. T. J. 783; 2 U. P. L. R. (A) 407.

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ticular person. No more serious offence, therefore, appears to have been proved against the accused than one under section 326, Indian Penal Code. The wounds amounted clearly to grievous hurt because they endangered life. Wounds which actually cause death must be held to have endangered life. The extreme sentence allowed by section 326 is transportation for life but, in view of the provocation received by the appellant, as described above, we do not consider it necessary to impose transportation for life. Another reason for not imposing this penalty is, that we consider that the deceased would probably not have died but for the journey to the *thana* and the further journey in the direction of the hospital. It is clear from the language of the initial report and also from the fact that the report was entered as an offence under section 307, Indian Penal Code, that the death of the deceased was not anticipated at first.

We, therefore, allow this appeal to the extent of altering the section of conviction from 302 to 326, Indian Penal Code, and we direct that the accused be punished with rigorous imprisonment for six years.

W. C. A. & N. H.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 63 OF 1923.

March 27, 1923.

Present.—Mr. Hallifax, A. J. C.

YESHWANTRAO PANDE—APPLICANT

versus

SECRETARY, MUNICIPAL COMMITTEE—NON-APPLICANT.

C. P. Municipal Act (XVI of 1903), ss. 2 (f), 44—Tax, essentials of—Lease money for Municipal building, whether tax.

The essential quality of a tax and of those similar imposts mentioned in section 2 (f) of the C. P. Municipal Act seem to be that the amounts or rates of payments are fixed by levying authority without reference to the payer. In regard to some of them there is the option of making no payment if no benefit is taken but in none of them

has the payer any option as to the amount to be paid.

An unpaid balance of lease money in respect of a Municipal market building is not a tax and is not recoverable by the summary procedure under section 44 of the C. P. Municipal Act.

Revision of the order of the City Magistrate, Nagpur, dated the 20th February 1923.

Mr. K. P. Vaidya, for the Applicant.

Mr. G. P. Dick, for the Crown.

ORDER.—At an auction held by the Municipal Committee of Nagpur of the right to sell provisions at a certain stall in the Cotton Market near the Railway Station the applicant, Yeshwantrao Pande, made the highest bid. He paid a portion of the amount of his bid and the sale was presumably sanctioned in due course by the Committee at one of its ordinary meetings. But before Yeshwantrao executed the deed required of him the Committee, as he alleges, broke one of the conditions of the contract and he filed a suit for damages. The Committee then applied under section 44 of Act XVI of 1903, the Central Provinces Municipal Act, to a Magistrate to recover the unpaid balance of the lease-money from him by distress and sale of his moveable property. Yeshwantrao objected that the money due from him was not due for any tax and that, therefore, section 44 of the Municipal Act did not authorise its recovery by distress and sale. The learned Magistrate examined the question and came to the conclusion that the amount recoverable was a "market due" within the meaning of clause VII of section 35 (a) of the Act, and was, therefore, a tax according to the extended meaning given to that word by section 2 (f), which lays down that it includes any toll, rate, cess, fee or other impost leviable under it. Sale of the moveable property which had already been attached was accordingly ordered, and Yeshwantrao has applied to this Court for revision of this order.

(2) The essential quality of a tax and of those similar imposts mentioned in section 2 (f) of the Municipal Act seems to be that the amounts or rates of payment are fixed by the levying authority without reference to the payer; in regard to some of them there is the option of making no payment if no benefit is taken, but in none of them

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has the payer any option as to the amount to be paid. That essential quality is absent in the present case, where the amount to be paid was fixed by agreement between the two parties.

(3) But it is not necessary to examine the general meanings of words for a decision of this matter. A tax recoverable under section 44 of the Act is a tax imposed under section 35, that is to say, a tax imposed with the previous sanction of the Local Government, or in special cases with that of the Governor-General in Council as well, "in the manner required by section 39." That section requires a proposition of the tax at a special meeting, publication of details of its incidence, consideration at another special meeting of any objections made, sanction of the Local Government after consideration of those objections and notification in the Official Gazette of the date of the imposition of the tax. Whether, therefore, the payment to be exacted from the applicant was a "market due" or not, and it certainly was a "due" or debt for using a market or exposing goods for sale in a place belonging to the Committee, it was certainly not a "market due" or tax of the kind mentioned in section 35 of the Municipal Act, as it was never imposed in the manner prescribed by that section. It cannot, therefore, be recovered by the summary procedure provided by section 44. The order of the Magistrate is accordingly set aside and the application of the Municipal Committee under section 44 will be dismissed. Yeshwant-rao's property will be released from attachment.

G. R. D.

*Application allowed.***ODDH JUDICIAL COMMISSIONER'S COURT.**

CRIMINAL APPLICATION No. 119 OF 1922.
November 14, 1922.

Present:—Mr. Kanhaiya Lal J. C.

GHISA—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 122
—Surety for good behaviour—Surety offered, fitness of.

AKHOY MONDAL V. BASU RAI.

Where a person is directed to furnish sureties for his good behaviour, the fact that a surety offered by him has already become surety for another is no ground for not accepting him.

Criminal application against the order of the Magistrate, First Class, Bara Banki, dated the 14th July 1922.

Mr. R. F. Bahadurji, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The applicant Ghisa has been bound over to be of good behaviour for a period of one year. He furnished two sureties, Jagannath Singh and Baiju Singh, one of whom was accepted by the Trying Magistrate. The other was not accepted on the ground that he had already stood surety for some other man. That ground is clearly insufficient. Jagannath Singh is *zemindar* and Baiju Singh is an under-proprietor. They undertook to look after the accused if their security bonds be accepted.

The application is allowed and the Trying Magistrate directed to release the accused Ghisa if the security-bonds of Jagannath and Baiju Singh are still subsisting and have not been withdrawn.

W. C. A.

*Application allowed.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION CASE NO. 787 OF 1922.
November 22, 1922.

Present:—Mr. Justice Newbould and

Mr. Justice Suhrawardy.

AKHOY MONDAL AND OTHERS—

PETITIONERS

versus

BASU RAI AND OTHERS—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Decree of Civil Court, awarding possession, effect of—Possession, mode of delivery of, whether material.

A Magistrate, in declaring possession in a proceeding under section 145, Criminal Procedure Code, cannot go behind a decision of a Civil Court in the matter. It is not for him to question the validity of the decree on the ground that it was passed without jurisdiction.

When a decree such as the above is *inter partes* it is immaterial whether the delivery of possession under it was symbolical or not.

NAGESHWAR V. EMPEROR.

Rule against an order of the Sub-Divisional Magistrate, Bankura.

Babus Manmatha Nath Mukherjee and Havendra Kumar Sarbadhicary, for the Petitioners.

Babu Norendra Kumar Bose, for the Opposite Party.

JUDGMENT.—This rule is directed against an order of the Sub-Divisional Magistrate of Bankura declaring the first party, the opposite party before us, to be in possession of certain lands under section 145, Criminal Procedure Code. The Magistrate has based his order on the Record of Rights published in the Settlement proceedings which recorded the possession of this party. But subsequent to the publication of this Record of Rights it appears that the second party, who are the petitioners before us, obtained a decree against the first party in the Court of the Subordinate Judge of Purulia and in execution of that decree they were put in possession of the disputed land. This Court has repeatedly held that, in a proceeding under section 145, Criminal Procedure Code, the Magistrate cannot go behind the decision of the Civil Court in the matter.

The Magistrate here has erred in thinking that the decree can be ignored because the Subordinate Judge of Purulia had no jurisdiction over this land and because the delivery of possession was symbolical. It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court. Also, when the decree is *inter partes* it is immaterial whether the delivery of possession is symbolical or not. We hold that in this case in disregarding this delivery of possession the Magistrate acted with gross irregularity in a manner that was likely to cause a failure of justice.

We accordingly make this Rule absolute and set aside the order of the Magistrate declaring the first party to be in possession.

N. H.

Rule made absolute.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 306 OF 1922.

November 14, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

NAGESHWAR AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 291—Defence witness, discharged—Accused, right of, to examine.

The fact that a witness cited by an accused person is discharged before his examination, is no bar to his being examined as a witness if he is in attendance, and the accused insists on his evidence being recorded. [p. 55, col. 1.]

Criminal appeal against an order of the Sessions Judge, Fyzabad, dated the 7th September 1922.

Mr. R. F. Bahadurji, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an appeal by certain persons who have been convicted of offences under sections 147 and 304, Indian Penal Code. They had filed before the Committing Magistrate a list of witnesses, which included Pandit Parmeshwar Nath Sapru, a Pleader practising at Fyzabad. He was summoned to attend the Court of Session, but having been engaged as a Counsel by some of the accused to conduct their defence before the Sessions Judge he naturally felt some delicacy in appearing both as Counsel and as a witness in the case.

On the 17th August 1922 before the trial commenced an application was made by Nageshwar, Ram Prasad, Bhola and Changa, accused, stating that they were present at the time of the alleged occurrence at the house of Pandit Parmeshwar Nath Sapru, that the said Pandit was aware of all facts and that they wanted to examine him as a witness and also to engage him as their Counsel. They further stated that the said gentleman was unwilling to accept the brief, if he was examined as a witness, and that they were obliged, in the circumstances, to discharge him. The learned Sessions Judge thereupon discharged the witness and proceeded with the trial. Subsequently, the said accused reconsidered their position and insisted on examining Pandit Parmeshwar Nath Sapru as one

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of their witnesses. He was present in Court. His clerk has already been examined. Mr. Sapru protested against the application and stated that he had given his clients the choice of either examining him as a witness or engaging him as a Pleader and that they should not be allowed to examine him after he had been discharged. The learned Sessions Judge accepted his contention and refused to examine him as a witness.

The attitude taken up by Mr. Sapru was quite unobjectionable, and the application now made by the accused places him in a position he wanted to avoid. Section 291 of the Code of Criminal Procedure, however, allows the accused to examine a witness, not previously named by him, if such witness is in attendance. It does not in express terms refer to a witness who has been discharged. But if the accused insists on the examination of a witness in attendance, who had been discharged before, the Court may, if it thinks that the interests of justice would be served, allow an opportunity for his production. The conduct of the accused in this matter has been somewhat disingenuous, but considering the position in which they were placed, it would be hard to refuse to them the opportunity which they sought to produce the witness whom they were obliged, under circumstances against their will, to discharge. The examination of the witness would in no case have involved an adjournment of the trial and the prosecution would hardly have suffered by the evidence of Mr. Sapru being recorded at that stage.

The learned Sessions Judge is, therefore, directed to examine Mr. Parmeshwar Nath Sapru in the presence of all the accused and the evidence so recorded should be certified to this Court as early as practicable.

W. C. A.

Order accordingly.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CRIMINAL REFERENCE NO. 17 OF 1922.

June 26, 1922.

Present:—Justice Sir Sydney Robinson, Kt., Chief Judge, Mr. Justice Maung Kin and Mr. Justice Macgregor.

NGA CHAN THA—APPLICANT

VERSUS

EMPEROR.—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 190 (1) (b), 351—Cognizance of offence on Police report—Witness, prosecution of, with other accused—Magistrate, jurisdiction of.

Where after some evidence for the prosecution had been led in a case in which the prosecution was initiated on a Police report, the Magistrate ordered the prosecution of one of the witnesses jointly with another accused and commenced the trial *de novo*:

Held, Per Robinson, C. J. and Macgregor, J., that the Magistrate had full jurisdiction to act, that section 351 of the Criminal Procedure Code applied to the case, and that the Magistrate, so far as section 190 was applicable, if it was applicable at all, had acted under section 190 (1) (b) of the Code. [p. 60, col. 2; p. 61, col. 1.]

Per Maung Kin, J.—That section 190 (1) (b) applied to the facts of the case. [p. 61, col. 1.]

Reference made in Criminal Revision of the order passed by the Sessions Judge of Tharrawaddy, confirming the original order of sentence of two years' rigorous imprisonment passed on the accused by the Special Power Magistrate, Tharrawaddy.

ORDER OF REFERENCE.

Maung Kin, J.—(April 7, 1922).—This is an application for revision by Chan Tha.

The Police sent up Po Ne and another for trial under section 379 of the Indian Penal Code. The Magistrate took cognizance and tried the case. After some of the witnesses for the prosecution had been examined, Chan Tha, who was one of the witnesses cited by the Police, appears to have been placed in the witness-box and to have been questioned by the Magistrate, though Chan Tha's replies have not been recorded; but we find the Magistrate recording in the case diary that Chan Tha tried to exculpate the other accused and that, according to the evidence which had been recorded, he was one of the principal persons who arranged the payment of the money and the return of the stolen cattle. The result was that Chan Tha was made a co-accused and the

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case was tried *de novo*. In the end, both Po Ne and Chan Tha were convicted. On appeal to the Sessions Court the convictions were confirmed; but as regards Chan Tha, the learned Sessions Judge considered the point whether the trial was illegal.

It appears the Magistrate was not empowered to take cognizance of a case under section 190 (1), clause (c), Criminal Procedure Code. It also appears that he did not, under section 191, inform Chan Tha that he was entitled to have the case tried by another Court. The learned Sessions Judge, however, held that the Magistrate had taken action against Chan Tha under section 351 of the Criminal Procedure Code, and that the trial was in order.

According to two cases, namely, *Khudiram Mookerjee v. Empress* (1) and *Queen-Empress v. Hirashanker* (2), where a witness is turned into an accused, the Magistrate takes cognizance of the case against him under section 190 (1), clause (c), of the Criminal Procedure Code. The former is a Calcutta case and was decided by O'Kinealy and Jenkins, JJ., and the latter is a Bombay case and was decided by Parsons and Ranade, JJ.

Against these two cases, we have the cases of *Jagat Chandra Mozumdar v. Queen-Empress* (3) and *Charu Chandra Das v. Narendra Krishna Chakravarti* (4). In the former case there was a complaint charging three persons with various offences. On the filing of the complaint, the Magistrate examined the complainant and some witnesses produced by him and then issued processes against the persons complained against and another person. Ghosh and Wilkins, JJ., held that the Magistrate took cognizance upon the complaint. In the latter case, a report was made to the Police against four persons as having outraged the modesty of a woman. The Police enquired into the case, and, as the complainant identified a certain person as one of those concerned, that person was sent up for trial. At the trial, it appeared

from the evidence of one of the witnesses that two other persons were concerned in the offence. The Magistrate then issued processes against these two others and they were tried along with the accused sent up by the Police. One of the two, the subsequently added accused, was convicted. An appeal to the Sessions Judge was unsuccessful. The matter came before the High Court before Prinsep and Hill, JJ. It was contended that the Magistrate had acted without jurisdiction in proceeding under clause (c) of section 190 of the Criminal Procedure Code as he was not especially empowered to take cognizance of the case under the said clause of the said section. It was also contended that the Magistrate did not take cognizance of the offence upon a complaint or upon Police report, inasmuch as no complaint was lodged against the petitioner and the Police did not send him up for trial. It was held that as there had been a complaint that some person or persons committed an offence the Magistrate had cognizance of the offence upon a complaint under section 190 (1) clause (a).

In my judgment, these two cases are entirely different to the case before me, inasmuch as there was no Police report or complaint against Chan Tha, nor was there any Police report or complaint to the effect that there were more than two persons concerned in the case. I would hold that, if section 190 applies to this case, the Magistrate took cognizance of the case against Chan Tha under clause (c) of that section and that, as he had not been especially empowered to take cognizance of the case under that clause, his proceedings must be held to be void; and even if he had been so empowered the same result would follow, because he did not, under section 191, inform the accused that he could have his case tried by another Magistrate, if he so wished.

This brings me to the contention by the learned Sessions Judge that the Magistrate did not take action under section 190 at all but under section 351. In support of this contention, the case decided by Sir Bepin Krishna Bose, Additional Judge of Nagpur, Judicial Commissioner's Court—*Emperor v. Sakhia* (5)—may be cited; but

(5) 3 Ind. Cas. 568; 5 N. L. R. 113; 10 Cr. L. J. 303.

(1) 1 C. W. N. 105.

(2) Rat. Un. Cr. C. 951; Cr. Rg. 2 of 1898.

(3) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103.

(4) 4 C. W. N. 367.

in my opinion, the conclusions arrived at by the learned Judge are not correct. He holds that section 351 is self-contained and complete in itself and independent of section 190 and consequently of section 191. He holds that where a Magistrate acts under section 351 against any person upon the evidence taken before him to be concerned in the offence under investigation, he cannot be properly regarded as taking cognizance of the case upon information received, or upon his own knowledge or suspicion within the meaning of clause (c) of sub-section (1) of section 190, so as to enable the accused to object to that Magistrate proceeding further with the case. He says: "Now section 190 finds place in a sub-chapter dealing with 'Conditions requisite for Initiation of Proceedings' whereas section 351 is located in a Chapter, which is headed 'General Provisions as to Inquiries and Trials.' While the former refers to the *initiation* of proceedings, the latter deals with a matter arising during the course of a proceeding *already initiated*. Looking to the fundamental difference in the character of the subject-matters of these two sections appearing in two distinct parts of the Code, it does not appear that the Legislature intended that the one should be dependent on the other to this extent that no proceeding can be started against any person under section 351 except in compliance with the conditions set forth in section 190. On the contrary, it would seem that section 351 deals with a state of things not covered by section 190. When an enquiry or trial has already commenced in one or other of the methods provided for by section 190, the power of the Presiding Magistrate is no longer fettered by its provisions. He may, independently of them, take action against a person filling the character described in section 351, 'as though he had been arrested or summoned.' These words seem, in my judgment, to indicate that the person proceeded against is to be regarded in the same light and is to be subject to the same disabilities as though he had already been arrested or summoned in pursuance of a proceeding initiated under section 190. The conditions for initiation of a proceeding as set forth in this section are in his case to be dispensed with. The case is to be

regarded as having passed the stage contemplated therein."

Section 351 is as follows:—

"(1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of enquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

"(2) When the detention takes place in the course of an enquiry under Chapter XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard."

This section is placed in the Chapter headed "General Provisions as to Inquiries and Trials" and it applies to all Criminal Courts. For instance, it applies to a Court of Session. It also applies to investigations preliminary to commitment for a subsequent trial. In the case of the Court of Session, any person attending the Court may be made a co-accused with another under trial. In the case of a Magistrate holding a preliminary enquiry with a view to commitment to the Court of Session, he can make any person attending his Court a co-accused with another against whom the enquiry is being made. These two cases do not come within the purview of section 190.

The question arises: what will be the meaning of section 351 in cases in which section 190 applies?

Now, under section 190, certain Magistrates are empowered to take cognizance of an offence upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion that such offence has been committed and where action is taken under section 191 the Magistrate is bound to inform the person proceeded against that he may, if he wishes, ask to be tried by another Magistrate. If the Trying Magistrate has no power to take cognizance in that way, or, having such power, fails to inform the accused as required by section 191, his proceedings are void under section 530 of the Code.

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If, under the circumstances of a particular case, it can be held that the action taken by the Magistrate was under section 190 (1), clause (c), and his proceedings are void for non-compliance with section 191, or because he had no power to take cognizance under that clause, the question arises as to whether section 351 will help to make his proceedings valid. In my judgment, that section will not. All that it says is that he may detain a person attending his Court for purpose of enquiry into or trial of any offence of which he can take cognizance and which from the evidence may appear to have been committed, and he may proceed against such person as though he has been arrested or summoned. But the section does not answer the question how the Magistrate should take cognizance of the offence against that person. For an answer to that question we must go to section 190 (1), clause (c), and section 191. In other words, section 351 must be read as a general provision applying to all Criminal Courts, with sections 190 and 191 as provisos thereto with reference to the various classes of Magistrates. I am unable to agree with Sir B. K. Bose that section 351 is self-contained and independent of sections 190 and 191. In coming to that conclusion, I am of opinion the learned Judge overlooked the fact that section 351 is designed to apply to all Criminal Courts and is, therefore, placed in the Chapter headed "General Provisions as to Inquiries and Trials." If the learned Judge's view is correct, section 351 will certainly be in conflict with section 190 (1), clause (c). Apparently, he recognized the possibility of this argument, inasmuch as he argued for the conclusion that section 190 applies to the initiations of proceedings and that section 351 applies to proceedings which have already been initiated. I am unable to discern in the language of either section, or both taken together, any indication of that view. My view is, that section 351 is a general provision applying to all Criminal Courts and must be held to apply to them subject to any special provision made with reference to any particular classes of Criminal Courts.

For the above reason, I am inclined to hold that the proceedings of the Magistrate as regards Chan Tha were taken under

clause (c) of section 190 (1), and that as the Magistrate has not been specially empowered to take cognizance of cases under that clause, his proceedings were void and that the same result would have followed, even if he had been so empowered, because there was no compliance with section 191. But as the point is of some difficulty and of great importance, I would refer to a Bench, Full or otherwise, as the learned Chief Judge may direct, the following question:—

Whether on the facts of this case, section 190 (1) (c), or section 351 or any other provision of the Criminal Procedure Code applies?

OPINION OF THE FULL BENCH.

Robinson, C. J.—The Magistrate in this case acted on a Police report, Po Ne and another person being sent up for trial under section 379 of the Indian Penal Code in a cattle theft case. After some evidence had been led for the prosecution, the Magistrate ordered the prosecution of Chan Tha, the petitioner, jointly with the other accused. The trial was commenced *de novo* and Chan Tha was convicted. His appeal was rejected by the Sessions Judge, who considered whether the Magistrate had jurisdiction to try him. An application in revision was filed in this Court by Po Ne and rejected by Mr. Justice Pratt. Another application for revision has now been filed by Chan Tha and the question of jurisdiction has been referred by my brother Maung Kin, to a Full Bench.

The question referred is thus stated:—

Whether on the facts of this case section 190 (1) (c), or section 351, or any other provision of the Criminal Procedure Code, applies?

The question involved really amounts to this: As to whether the provisions of section 351 of the Code are governed by the provisions of sections 190 and 191 of the Code. Section 190 deals with the conditions requisite for the initiation of proceedings, and the section provides that a Magistrate may take cognizance of any offence:—

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a Police report of such facts;

(c) Upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion, that such offence has been committed.

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It is to be noted that the section provides that cognizance may be taken of *any offence* and that no reference is made to the offender. Indeed, the identity of the offender is in no way involved, for a complaint may be presented with a view to action being taken against some person or persons unknown. When, therefore, proceedings are initiated on a complaint, or on a Police report, the Magistrate can legally take cognizance of the offence and the requirements of section 190 of the Code are complete.

In the present case, the trial was commenced and action was taken against Chan Tha. The addition of a new accused does not, in my opinion, necessitate fresh proceedings in initiation. The evidence, it is true, must be recorded *de novo*, but that is merely in order that the witnesses, whose evidence has already been recorded, may be used against the new accused. The Magistrate having taken cognizance of the offence it is right and proper that he should bring to justice all those persons, whether originally mentioned or not, who the evidence shows were guilty of that offence. It has been held that in such cases, the Magistrate should be regarded as taking cognizance under the same clause of section 190 as he did against the original accused; and if it were necessary to apply section 190 at all, I would hold that that is the correct view to take for the reasons that I have given above. But, in my opinion, section 351 applies to such cases, and is intended to apply to them. The offence being one and the same, and the Magistrate, having cognizance of that offence, acting under section 190 (b), has full seizin of the offence. He takes action on the evidence given for the prosecution to establish the offence, and there is apparently no need, therefore, to refer back to section 190 at all. However this may be, if there is such necessity, there is ample authority to support the view that in this case the Magistrate was acting under section 190 (b). I am unable to agree that there is no indication in the language of section 351 to support the view that section 190 applies to the initiation of proceedings and that section 351 applies to proceedings that have already been initiated. The section distinctly refers to cases in which a trial has already been begun, and the section, as now drafted, refers to enquiries and

also trials. With the exception of one case, there is no reported case that I can find that takes a different view. That one case, which is also the earliest, is that of *Khudiram Mookerjee v. Queen-Empress* (1). It was under the old Code of Criminal Procedure and before section 351 had been amended. In that case, however, there is a bare statement of the opinion of the Court. No reasons for the decision are given, and it is, therefore, impossible to ascertain or consider the grounds on which the decision was arrived at. In the case of *Raghab Acharjee v. Queen-Empress* we have only a note of the case, which has not apparently been reported in full. The case is different to the present one, in that the Magistrate took action against the petitioner on the evidence that was led for the defence of the original accused and not on the evidence which was given for the prosecution. The case was decided on other grounds, but it was held that a Magistrate is competent at the trial of one person to proceed against any other who may appear, upon the evidence taken, to be concerned in that offence, and that in doing so he cannot be properly regarded as acting within the terms of section 190, clause (c). It was further held that this rule should not be applied to a case where the trial of the 2nd accused is not on the same evidence on which the 1st accused was tried but on other evidence adduced on behalf of the defence of the 1st accused.

On the facts of the present case, therefore, this authority differs from that of the previous one quoted. In *Jagat Chandra Mozumdar v. Queen-Empress* (3), the Magistrate took cognizance of the case upon a complaint against three persons. After examining the complainant and some witnesses on his behalf, the Magistrate took action against another person, and it was held that he took cognizance of the offence as against this other person under clause (a) and not under clause (c) of section 190; that is to say, it was held that the proceedings having been initiated on a complaint, the proceedings against the additional accused must be held to be initiated on the same complaint. In *Charu Chandra Das v. Narendra Krishna Chakravarti* (4) the same view was held. A complaint was made to a Head Constable of the Railway Police at Hooghly that four

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Babus had outraged the modesty of the complainant's wife. The Police held an enquiry and the complainant identified one Bhut Nath Mukerjee who was sent up for trial. At the trial it appeared upon the evidence of one of the witnesses that the petitioner was also concerned in the offence, and the Magistrate instituted proceedings against him. It was urged that the Magistrate had acted without jurisdiction in proceeding under clause (c) of section 190 of the Code of Criminal Procedure, as he was not especially empowered by the Local Government to take cognizance of the case under the said clause and that he had not taken cognizance upon complaint or upon a Police report, inasmuch as no complaint was lodged against the petitioner. It was held that he had taken cognizance of an offence and, having cognizance of the offence, it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence.

The next case, *Emperor v. Sakhia* (5), deals fully with section 190 and section 351. It was held that the Magistrate taking action, as he did in the present case, cannot be regarded as taking cognizance upon information received or upon his own knowledge or suspicion within the meaning of clause (c) of section 190. It was held that section 351 is self-contained, complete in itself and independent of section 190.

Lastly, there is the case of *Dedar Bux v. Syamapada Malakar* (6), where most of the previous authorities that I have referred to are considered. In this case a complaint was made by the husband of a girl against four persons under sections 342 and 363 of the Penal Code. The Magistrate directed the complainant to prove his case, and two days later he presented a petition for withdrawal of the complaint and its dismissal as untrue, but the Magistrate proceeded and examined the girl and some prosecution witnesses and he found that, though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and, treating the girl as the real complainant, issued processes against them for offences.

(6) 24 Ind. Cas. 954; 1 C. 1013 18 C. W. N. 921; 15 Cr. L. J. 546.

Under sections 342, 352, and 363 of the Penal Code. It was held that he took cognizance against these new accused not named in the complaint under clause (a) and not clause (c) of section 190 of the Code. *Raghab's case* is distinguished.

The authorities, therefore, are strongly in favour of the view that a Magistrate so acting must be held to have acted under the same clause of section 190 as that under which the proceedings were initiated.

There is also authority for the view that section 351 is independent of the provisions of section 190.

For the reasons given above, I would hold that the Magistrate had full jurisdiction to act, that section 351 applies to the case, and that the Magistrate, so far as section 190 applies, if it applies at all, was acting under section 190 (b).

Maung Kin, J.—I have had the advantage of reading the judgment of the learned Chief Judge and have taken time to consider the point.

In my opinion it is right to hold that section 190, which relates to the conditions requisite for the initiation of proceedings, provides that Magistrates may take cognizance of any offence upon information derived in one of the three ways mentioned in (a), (b) and (c) of sub-section (1) of section 190, and that it is not necessary that any particular person should have been accused before cognizance is taken of the offence by a Magistrate.

I think as regards section 190(1) (c) the information, or the knowledge, or suspicion referred to therein, has reference to the initiation of proceedings in regard to the offence alleged to have been committed, and not to a later stage of the case.

The Magistrate's action in the present case refers to a stage later than that when cognizance was taken of the offence. Therefore, section 190(1) (c) does not apply. And there is abundant authority for holding that a Magistrate can proceed against anybody who may afterwards be shown to have been, or suspected of having been, concerned in the commission of the offence of which he has taken cognizance. In view of the ruling in *Dedar Bux v. Syamapada Malakar* (6) it cannot now be held that there is any distinction between the case before us and the

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cases of *Jagat Chandra Mozumdar v. Queen-Empress* (3) and *Charu Chandra Das v. Narendra Krishna Chakravarti* (4) on the ground that there was no complaint or Police report against Chan Tha.

The Magistrate took cognizance of the offence in question and enquired as to who committed it or was concerned in the commission of it. That was the question the Police by their report asked him to try. For this reason it must be held that the Magistrate took cognizance of the case against Chan Tha upon a Police report under clause (b).

With great respect to the learned Judges, their ruling in *Khudiram Mookerjee v. Queen-Empress* (1) cannot be followed, because, in my opinion the point was overlooked that all the three cases which enable a Magistrate to take cognizance of the case relate to initiation of the proceedings and not to a later stage in the proceedings.

In the view I have taken of the meaning of section 190, it is unnecessary to express any opinion as to the meaning of section 351.

My answer to the question referred is that on the facts of the case section 190, (1) (c), applies.

Macgregor, J.—I concur in the answer of the learned Chief Judge.

W. C. A.

Order accordingly.

ODISH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 19 OF 1923.

March 22, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

MIAN JAN AND OTHERS—ACCUSED—
APPLICANTS

versus

EMPEROR, THROUGH ABDUL

RAZAK—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 34
—Common intention—Sudden quarrel.

Where several persons go to the house of another and on a quarrel ensuing there, one of the party calls on his companions to beat the latter, and they do so, section 34 of the Penal Code applies to impute common intention to all of them even though the party did not come with the intention of beating the men in the first instance.

Application for revision against an order of the Sessions Judge, Fyzabad, dated the 22nd December 1922, upholding the order of the Magistrate, First Class, Sultanpur, dated the 18th November 1922, upholding the order of the Honorary Magistrate, Second Class, dated the 25th September 1922.

Messrs. *Zahur Ali* and *Moti Lal Sakesena*, for the Applicants.

The Government Pleader, for the Opposite Party.

JUDGMENT.—The applicants, Mian Jan, Mian Din, Hasrat Din, Lal Muhammad and Baqridi, have been convicted of an offence under section 323 of the Indian Penal Code and sentenced to a fine of Rs. 60 each.

It appears that Nur Muhammad, the son of the complainant, was married to the niece of Baqridi. On the 6th May 1922 Baqridi and the other four accused went to the house of Abdul Razzak, and asked him to get his son to divorce his wife. His son was not in the house at the time. Abdul Razzak, therefore, expressed his inability to do anything in the matter. It is not clear whether any conversation took place at the time about the payment of money in consideration of the proposed divorce or not. A quarrel ensued, and Baqridi asked his companions to beat the complainant; Mian Din, Hasrat Din and Lal Muhammad then attacked the complainant with *lathis*. The complainant fell down. Mian Din sat on his chest and pressed his throat. Meanwhile, *Musammam* Nasiban, the wife of the complainant, raised a hue and cry, and on the arrival of certain persons, who have given evidence in the case, the assailants withdrew. The complainant had received certain injuries, one of which was grievous. The Trying Magistrate was not satisfied that the accused had gone there with the common object of attacking the complainant or as to the person who had caused the grievous hurt. He, therefore, acquitted the accused under sections 325 and 147 and convicted them under section 323 of the Indian Penal Code. On appeal that conviction was upheld.

The case has not been properly tried. If the accused had gone with the object of asking the complainant to get his son to divorce a certain woman without any intention of beating the complainant, they had gone for what might be described as

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a lawful purpose, but when the complainant refused to take any steps in the matter and a quarrel ensued, the call of Baqridi to his companions to beat the complainant and the joining of the other accused in beating him constituted a common object which ought to have been taken into consideration in fixing their common responsibility for the crime. If that common object be excluded from consideration, the conviction of Mian Jan, Mian Din, Hasrat Din and Lal Muhammad under section 323 of the Indian Penal Code will still stand though that of Baqridi will have to be altered into one under section 109, read with section 323, of the Indian Penal Code, unless section 34 of the Code be made applicable to him. As the accused have been acquitted under sections 149 and 325 of the Indian Penal Code no further notice need be taken of the matter. The beating was started at the instance of Baqridi, and section 34 of the Code will, therefore, apply.

The application is dismissed.

N. H.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 886 OF 1922.

January 3, 1923.

Present:—Mr. Justice Walsh.

KHETAL, AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

EMPEROR—DEFENDANT—

RESPONDENT.

Evidence, admissibility of—Identification by co-accused—Secondary evidence, whether admissible—Evidence by official witness when admissible—Identification, mistake in—Evidence in other respects, whether discredited.

Inasmuch as an accused cannot give evidence while on his trial, secondary evidence of an identification of a co-accused by him is clearly inadmissible. Evidence by an official witness of identification is only admissible, if the identifying witness is called to support his identification on oath. [p. 63, cols. 1 & 2.]

The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. [p. 64, col. 1.]

Criminal appeal from an order of the Sessions Judge, Shahjahanpur, dated the 17th October, 1922.

Mr. J. M. Banerji, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—In this case five men, Daryao Singh, Umrai, Sibba Singh, Khetal and Bhopal Singh, appeal against their convictions for dacoity by the Sessions Judge of Shahjahanpur. They have been sentenced to ten years' rigorous imprisonment. It is a bad case. Owing to the mistakes of the Sessions Judge, and to what appear to me to be errors of judgment on the part of the Deputy Superintendent of Police, due in part to a strange order by the Magistrate in refusing an application for pardon, I have had difficulty in disposing of the case. I am compelled to allow two of the appeals, but in one case it seems to me a miscarriage of justice.

The learned Judge has based his decision almost entirely upon the confessions of Daryao Singh and Sibba Singh. He has worked from this stand-point, and has sought for corroboration of the confessions from independent evidence against each of the accused, except in the case of Daryao Singh where he has fallen back upon the confession of his co-accused Sibba Singh. This is a very usual method in such cases as this, but when both confessions are inadmissible, which is the case here, it has serious drawbacks. A great deal of the Judge's work has been thrown away, and I have had to do it again.

The dacoity took place in the night of the 4th and 5th June 1922, and on the 6th June, Daryao Singh and Sibba Singh were arrested. Both were old soldiers and had gun licences. Both were obviously persons who never ought to have been permitted to carry fire-arms. Both were willing to sell their comrades to the public for a pardon. I am quite satisfied that both were induced to make their confessions by the promise of being made an approver if possible.

At the end of his confession Daryao Singh said that he had been told by the *darogha* that he would be made an approver. He explained to the Magistrate in the most convincing fashion that he was telling the truth for this reason, and that he knew that what he said might procure his conviction or his release. The Magistrate wrote

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the usual certificate in an unusual form. He said, "I believe the above statement was voluntarily made although it is quite possible that the Police Officers may have told him that he will be made an approver." It seems incredible that this confession should have been admitted in the face of this. Section 24 of the Evidence Act makes a confession inadmissible if it appears to have been caused by any *inducement or promise*. Both the Sessions Judge and the First Class Magistrate, and even the assessors, under the misdirection of the Judge, held that it was made voluntarily. Of course it was, in the colloquial sense of that term. Everything done willingly under a promise or inducement is done voluntarily. Every Judge ought to know that this section requires a confession to be made spontaneously, and without any inducement, and voluntarily, only in that sense. This is elementary. In the case of this appellant there is no independent evidence against him and he must be acquitted.

I am satisfied that the confession of Sibba Singh was also caused by the same inducement. He not only says so himself, but the Deputy Superintendent of Police said at the trial that the confession of Daryao Singh was not clear or satisfactory to his mind. He, therefore, took Sibba Singh with him to the spot to verify his statements, obviously with the intention of making him an approver instead of Daryao. He applied to the Magistrate for a pardon to Sibba Singh. This, for some reason which has not been stated in evidence, was refused. This seems to have upset the judgment of the Deputy Superintendent and he abandoned the plan of putting forward any accused as an approver, apparently trusting to evidence of identification against these two men, and possibly also to their confessions. But neither of them has been identified. In addition to this it is to be noted that these two accused, while awaiting trial, were put up to identify their co-accused. If neither of them was to be made an approver, this would be a natural proceeding. But neither of them was, and the Sessions Judge allowed evidence of identification by them, which in substance came to little, to be given at the trial. The Judge has failed to see that, inasmuch as an accused cannot give evidence while

on his trial, secondary evidence of identification by him is clearly inadmissible. Evidence by an official witness of an identification is only admissible if the identifying witness is called to support his identification on oath. Both these confessions ought to be rejected. But in the case against Sibba Singh there are other features which I will examine hereafter.

The case against Umrai rests upon the inadmissible confession of Sibba Singh, and a remarkable incident alleged to have occurred when he was arrested. Sibba Singh had been left at the village of the dacoity in the custody of two constables. He had first disclosed, and handed over, ornaments looted at the dacoity, which were hidden on his premises. He was driven back on an *ekka* accompanied by the two constables. In the Sadar Bazaar, Shah-jahanpur, he pointed out Umrai to the constables, who arrested him as one of the dacoits. The Judge says this was on the 12th July. But he has made several slips in his dates, and it must have been the 12th June. Umrai was not searched. This was a piece of gross negligence. He was driven on the *ekka* to the Deputy Superintendent's where he was searched and nothing incriminating was found. When the party came away from the Deputy Superintendent it was decided to leave the *ekka*. Two coats belonging to the two constables had been spread on the *ekka*, and the four men had sat on them, the two prisoners, unhandcuffed, sitting between the constables when the coats were removed from the *ekka*, three ornaments, two being *basibunds*, and therefore, of some size, were found concealed beneath. The evidence of the finding is hopelessly contradictory. The *ekkawala* says the constable took down the coat; the constable says the *ekkawala* did. One says they were picked up from the ground; another says they were found under the coat. One constable and the *ekkawala* contradict one another as to which coat Umrai sat upon. The Judge has noted only one discrepancy, but the witnesses seem agreed upon hardly a single detail. Umrai's costume was such that concealment of these articles must have been difficult. It must also have been difficult to put them under the coats upon which the four men were sitting. It is necessary

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to find that he had them on him when he went, one week after the dacoity, and sat in a shop in the Bazaar. There is nothing suggestive about the shop, and I am unable to accept this story of the finding of the articles in his possession as satisfactorily proved. There is no other evidence against Umrai, and he also is entitled to an acquittal.

As for Sibba Singh, there is a good deal of evidence against him which the Sessions Judge, presumably because he relied upon the confession, has not dealt with in detail. The discovery of the ornaments at his house is clearly a fact discovered within the meaning of section 27 of the Evidence Act, and is admissible in evidence. As the guilt of Umrai is not established, the discovery of Umrai is not a fact within the meaning of this section. The discovery of the gun by the Police with the assistance of Sibba would have been a fact if it were clearly established that this had been used in the dacoity. But the Judge has rightly formed the opinion that it was not, and that the gun exhibited in the case, which was dropped by a dacoit during the struggle with the villagers was the gun covered by Sibba's license. He has given strong reasons for this inference, but the fact is corroborated by the evidence of two witnesses. Ganga Ram at the trial pointed to Sibba as the man who dropped the gun. Narpat said the same thing. He also said that he had told the Investigating Officer this before the hearing by the Committing Magistrate but that he forgot it when giving evidence. This happens not infrequently in criminal cases, and is often due to the omissions of the prosecuting officer in examining the witnesses. It appears to be an honest and natural statement. Narpat made a hopeless mess of the identification at the Jail. Sibba of course was not put up, but Narpat said he did not see Sibba when he came to the village. The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. It is, indeed, strong evidence that he has not been coached by the Police, but is merely an enthusiast who is not to be trusted in recognizing faces seen under such circumstances. But it is another thing when a man is seen in moonlight struggling with a gun which he is forced to drop. It must be accepted that Sibba was using the gun

which had been dropped at the dacoity that he had two guns in his possession, and that he voluntarily disclosed the second in order to disclaim his connection with the one dropped. This is quite sufficient to establish his guilt.

With reference to Khetal and Bhupal, they were identified by eight and four witnesses respectively. Making due allowance for those who made mistakes, and ignoring the confessions of Daryao and Sibba, which I have not read, the balance of evidence against these men is ample, and their convictions were right.

The result is, that the appeals of Daryao and Umrai are allowed and they must be discharged. The appeals of Sibba, Khetal and Bhupal are dismissed and their convictions and sentences confirmed.

I direct that a copy of this judgment be sent to the District Magistrate with a view to his considering the propriety of instituting proceedings against Daryao Singh under the bad livelihood sections. I have held that the confessions were inadmissible in law. But Daryao's statement may afford clues to evidence as to his conduct. It appears also that he is an associate of Sibba Singh, and identified the brother, Sukha, in Jail. It would be well if the District Magistrate were to draw the attention of the Magistrate who took the statements of Daryao and Sibba Singh to what I have said about section 24, and to inquire why two accused persons, who were not made approvers, were put up to identify their co-accused, and why the Deputy Superintendent's application for a pardon of Sibba Singh was refused. He should also draw the Deputy Superintendent's attention to the negligence of the constables in failing to search Umrai when he was arrested.

N. K.

*Appeal partly allowed
and partly dismissed.*

KRISHNAJI V. SUKHDEO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 150-B OF 1922.

February 23, 1923.

Present:—Mr. Prideaux, A. J. C.

KRISHNAJI—DEFENDANT—APPLICANT

versus

SUKHDEO—PLAINTIFF—NON-APPLICANT.

Stamp Act (II of 1899), s. 36—Document insufficiently stamped—Admission in Trial Court—Revision, interference in, whether competent.

If a deed has been admitted in evidence before the Trial Court, even though insufficiently stamped, its admissibility cannot be questioned by a Court exercising revisional jurisdiction.

Application for revision of the decree of the Judge, Small Cause Court, Khamgaon, dated the 28th August 1922, in Civil Suit No. 851 of 1921.

Messrs. S. B. Gokhale, P. B. Gole and G. R. Deo, for the Applicant.

Sir Bipin Krishna Bose and Mr. V. K. Rajwade, for the Non-Applicant.

ORDER.—In this case the plaintiff Sukhdeo Narayan sued Krishnaji Mahadeo for the amount of Rs. 412-3-3 due on shop dealings which have been evidenced by a *ruzu*. Defendant does not dispute the correctness of the account nor the amount claimed; but he does dispute plaintiff's right to bring the suit. His Pleader stated: "If it is held that the plaintiff is the owner of the shop, then the defendant admits the claim." The plaintiff has been found to be the owner of the shop but, as this revision application shows, despite that fact defendant denies plaintiff's right to recover.

The applicant's contention was that the real owner of the shop was one Tani, grand-daughter of Narayan Kadtaji. Plaintiff's case was that he was adopted by the widow of Narayan Kadtaji in 1906 and whatever rights Tani had in the property in the shop were relinquished by her in favour of the plaintiff by a registered deed of relinquishment dated 18th September 1919. The lower Court held that it was unnecessary to go into the question of adoption as the suit could be disposed of on other grounds. It held that Tani satisfactorily executed the deed of relinquishment in favour of the plaintiff of her own free-will and that there was no coercion as

urged by the defendant in the matter, Tani has been examined as a witness and she admits the deed.

The contention here is, that the deed of relinquishment cannot operate as it is insufficiently stamped. Section 130 of the Transfer of Property Act and section 23 of the Contract Act are quoted. It is argued that the object of executing the release on a five rupees stamp-paper was to defraud the Government of stamp-duty and that it is really conveyance. I am also referred to the following cases: *Mulraj Khatau v. Vishwanath Prabhuram* (1), *Jadu Nath Poddar v. Rup Lal Poddar* (2); *Dharam Chand Boid v. Mouji Shahu* (3) and *Narak Lal v. Thagoo Lal* (4). It is argued that the release does not operate as a conveyance and plaintiff can have no title to the shop because of it.

The document itself (Exhibit P-3) is headed as a deed of relinquishment. It is in favour of the plaintiff by Tani. It states:—

"You are the adopted son of Narayan Patil. My father Sadu Patil had already relinquished his right to the estate. You, that is, Sukhdeo Narayan Patil, are the true and proper owner of the estate of the deceased Sadu, son of Narayan Patil, and that estate is in your possession as owner. I have no right to or interest in the said estate in any way. As others sometimes raise an objection that I have a right to and interest in the aforesaid estate, I hereby state that I neither have nor had a right to or interest in the aforesaid estate in any way....."

The deed goes on to state:—

"I have relinquished my right to the moveable and immoveable property mentioned above, worth about Rs. 60,250 without taking anything from you. I have executed this deed of relinquishment of my own free-will and pleasure after full consultation."

(1) 17 Ind. Cas. 627; 37 B. 198; (1912) M. W. N. 12 47; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162 40 I. A. 24 (P. C.).

(2) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.

(3) 16 Ind. Cas. 440; 16 C. L. J. 436.

(4) 13 Ind. Cas. 455; 22 C. L. J. 380.

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The document states that Tani, the executor, had no right to the property and that being so, it is not clear how she can relinquish what she did not possess. She herself, examined as a witness, states that the shop belongs to the plaintiff and she has no interest in the shop. It was held in a mortgage case by this Court, the defendants being different, that on Narayan's death his separated son Sadasheo succeeded in preference to the widow and he in turn was succeeded by his daughter Tani. Now, Tani, as already stated, comes forward and states she has no interest in the shop and that statement seems sufficient for the purposes of this suit. The fact of the adoption is not challenged here.

The deed of release has been admitted in the case. That being so, this Court cannot question its admissibility: See *Shidapa v. Irava* (5) and section 36 of the Indian Stamp Act.

I think it has been sufficiently established that plaintiff has a right to sue in the present case and I also think that the finding of the lower Court is correct. I, therefore, dismiss this application for revision with costs. I fix Pleader's fee at Rs. 15.

G. R. D. • *Application dismissed.*

N. K.

(5) 18 B. 737; 9 Ind. Dec. (N. S.), 1000.

—Secondary evidence—Easements Act (V of 1882), ss. 30, 47—Transfer of dominant heritage—Easement, division of—Discontinuance of easement—Extent of easement.

Where the terms of a contract are reduced to writing, the only evidence which is allowable under section 91 of the Evidence Act to prove the terms thereof is the document itself or such secondary evidence as is mentioned in section 63 of the Act. Any other kind of documentary evidence is inadmissible in evidence. [p. 68, col. 2.]

Where a portion only of a dominant heritage passes to another by a sale-deed, the whole of the easement right cannot be deemed to have been transferred, notwithstanding that no right was specially reserved by the vendor in the sale-deed. Under section 30 of the Easements Act when a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the sharers provided that such annexation is consistent with the terms of the instrument under which the division was made. [p. 69, col. 2.]

Under section 47 of the Easements Act, a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of 20 years. Such period should be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, and in the case of a discontinued easement from the day on which it was last enjoyed by any person as dominant owner. [p. 70, col. 1.]

The exact nature of the right of easement acquired by a party is determined by the accustomed user and where the user proved is only the erection of a dam of flimsy structure across a stream, there is no right to erect a permanent dam. [p. 71, col. 1.]

Bakhtavatsal Ammal v. Secretary of State, 9 Ind. Cas. 636; 9 M. L. T. 375, relied on.

Appeals against the decree of the Court of the Government Agent, Godavary, in Original Suit No. 2 of 1916, in Appeals Nos. 304 and 350 of 1918 and in Original Suit No. 1 of 1917.

Messrs. T. R. Venkatarama Sastriar, Y. Suryanarayana and B. Satyanarayana, for the Appellants, in Appeals Nos. 283 and 304.

Messrs. S. Srinivasa Iyengar, L. A. Govindaraghava Iyer and A. Krishnaswamy Aiyar, for the Respondents.

Mr. L. A. Govindaraghava Iyer, for the Appellant in Appeals Nos. 334 and 250 of 1918

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 283, 304, 334 AND 350 OF 1918.

December 14, 1922.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

HOTA VEERABHADRAYYA AND OTHERS

—APPELLANTS

versus

THE Hon'ble Sri Rajah KOCHERLA KOTA RAMACHANDRA VENKATAKRISHNA RAO BAHADUR GARU AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), ss. 63, 91—Document

HOTA VEERABHADRAYYA v. VENKATAKRISHNA RAO.

Messrs. S. Srinivasa Aiyangar, A. Krishna-swamy Aiyar, V. Suryanarayana and B. Sathanarayana, for the Respondents.

JUDGMENT.

Phillips, J.—These four appeals relate to a triangular dispute between the *zemindars* of Polavaram, Gutala and Gangole, who will hereafter be styled by their territorial names. In 1824 before the creation of the Gangole estate, the proprietors of Polavaram and Gutala entered into a compromise with regard to the use of the water of the natural streams passing their two estates, and in 1829 an agreement is said to have been entered into by the two proprietors. In order to understand the case, it is necessary briefly to state the respective positions of the lands, and the streams passing through them. One stream, Kovvada Kalva, with which we are chiefly concerned, runs from west to east through, first of all, the Gutala estate, subsequently through Polavaram and again through Gutala and Polavaram. A feeder channel, Nakkalagayya Kalva, joins Kovvada Kalva at a point in the Polavaram estate, and another channel, Pedralla Kalva, also does the same but further to the east. Apparently, water was taken by the lands of both the estates from all these streams, but the Polavaram proprietor wished to utilise the water of the Pedralla Kalva exclusively for his own lands and he built a masonry dam which effectively diverted its waters from the Kovvada Kalva. In return for this, a compromise was entered into between the proprietors of Gutala and Polavaram permitting the former to dam up the Kovvada Kalva at a point above its junction with the Nakkalagayya Kalva, so as to prevent water coming down below the point of damming. Apparently, the Gutala proprietor did erect such a dam across the Kovvada Kalva in the year 1830, but it was almost immediately washed away and for some years no further dam was constructed. In 1843 the Gutala proprietor sold certain villages of his estate to one Hota Gangayya by Exhibit A. It is argued for Gutala that this transfer did not amount to a sale but it is perfectly clear, as found by the lower Court, and from the language of Exhibits A-1 and A-2, that the transfer did amount to a sale. The land thus transferred is now what is called Gangole *muttah*. In 1849 the Gangole

muttah was separately registered as an estate by the Collector, and from that date we have the three estates with which we are here concerned. In 1848 Hota Gangayya started the erection of a dam across the Kovvada Kalva, and when objection was raised by Polavaram, Gutala supported his vendee. Apparently, the dam was not fully constructed, although the Sub-Collector had approved of Gangayya's action, for, it appears from Exhibit D-30, that the masonry dam had not been constructed in 1852. Again, in 1863, a further attempt to build the dam was made and also in 1869, 1876 and 1880, but these attempts all failed owing to opposition of Gutala and Polavaram. Nothing apparently happened after 1880 until 1898 when the then proprietor of Gangole, plaintiff in Original Suit No. 2 of 1916, assumed charge. In 1905 a dam was put up, but the District Magistrate, on the complaint of Gutala, ordered the blocking up of the Sagupadi channel which was fed by the water retained by that dam and it was not till 1911 that a complete masonry structure was put up. The structure consisted of two parts, firstly, what is called the *valanka*, which apparently means a sort of training *bund* running from one bank up the middle of the stream, and, secondly, a cross-dam from the end of that *bund* to the opposite bank. The cross-*bund* was ordered to be removed in 1911, but the *valanka* was allowed to remain. Gangole has, therefore, brought this suit, Original Suit No. 2 of 1916, for a declaration of his right to construct a cross-*bund* of any material he pleases and for an injunction restraining the defendants, namely, the *zemindars* of Polavaram and Gutala, from interfering with his enjoyment. Gutala has filed a cross-suit, Original Suit No. 1 of 1917, against Gangole only, in which he asks for the removal of the *Valanka* built in 1911, and he also asks for a declaration of the parties' respective rights in the water of the Kovvada channel. The Government Agent in trying these suits has held that Gangole has no right to erect a permanent cross-*bund* in the channel, but he has not dismissed the suit but has declared that he is entitled to use such portion of the water of Kovvada Kalva as is reasonable to the enjoyment of his estate as an upper riparian owner. He has left the exact extent of that right

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and the manner in which it is to be enjoyed to be determined in execution. In the cross-suit, he has dismissed the suit entirely although in the first suit he has held that Gangole was not entitled to put up a permanent cross-bund.

Appeals are now filed against both decrees by Gangole (Appeals Nos. 283 and 304) and by Gutala (Appeals Nos. 334 and 350).

I have talked of this compromise in 1829 as an admitted fact. It is, however, admitted only by Gutala, and, while Polavaram does not entirely deny the existence of some compromise, he contends that the compromise evidenced by Exhibits E, E-1 and E-2 is not in accordance with the compromise actually effected. So far as Gutala is concerned, the compromise in terms of Exhibit E is admitted, and that document itself is produced by them. It is contended for Polavaram that Exhibit E has not been proved and that there is no other evidence of the terms of the compromise.

Exhibit E is a copy of the original document purporting to have been executed by the Polavaram *zemindar* in favour of the *zemindar* of Gutala. It is only a private copy and it is neither signed nor dated. The learned Government Agent, in considering its admissibility, has apparently relied on circumstantial evidence in proof of its genuineness. In one part of his judgment he seems to rely on section 90 of the Evidence Act on the ground that section 90 has been held to be applicable not only to original documents but also to copies. But he has gone considerably further than the presumptions warranted by section 90 without really considering the exact effect of that section, and sums up his finding as follows:—

“The copy produced appears to be genuine and ancient. It gives Polavaram what on the face of it is a reasonable *quid pro quo*. The original is lost. The custody is proper. All that is not proved is the signature and the handwriting, but the collateral evidence and the circumstances point to its genuineness. For these reasons I accept Exhibit E.” There is no doubt a considerable body of evidence which goes to show that there was some sort of compromise and that its terms were somewhat similar to, if not exactly the same as, the terms of Exhibit E: but there is absolutely no proof of the document. The writer is

unknown and it does not even purport to be written by any particular person. The date of its making is also unknown and, therefore, it cannot be said with any certainty that it is thirty years old nor does it purport to be thirty years old. If, therefore, the document is to be admitted in evidence it must be proved in some way or another. It has not been proved by any witness and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old and are produced from proper custody. This is not one of such documents and, therefore, the limited presumption of section 90 cannot apply. One of the cases relied on by the Government Agent for admitting Exhibit E is *Ponnambalath Parapravan v. Karoth Sankaran Nair* (1), but, from the brief judgment in that case, it does not appear that the copy was not proved, but, on the contrary, it would appear that there was some evidence adduced in regard to the copy. Here we have no evidence at all as to the making of the copy. The document not being proved to be thirty years old and being only a private copy proof would be necessary that it was compared with the original before it could be admitted in evidence. As there is no evidence that Exhibit A conforms to any of the provision of the Evidence Act (see section 63) in regard to secondary evidence it is not admissible in evidence and must be rejected.

Exhibit E-2 is a copy of the petition submitted by the *zemindar* of Polavaram and it contains the terms of the compromise though not in exactly the same language as Exhibit E. The same objections apply to this document as to Exhibit E, although we have got the evidence of one witness that the writing of it resembles the writing of one Vedlamani Seshayya, who was a clerk in the estate office. Here, again, the document is not proved, and does not purport to be thirty years old. Section 90 is, therefore, inapplicable.

There is also another objection to Exhibit 2 in that it is apparently a copy of a copy. We find that the words ‘compared by Patri Rayappa’ appear on the document and that the signature ‘Patri Rayappa’ is only a copy. It would, therefore, appear

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that Exhibit E-2 was a copy prepared by some private person unknown of the copy granted by the Collector's Office.

Exhibit E-1 is a copy of a petition purporting to have been submitted by the *zemindars* of Gutala and Polavaram. But here, again, the same objections apply. So far as Polavaram is concerned, therefore, the terms of the compromise have not been proved by Exhibit E series.

It is then suggested that there is a good deal of other documentary evidence which goes to prove these terms, but, unfortunately, section 91 of the Evidence Act prohibits any such evidence being given, for the only evidence of this contract which is allowable under that section is the document itself or secondary evidence of its contents: and none of the evidence which is now adduced comes within the category of secondary evidence contained in section 63.

Inasmuch as the Gangole *zemindar* relies upon the terms of this contract or grant of 1829 for his right to construct a masonry dam, his case must fail as against Polavaram.

An attempt has been made to show that he has acquired such a right by user and prescription, but it has been found in the lower Court and admitted in arguments, that until 1911 no masonry dam had ever been constructed. His prayer, therefore, for a declaration that he is entitled to put up a dam made of any substance he pleases must fail and his suit must be dismissed so far as Polavaram, the first defendant is concerned.

As Gutala has admitted Exhibit E and in fact relies upon it, it will be necessary to consider, so far as the proprietors of Gutala are concerned, what rights the plaintiff has. The Gangole *muttah* was sold to the plaintiff in 1843 and another deed was executed in 1849 at the time when the transfer of registry was effected by the Collector. The contention now is, that all the rights conferred by Polavaram upon Gutala in 1829 passed by that sale to Gangole. Neither of the sale-deeds contains any recital as to rights of water or any reference to the compromise, but it is urged that the right was appertaining to the land which was sold to Gangole. The right to dam the stream and prevent flow of water to the Polavaram estate

which is given by Exhibit E is claimed to be an easement right, the dominant heritage being the Gutala estate, which at that time comprised also the Gangole *muttah*, and the servient heritage being the Polavaram estate. It is contended that, as no right has been reserved in the sale-deed, the whole of this easement right must be deemed to have been transferred. It must, however, be observed that the right when created was a right pertaining to the whole of the Gutala estate, and must be deemed to have been for the benefit of the whole estate. In fact, we have evidence that in 1830 a *bund* was constructed and the Sagupadi channel which takes off from that *bund* was extended so as to water not only the villages of Gangole *muttah*, but also the Gutala villages lower down the stream. It is, therefore, difficult to understand how this right, which included a benefit to the estate retained by the vendor Gutala, can be said to have passed wholly to Gangole, who became the owner of only a portion of the dominant heritage. Under section 30 of the Easements Act, when a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. Here the annexation of the right to Gangole alone would be to create an easement in Gangole as against the remainder of the Gutala estate, for the effect of damming up the waters in the Gangole *muttah* would not only deprive Polavaram of water but also the lower parts of Gutala. No doubt, an arrangement might have been made for watering these lower villages by means of a continuation of the channel which waters the Gangole estate. But in order to enjoy such a right it would be necessary for Gutala to have a right to enter upon the land of Gangole in order to reap such a benefit or, alternatively, an easement right to take water through Gangole would be conferred on Gutala. In the absence of a definite agreement to that effect, no such right can be presumed in Gutala, and, therefore, it appears to me that the terms of the sale are quite inconsistent with the idea that the easement right was wholly transferred to Gangole. Whether Gangole and Gutala still possess

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a joint right against Polavaram it is not necessary here to discuss, because so far as Polavaram is concerned, this suit must be dismissed, and no attempt has been made by Gutala in their litigation to assert such a right.

One fact relied on by Mr. Venkatarama Sastri for Gangole is that, in 1848, when Hota Gangayya commenced the erection of a dam, he was supported by the proprietor of Gutala: but it must be remembered that at that date Gangole had not been separately registered and consequently would not be recognised by the Revenue Authorities. The registered proprietor of Gangole *muttah* was at that time the Gutala *zemindar* and, therefore, there was nothing extraordinary in the *zemindar* of Gutala conducting the proceedings with reference to the dam in opposition to the Polavaram estate on behalf of his vendee. This one circumstance certainly cannot be deemed to prove that Gutala intended to part with all his rights under Exhibit E by the sale-deed in 1843. It is possible that Gutala did not, at that date, care very much whether the right was exercised by Gangole or by himself, but was anxious to assert his right against Polavaram. We see that in 1867 when further disputes arose Gutala definitely opposed Gangole's attempts to raise a dam and from that time forward there have been continuous disputes between the parties. I must hold, therefore, that the Gangole proprietor has failed to establish the right claimed in his plaint.

I think also for another reason that his suit must fail. Under section 47 of the Easements Act, a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years. Such period should be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, and in the case of a discontinuous easement from the day on which it was last enjoyed by any person as dominant owner. Assuming that this is a continuous easement as contended for by Gangole, obstruction was begun in 1867, or certainly in 1876, and has continued up till the time of filing this suit. Admittedly, the permanent dam was never constructed until 1911 and, therefore, it is clear that the right had not been enjoyed

for an unbroken period of at least twenty years prior to 1911. On that ground also Gangole's suit must fail.

These findings might be sufficient also to dispose of the connected suit in which Gutala sues for the removal of the masonry *Valanka*, but a great deal of evidence has been adduced to show that the Gangole proprietor has from time to time been putting up *Valankas* and cross-dams of a non-permanent character and thereby diverting the water of the Kovvada Kalva into his Sagupadi channel, and the Government Agent has ordered in his decrees that the extent of this right, which he terms the right of the riparian owner, should be determined in execution. No doubt, as the Government Agent is responsible for the due administration of the Scheduled District and for the peace and order therein, his decree may be said to be equitable as giving an opportunity to the parties to come to terms as to their respective rights to the user of the water a question which can only be accurately settled with great difficulty. Treating the question as one of law, it seems to me clear that the Government Agent's decree cannot stand. When he found that Gangole had no right to build a permanent cross-dam, he ought to have dismissed Original, Suit No. 2 of 1916. Similarly as regards the *Valanka*, which apparently is now a solid structure extending some 200 yards into the stream, an order for its removal or at least diminution should have been passed. It is suggested that in the case of the *Valanka* which only diverts the water of the stream and does not dam it up, it is really immaterial whether it is constructed of sand or *tatties* or loose stones, or whether it is made of stones and mortar. It is, however, quite clear that the temporary flimsy structures which had been put before were constantly washed away and, therefore, for long periods constituted no obstruction at all to the flow of water to Polavaram and lower Gutala were as the existence of a permanent masonry *Valanka* must always divert a certain quantity of water, which in times of low water might be of considerable importance to the lower proprietors. Gangole has in no way established his right to put up such a permanent structure, for I have held that the right under

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Exhibit E has not passed to him, and, therefore, I think, that an order must be made for the removal of *Valanka*. It is, perhaps, unfortunate that Gangole should be driven to building temporary structures, which naturally entail considerably additional expense, as they are repeatedly washed away and have to be rebuilt; but, as a question of right, it must be held that nothing further has been established by him. The right he has obtained can only be a right by user or prescription and it is incumbent on him, if he claims any particular right, to prove that he is entitled to it. In this Court in Second Appeal No. 11 of 1904 the erection of a permanent dam having been constructed prior to 1922, no right to such a dam can have been acquired by prescription. The user proved is only the erection of the flimsy structures. As pointed out in *Bakhtavathsala Ammal v. Secretary of State* (2), the question in each case must be, what is the exact nature of the right which is shown by the evidence to have been acquired by the party? In this case Gangole has failed to show that he is entitled to a permanent *Valanka* as now existing and, therefore, his defence in Original Suit No. 1 of 1917 must fail.

As a rule, Original Suit No. 2 of 1916 must be dismissed with costs two sets, and in Original Suit No. 1 of 1917 there will be a decree, directing the removal of the *Valanka* within four months with costs and that in default plaintiffs be at liberty to remove it and recover costs thereof, to be determined by the lower Court, from defendant. Gangole will pay costs in Appeal No. 283 (2 sets) and in Appeal No. 350 (one set). In the other appeals parties will bear their own costs.

Devadoss, J.—I agree.

V. N. V.

Order accordingly.

(2) 9 Ind. Cas. 636; 9 M. L. T. 375.

PATNA HIGH COURT.

CIVIL REVISION NO. 120 OF 1922.

March 13, 1923.

Present:—Justice Sir B. K. Mullick, Kt.

Mr. Justice Kulwant Sahay.

RAMJAS AGARWALA AND ANOTHER—

PETITIONERS

versus

MESSRS. LINTON, MOLESWORTH & CO., LTD., AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. I, rr. 1, 3, O. I I, r. 3—Misjoinder of parties and causes of action—Interlocutory order—Revision.

Defendants second party agreed to sell certain land to plaintiff No. 1. They subsequently sold the land to defendants first party and plaintiff No. 2 in certain shares. Plaintiffs Nos. 1 and 2 sued the defendants for specific performance of the agreement in favour of plaintiff No. 1, for possession of the entire land and for damages and mesne profits and in the alternative for partition of the share sold to plaintiff No. 2 and for accounts and profits of that share.

Held, (1) that the right to the reliefs claimed by the plaintiffs did not arise out of the same act or transaction or series of acts or transactions; [p. 73, col. 1.]

(2) that there was no common question of law or fact arising out of the separate claims of the plaintiffs; [p. 73, col. 1.]

(3) that the joinder of the plaintiffs and their causes of action in one case was not authorised by any provision of the Civil Procedure Code; [p. 73, col. 1.]

(4) that, therefore, the suit was bad for misjoinder of parties and causes of action. [p. 73, col. 1.]

Fakirapa v. Rudrapa, 16 B. 119; 8 Ind. Dec. (N. S.) 555, *Pinapati Mrutyumjaya v. Pinapati Janakamma*, 26 M. 647 (F. B.), distinguished.

The High Court will not interfere in revision with an interlocutory order unless some irreparable injury is caused to any party thereby. [p. 73, col. 1.]

Civil revision against an order of the Subordinate Judge, Dhanbad, dated the 9th March 1922.

Mr. A. B. Mukerjee, for the Petitioners.

Messrs. P. C. Rai, S. C. Mazumdar, and P. K. Sen, for the Opposite Party.

JUDGMENT.

Kulwant Sahay, J.—This is an application by the plaintiffs against an order, dated the 9th March 1922, passed by the Subordinate Judge at Dhanbad, whereby he has held that the suit was bad for misjoinder of parties and causes of action. The material allegations of the plaintiffs as set out in the plaint are shortly these:—

Defendants Nos. 3 to 20 entered into a partnership and acquired 66 *bighas* 11 *cottas* of land and started a colliery therein

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In August 1918 they negotiated for sale of the land and the colliery with the plaintiff No. 1 and in June 1919 the terms of the alleged sale were settled between plaintiff No. 1 and the defendants Nos. 3 to 20. It was agreed that the defendants Nos. 3 to 20 would attend the office of the plaintiff's Solicitor the next day, to execute a formal agreement and receive a sum of Rs. 5,000 as earnest-money, but that the defendants Nos. 3 to 20 failed to do so, that thereafter the defendants Nos. 3 to 20 carried on negotiations for sale with others and ultimately they negotiated with the defendants Nos. 1 and 2, and on the plaintiff No. 1's coming to know of this fact, he served a notice through his Solicitor upon the defendants Nos. 1 and 3 to 20 informing them of the agreement with him and calling upon the latter to carry out the agreement. The defendants Nos. 3 to 9, however, sold 13 annas odd share in the land and the colliery to the defendants Nos. 1 and 2 in November 1919 and the defendants Nos. 10 to 20 sold the remaining share to the plaintiff No. 2 in September 1919. Thereupon, in December 1919 the present suit was brought by both the plaintiffs and the reliefs asked for in the plaint are as follows:—

(1) That a decree be passed for specific performance of the agreement with the plaintiff No. 1; (2) that a declaration be made that the defendants Nos. 1 and 2 cannot retain possession of the property in suit; (3) for possession of the entire property; (4) for damages and mesne profits; (5) for dissolution of partnership and appointment of a Receiver pending the dissolution; (6) that if a decree for specific performance be not passed then a decree for partition may be passed; and (7) for recovery of profits after taking accounts.

Issues were settled on the 8th of March 1922 and Issue No. 2 was to the effect, "is the suit bad for misjoinder of parties and causes of action?" The learned Subordinate Judge tried this issue, and by his order dated the 9th of March 1922 held that the suit was bad for misjoinder of parties and he gave an opportunity to the plaintiffs to elect as to which of them should proceed with the suit and for which relief and to amend the plaint accordingly, and he gave them time till the 27th of March

within which the plaintiff should make the election and make the necessary amendment, and it was ordered that in the event of their failure to do so, the suit should stand dismissed. The plaintiffs apply for revision of this order.

In my opinion the order of the learned Subordinate Judge is perfectly right and cannot be interfered with. It will appear that upon the allegation made in the plaint the two plaintiffs cannot properly join in the present action. The claim of the plaintiff No. 1 is based upon an agreement alleged to have been entered into by and between the defendants Nos. 3 and 20 and himself for sale of the land and the colliery. The claim of the plaintiff No. 2 is based upon his purchase of September 1919 from the defendants Nos. 10 to 20. The plaintiff No. 1 has absolutely nothing to do with the claim of the plaintiff No. 2 so far as possession and partition of the plaintiff N. 2's share is concerned. Similarly, the plaintiff No. 2 has no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the two suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction, or series of acts or transactions, and the joinder of the two plaintiffs and the causes of action alleged by them is not authorised by any law or principle.

The learned Vakil for the petitioner relies on the cases of *Fakirapa v. Rudrapa* (1) and *Pinapati Mrutyumjaya v. Pinapati Janakamma* (2), but these two cases have absolutely nothing to do with the facts of the present case. In the first case the suit was brought by the widow and the alleged adopted son of one Irapa for a declaration that a certain property attached in execution of a decree against one Rudrapa belonged to them and not to the judgment-debtor, and the suit was brought to set aside the attachment. The Court of first instance decreed the plaintiff's suit, but on appeal by the defendant the lower Appellate Court was of opinion that the interest of the two plaintiffs were antagonistic and

(1) 16 B. 119; 8 Ind. Dec. (N. S.) 555.

(2) 26 M. 647 (F. B.).

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it held that the suit was bad for misjoinder; of parties. On second appeal to the High Court it was held that there was no misjoinder; the two plaintiffs were both jointly interested in disproving the defendant's title and their claims were in no way antagonistic and that they could, therefore, issue jointly. In the second case the widow and the adopted son of a deceased person joined together as plaintiffs and brought a suit to recover a certain sum of money payable by the defendants to the deceased. The money was undoubtedly due to one or the other of them and they were agreed that either should take it. The widow joined as plaintiff because the right of the adopted son was questioned. It was held that the suit was not bad for misjoinder of plaintiffs. It is argued by the learned Vakil for the petitioner that in the present case the plaintiff No. 2 agrees to give up his interest in favour of the plaintiff No. 1 if he succeeds in establishing his agreement, and, therefore, the interest of the two plaintiffs are not antagonistic; but that would not have given them a right to join two totally dissimilar claims in the same action. In my opinion, the right to relief claimed by the two plaintiffs is not in respect of or arising out of the same act or transaction, nor is there any common question of law or fact arising out of the separate claims of the two plaintiffs and, therefore, the joinder of the two plaintiffs and their causes of action in the present case is not authorised by the provisions of O. I, r. 1, or any other provision of the Code of Civil Procedure.

Moreover, the present application is made against an interlocutory order passed by the Subordinate Judge, and it is settled law that the High Court will not interfere in revision with such orders unless some irreparable injury is caused to any party thereby. Here, we are informed that the plaintiff No. 2 has paid no Court-fee upon the reliefs claimed by him and there is no irreparable injury caused to any party by the order passed by the learned Subordinate Judge.

The application is, therefore, dismissed with costs two gold mohurs. The plaintiffs may make the election and the necessary amendment of the plaint within two weeks of the arrival of the record in the Court below, failing which the suit shall stand dismissed.

Mullick, J.—In my opinion the frame of the suit is bad, both under O. I, r. 3 and O. II, r. 3 of the Civil Procedure Code. I am also of opinion that this Court cannot interfere in this case in exercise of its powers of revision, and that no case has been made out for the exercise of our powers of superintendence.

Z. K.

Application dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL No. 8 OF 1921.

July 14, 1922.

Present:—Mr. Ashworth, J. C., and Mr. Simson, A. J. C.

NAGESHWAR PRASAD—APPELLANT
versus

JAI NARAYAN AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908); O. IX, r. 9, application of—Execution application, dismissal of—Restoration.

O. IX, r. 9 of the Civil Procedure Code has no application to execution proceedings. Execution applications are practically never restored, the reason is, that fresh applications can be filed. [p. 74, col. 1.]

Mr. W. Wasim, for the Appellant.

Mr. S. N. Roy for Respondents Nos. 1, 4, 7, 11.

JUDGMENT.—This is an appeal from an order re-transmitting a decree for sale of ancestral property to the Collector for execution. The decree had originally been transmitted to the Collector for execution on the 18th January 1917. Subsequently, it transpired that Walayat Husain, one of the judgment-debtors, had died and Basdeo, one of the decree-holders, was also dead. The Collector sent the papers back for necessary action with a report of these two deaths. The Court in charge of the execution proceeding issued notice to Hashmat Ali to show cause why his name should not be substituted in place of Walayat Husain, deceased. The date fixed was 3rd September 1920. On that day Hashmat Ali's summons was

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returned unserved. The decree-holder was ordered to file his correct address and 16th November 1920 was fixed. Between these two dates, on 13th September 1920, the decree-holder put in an application in which he said that the heir of Walayat Hussain was Hashmat Ali and that Hashmat Ali's name was already arrayed among the judgment-debtors. Upon this application an order dated 29th October 1920 was passed that Walayat Hussain's name was to be struck off and that the decree-holder was to amend the execution application. The case was then put up on 16th November 1920. There was no appearance for the decree-holder; the judgment-debtors also were not present. The execution application was struck off in default. That order was proper.

Under the order of 3rd September 1920 the decree-holder had been directed to file a correct address and process-fee for giving notice to Hashmat Ali. He had never been excused from this. Under the order dated 29th October 1920 he had been directed to amend the execution application. No doubt, the amendment in such cases should be made by the Court itself, but before making the amendment the Court was entitled to be satisfied that Hashmat Ali was in fact the heir of Walayat Husain.

When this case went back on remand evidence was given that Walayat Husain in fact left a son who is heir. The decree-holders' Counsel says that he was under the impression that the order dated 29th October 1920 was an order which in some way excused him from making an appearance on 16th November 1920. He also says that he did not communicate with his client. We see no justification for his omission. Later on, application was made for transmitting the decree again to the Collector and this application was granted by the Subordinate Judge. That order was appealed against to this Court on the ground that it was without jurisdiction, and the case was remanded, with a direction to the learned Subordinate Judge to determine, after taking such evidence as the parties may adduce, whether there was any sufficient reason for the revival asked for.

It is to be borne in mind that O. IX, r. 9, Civil Procedure Code, has no application to execution proceedings. Execution applications are practically never restored, the reason is that fresh applications can be filed. In the order of remand it was said: "At least as strong grounds would be required to justify an application under section 151, Civil Procedure Code, as would be required on an application for review."

The only ground set up here is that Hashmat Ali, the alleged heir of Walayat Hussain, was already a party to the execution proceeding so that nothing was required to be done beyond the striking off of Walayat Husain's name. But as we have shown the Court was bound to satisfy itself that Hashmat Ali was the heir (which indeed it was not); and the application was rightly struck off for the non-appearance of the decree-holders. This being so, there was no ground for restoring the application.

We allow the appeal, set aside the order transmitting the execution to the Collector and we restore the order dated 16th November 1920 under which the application for execution was struck off. The respondents will pay costs of the appellant.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 171 OF 1922.

AND

APPEAL AGAINST APPELLATE ORDER

No. 37 OF 1922.

January 22, 1923.

Present :—Justice Sir Francis Oldfield, Kt.,
and Mr. Justice Venkatasubba Rao.

LAKSHMINARAYANA AIYAR—

APPELLANT

versus

C. R. SUBRAMANIYA AIYAR, THE
OFFICIAL RECEIVER, TANJORE

—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 10, 24-(1)(a), proviso, 35—jurisdiction of District Court—Residence, what amounts to—'Unable to pay his debts,' meaning of.

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A debtor who remains within the limits of the jurisdiction of a District Court is resident therein and is entitled to present an application to that Court to adjudicate him an insolvent although he has no permanent or continuous residence within the District and may have even occasionally gone outside the District and returned. [p. 76, col. 1.]

Kumud Nath Roy Chaudhry v. Jatindra Nath Chaudhry, 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399, referred to.

Where all the properties of a debtor are under attachment to a creditor and his petition for permission to execute a private sale of the properties is negatived, the mere fact that there is an apparent surplus of assets over the gross debts does not prove that the debtor is not unable to pay his debts within the meaning of section 10 of the Provincial Insolvency Act. [p. 76, col. 1.]

Under the proviso to section 24 (1) (a) of the Provincial Insolvency Act, a debtor is required to furnish only *prima facie* proof of the fact that he is unable to pay his debts for the purpose of being adjudicated insolvent. [p. 76, col. 1.]

Appeal against an order, dated the 12th December 1921, of the District Court of West Tanjore, in I. A. No. 220 of 1921 in I. A. No. 42 of 1920.

Appeal against an order, dated the 22nd December 1921, of the District Court of West Tanjore, in Appeal Suit No. 128 of 1921, preferred against an order of the Court of the Subordinate Judge, Kumbakonam, in E. A. No. 973 of 1920 in O. S. No. 63 of 1918.

Mr. K. Bhaskyam Iyengar, for the Appellant.

Mr. T. R. Venkatrama Sastiar, for the Respondent.

JUDGMENT.

A. A. O. No. 171 of 1922.

This is an appeal against an order by the District Judge of Tanjore West annulling the adjudication of the appellant-debtor under section 35, Provincial Insolvency Act. The lower Court has given two reasons for its orders. First, that the debtor was not resident on the date of the presentation of the petition within its jurisdiction; secondly, that he was not proved to be, as section 10 requires, unable to pay his debts.

As regards the question raised by each of these grounds of decision, it must be pointed out that the amount of proof which can be expected of the debtor, the burden undoubtedly being on him, will vary very greatly with reference to the circumstances of the case.

Here the debtor throughout has alleged that he was, at the date of the petition, a resident in West Tanjore District, and there is the verified statement in his petition to that effect and also a counter-affidavit filed in the present proceedings in the lower Court. It is further not shown that he was cross-examined in any way on his allegations. Against that, there is only the fact that the present respondent, first creditor, did not actually deny the residence in the District and has never said where, in his opinion, the debtor in fact resides, but only in his petition under section 35 put the debtor to proof of his residence in the following terms: "The alleged insolvent has not given *prima facie* proof of his right to present the petition or that the District Court has jurisdiction to entertain the same." The contentions of the opposing creditor being thus indefinite, in our opinion, it was not necessary for the lower Court to complain of the absence of additional affirmative evidence on the part of the debtor. It in fact proceeded mainly with reference to the returns on certain processes addressed to it. There is, first, the return dated January 1920, that he was not to be found in his house at Tirupapuliyar, South Arcot District, because he had left it for a place in West Tanjore. That return, however, so far as it is evidence on the material point, the debtor's possession of a house and residence in Tirupapuliyar, does not necessarily involve more than that the process-server adopted for his purpose, the assertion of the present respondent, at whose instance the process was issued, that the debtor was residing in Tirupapuliyar, and further this piece of evidence, so far as it is admissible, relates to a date 8 months before the date of the presentation of the debtor's petition. Next, reference has been made by the lower Court to the fact that, when another notice was sent on 25th March 1920, the return was that the debtor had gone away and his whereabouts were unknown. There is also the fact that the insolvent in his counter-petition in these proceedings gave his address as Kuttalam in the Mayawaram Taluk. That is no doubt just outside the border of the West Tanjore District, but it is very near to the adjoining border of East Tanjore District. We have been referred to

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definitions of "residence" adopted by two learned Judges of the Calcutta High Court for the purpose of construction of O. IX, Civil Procedure Code, in *Kumud Nath Roy Chaulhry v. Jatindra Nath Chaulhry* (1). But we are not prepared to adopt those definitions as exhaustive. We can quite understand that a person, especially a person in the financial position of the debtor, may not have any permanent or continuous residence. It is, in our opinion, sufficient that we have no reason for doubting that he has remained, as he said, within the limits of the District of West Tanjore, though he may have occasionally gone outside the District and returned to it. It should be said that the debtor in the lower Court and in his ground of appeal here was foolish enough to rely on a case of residence in a house in Kuttalam, which belonged to him and which he had let to somebody else. That he has given a bad reason in support of his contention does not debar us from holding that it is sufficiently supported otherwise by his own statement in his petition and his counter-affidavit, which has not been shown to be incorrect.

Turning to the second ground on which the lower Court annulled the adjudication that the debtor was not proved to be unable to pay his debts, we refer to the proviso to section 24 (1) (a), Provincial Insolvency Act, as showing that the debtor can, for the present purpose, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing his allegation. The facts as set out in his petition, and those facts were not disputed in the lower Court and are not disputed here, are that his debts amount to over Rs. 40,000 and his assets to over Rs. 51,000. No doubt, there is, on these figures, a balance of about Rs. 8,000 in his favour. But he has contended further that, all his property being under attachment by the second respondent and his petition for permission to execute a private sale of the properties having been practically negatived, the surplus of assets over debts is only apparent. We have not been given the exact terms of the proposal for a private sale or of the order of the Court rejecting it. It is, however, sufficient that

the properties are under attachment and presumably would be sold and that it is accordingly not possible for the debtor to realize the price himself or to use them for the payment of his debts.

There is, next, the material consideration that the realisation by the debtor under pressure or by the Official Receiver or otherwise by the Court by public sale is not likely to be advantageous and it is even less likely to result in the property fetching a fair price. That is the common experience of private sales under pressure and of Court sales. It is, of course, impossible to say with any accuracy how for the price which would be realized in these circumstances, would be less than the fair value of the properties, if realized with reference to ordinary considerations. It is not, in our opinion, clear that the margin between what, it is not disputed, would be the fair value of the properties and the debts will not be wiped out in the course of an immediate realization. There is enough in the undisputed allegations of the debtor as to his circumstances to satisfy the requirements of the provision of law already referred to, and there is nothing in evidence on the other side. We, therefore, must dissent from the lower Appellate Court's conclusion that the debtor has failed to prove inability to pay his debts.

These findings entail the success of the appeal and the setting aside of the lower Court's order with costs throughout. The cases will go back to the Official Receiver who will proceed with the administration of the estate.

A. A. A. O. No. 37 of 1922.

The order annulling the adjudication of the present appellant debtor having been set aside, we must set aside the decision of the lower Appellate Court in Appeal against Appellate Order No. 37 of 1922 and remand the appeal to it for disposal in the merits.

Costs to date will be costs in the cause and be provided for in the order to be passed.

V. N. V.

Cases remanded.

(1) 9 Ind. Cas. 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399.

SATISH CHANDRA BISWAS v. NILMADHAB SAHA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.

219 OF 1919.

August 10, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Rankin.SATISH CHANDRA BISWAS AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

NIL, MADHAB SAHA AND OTHERS

PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50, presumption under—Rent receipts for twenty years, production of, whether necessary.

Under section 50 of the Bengal Tenancy Act what has to be established is, not that rent has been actually paid at a uniform rate during twenty years, but that the tenant has held *at a* rate of rent which has not been changed during twenty years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the twenty years.

Mohini Kanta Saha v. Preo Nath Neogy, 67 Ind. Cas. 381; 35 C. L. J. 309; (1922) A. I. R. (C) 141; 49 C. 661, followed.

To entitle a tenant to the benefit of the presumption embodied in section 50 of the Bengal Tenancy Act, it is not necessary for him to produce receipts for a continuous series of twenty years. If some of the receipts are missing uniform payment may be proved for the wanting years by other proof and from surrounding circumstances.

Kattyani Debea v. Soonduree Debea, 2 W. R. Act X Rul. 60, *Elahae Buksh v. Roopun Teles*, 7 W. R. 284, followed.

Appeal against a decree of the District Judge, Nadia, dated the 18th May 1918, affirming that of the Revenue Officer, Krishnagar, dated the 14th December 1916.

Babu Mohendra Nath Roy (with him Babu Barnashi Bashi Mukherjee), for the Appellants:—The defendants are the appellants. The appeal arises out of a proceeding under section 105 of the Bengal Tenancy Act. We were recorded as settled *raiya*s. The first Court considered a number of rent receipts from 1886 downwards for more than 20 years showing a uniform rate of rent. It held that we were not entitled to a presumption under section 50 of the Bengal Tenancy Act. On appeal the same view has been held by the Court of Appeal below on the ground that it is necessary to produce rent receipts for 20 consecutive years prior to the suit to entitle the tenant to the

benefit of the presumption. I submit that view is clearly wrong. See *Mohini Kanta Saha v. Preo Nath Neogy* (1).

Babu Ram Chandra Mazumdar (with him Babus Amarendra Nath Bose and Upendra Narain Bagchi), for the Respondents.—The appeal is concluded by findings of fact although they may be grossly wrong. The Courts below have doubted the genuineness of all the rent receipts produced. I submit, under such circumstances, and for the reasons assigned by the Courts below, it is clear that the presumption under section 50 would not apply.

JUDGMENT.—This is an appeal by the tenants in a proceeding instituted by their landlords under section 105, Bengal Tenancy Act, for assessment of fair and equitable rents in respect of the lands in their possession. The question in controversy is as to the status of the tenants. They were recorded as settled *raiya*s in the finally published Record of Rights. The landlords thereupon instituted the present suit for settlement of fair and equitable rent. The tenants contended that they were *raiya*s at fixed rent. In order to establish their allegation, they relied upon the presumption embodied in section 50, sub-section (2), of the Bengal Tenancy Act, which provides that if it is proved in any proceeding under the Act that either a tenure holder or *raiya* and his predecessors-in-interest have held, at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the proceedings, it shall be presumed until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. On establishment of this presumption, sub-section (1), the *raiya* becomes entitled under section 50 (1) to protection from enhancement of rent. The tenants produced rent receipts from 1885 to 1895 and from 1904 to 1911 in order to show that they held the tenancy at the uniform of rent of Rs. 13-13-13 *gds*. The Settlement Officer held that as no receipts were produced for the years 1896 to 1903 the tenants were not entitled to the benefit of the presumption. In his

(1) 67 Ind. Cas. 381; 35 C. L. J. 309; (1922) A. I. R. (C) 141; 49 C. 661.

SATISH CHANDRA BISWAS V. NILMADHAB SAHA.

opinion, it is necessary to produce rent receipts for 20 consecutive years antecedent to the suit, to entitle the tenant to the benefit of the presumption. On appeal the Special Judge has adopted the same view of the law. He has, however, stated in his judgment that the receipt produced for the year 1890 was suspicious and he has added that the genuineness of the receipt from 1885 to 1889 was doubtful. The reason assigned by the Special Judge for his conclusion that the receipt produced for the year 1890 was suspicious has been criticised in this Court, and it has been pointed out that, although the receipt bears on the face of it the figures "1269" instead of "1297" in writing, we find words which leave no doubt that the receipts were genuine. We are, however, not directly concerned with the reasons assigned by the Special Judge for his conclusion upon a question of fact. The fact remains that even if we accept the view that the receipt for 1890 was suspicious and that the receipts for 1885 to 1889 were of doubtful genuineness, still we have receipts from 1904 to 1911. A period of 20 years intervenes between the earliest and the latest of these receipts. Consequently, the question cannot be avoided whether it is necessary for a tenant to produce receipts for a continuous series of 20 years to entitle him to the benefit of the presumption embodied in section 50. There can be no doubt that the view taken by the Courts below upon this matter is erroneous.

In the case of *Kattyani Debea v. Soondures Debea* (2) it was laid down as follows:—"It is not absolutely necessary that *dakhilas* should be for 20 consecutive years before the date of suit, for it might frequently happen that parties, with every right to the presumption, might lose one or two *dakhilas* here and there, during such a long period, and it would be manifestly unjust to deprive them of the benefit allowed by law when no suspicion could arise of misfeasance, merely because one or two of these receipts has been mislaid or lost. In the present case, the missing *dakhilas* are for years about the middle of the period, and we do not think that their non-appearance should defeat the special appellant's claim

to the presumption." The same view was affirmed in *Elahee Bukhsh v. Roopun Telee* (3) where Mr. Justice Pundit said as follows: "When receipts are filed, not for the entire period of 20 years preceding suit, but some are wanting here, and some there in that interval, still uniform payment may be proved otherwise for the wanting years by other proof, and from surrounding circumstances." This view is undoubtedly correct, upon a true interpretation of the language used by the Legislature in section 50. What was to be established is, not that rent has been actually paid at uniform rate during 20 years, but that the tenant has held at a rent or rate of rent which has not been changed during 20 years. Such holding may be established, even if it is not proved that rent has actually been paid during a portion of the 20 years. This is precisely the interpretation adopted by this Court in *Mohini Kanta Saha v. Preo Nath Neogy* (1). To return to the concrete facts of this case, assume it to be established that the rent has been paid at the rate alleged by the tenants during the year 1891 to 1895 as also during the years 1904 to 1911. It is theoretically possible that in the interval there may have been an enhancement of the rent followed by a reduction, so as to make the rent payable in 1904 identical with that paid in 1895. But it is really for the Court of fact to decide, from all the circumstances of the case, whether the principle of continuity or the principle of discontinuity should be applied. In this connection, it must be observed that it is open to the landlord to rebut such evidence as may be produced by the tenants, by the production of counter-foils of receipts and collection papers. It is clear that the case has not been considered from the right point of view by either of the Courts below.

The result is that this appeal is allowed, the decree of the lower Appellate Court is set aside and the case sent back to that Court to be re-considered. We leave it to the Special Judge to decide whether the parties should be allowed to adduce additional evidence. Costs will abide the result. We assess the hearing fee at one gold mohur.

Z. K.

Appeal allowed;
Case remanded.

ABDUL MANAN v. FAROQA.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 115-68
OF 1921.

July 3, 1922.

Present.—Mr. Pison, J. C.

ABDUL MANAN, SON OF ABDUL WAHAB
—APPELLANT

versus

Musammat FAROQA AND OTHERS—
RESPONDENTS.*Custom—Will—Muhammadzai Pathans of Charsadda Tahsil, Peshawar District—Sonless proprietor—Will in favour of daughters.*

Custom is a mere crystallisation of public opinion in matters affecting the social and economic life of a community. [p. 85, cols. 1 & 2.]

Where the practice of gift-making has established itself, the effect must be to incline public opinion favourably towards the practice of testamentary bequests, which are really in the nature of deferred gifts which are more easily revocable. [p. 80, col. 1.]

Bano v. Fateh Khan, 48 P. R. 1903; 111 P. L. R. 1903 (F. B.), referred to.

Restrictions placed upon testamentary disposition with a view to safeguarding the interests of sons have little force as presumptive evidence that a sonless proprietor is governed by similar restrictions safeguarding the interests of mere reversioners. [p. 81, col. 2.]

When the practice of Will-making establishes itself, it is the sonless proprietor who obtains the first power of bequest. [p. 81, col. 2.]

A sonless Muhammadzai proprietor of the Peshawar District is competent to bequeath the whole of his estate to his daughters, married or unmarried, in the presence of reversioners. [p. 86, col. 2.]

The history and conditions of the settlement of Pathan tribes in the different Districts of the North-West Frontier Province are widely dissimilar, and, in ascertaining the customs of the Pathans of the Peshawar District, no useful inferences can be drawn from customs obtaining in the other Districts of the Province. [p. 80, col. 2.]

Second appeal from the order of the Divisional Judge, Peshawar, dated the 28th July 1921, affirming that of the Sub-Judge, Charsadda, dated 27th May, 1920.

JUDGMENT.—The parties in this case are Muhammadzai Pathans of the Charsadda Tahsil in the Peshawar District. Fazal Rahman, a sonless proprietor, executed a Will bequeathing the whole of his estate to his four daughters, subject to a life-interest in favour of his widow. Two of

the daughters are married and two are unmarried. The nephews of the deceased proprietor sue for a declaration that it is invalid as against their reversionary rights. The question of the life-interest secured to the widow by the Will need not be further considered, inasmuch as the creation of such a life-interest is strictly in accordance with custom independently of the Will, and cannot be challenged. The question which I have to decide is, whether or not a sonless proprietor of Muhammadzai tribe is competent, by custom, to bequeath the whole of his estate to his daughters as against the interests of his reversionary heirs.

The issue may be regarded as implying two questions—(a) whether a sonless proprietor can make a Will in favour of his daughters at all, and (b) whether, if he can do so, his power is limited to a portion only of the estate, and cannot cover the whole. To arrive at a correct decision upon this issue, we have three classes of material:

(1) The Official Records of tribal custom as compiled in the *Riwajnama* of 1870 and in Lorimer's Customary Law of the Peshawar District compiled at the Settlement of 1895, and corrected by the author in 1897.

(2) Judicial precedents affecting either the Muhammadzai tribe itself, or adjoining tribes, whose customs may be presumed to be similar.

(3) Special local enquiries made during the present proceedings, I proceed to deal with the evidence derived from each.

(1) The *Riwajnama* of 1870 is actually silent as regards the practice of Will-making. But it deals with the power of proprietors to alienate by gifts. Rattigan's Digest of Customary Law, paragraph 56 (b); and *Bano v. Fateh Khan* (1) are authorities for holding that the distinction under Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only, and where power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation. This view, it is true, was challenged by Mr. Barton, Judicial Commissioner of this Province, in his published ruling,

(1) 48 P. R. 1903; 111 P. L. R. 1903 (F. B.).

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Judicial Record 78 of 1915. It may perhaps be going too far to say that power of unrestricted gift necessarily implies a power of unrestricted testation. There is no doubt that the custom of gift tends to be more prevalent than that of testamentary disposition. The most correct view is probably that taken by Mr. Barton in the ruling quoted above, where he says that, "I am prepared to admit that where the practice of gift-making has established itself, the effect must be to incline public opinion favourably towards the practice of testamentary bequests which are really in the nature of deferred gifts which are more easily revocable." The recorded custom on the subject of gifts laid down in the *Riwojnama* of 1870 is, therefore, at least relevant, though it may not be conclusive. Sections 3 and 5 of the *Riwojnama* imply that, in the absence of sons, a Muhammadzai proprietor could dispose of his entire estate to his daughters or their issue. In Mr. Lorimer's Customary Law, compiled 25 years later, the Muhammadzai representatives stated categorically that they recognized no restrictions upon the power of bequest. In this connection it may be observed that when Mr. Barton declined to follow Mr. Lorimer's Customary Law in admitting an absolutely unrestricted power of bequest, one of his main reasons for doing so was that the *Riwojnama* of 1870 did imply certain restrictions. The restrictions which he alluded to were that, in the presence of sons, a landed proprietor could gift only a part of his property to a daughter or son-in-law. But no restrictions on the power of gift by a sonless proprietor to daughters were ever stated in 1870. If the principle be accepted that a power of gift is evidence of a power of testation, it cannot be denied that both the *Riwojnama* of 1870 and the Customary Law of 1895 are unanimous in acknowledging the unrestricted power of a sonless proprietor to bequeath his estate to his daughter. The unanimity of the two records in this respect is clearly entitled to considerable weight.

2. I now turn to the question of judicial precedents. There is no judgment relating to the Muhammadzai tribe which specifically covers the question now in issue. The rulings which are relevant are of two

classes; those which, when dealing with the power of Will-making among Muhammadzais, indicate a view bearing upon the present issue, or contain *obiter dicta* relevant to it, and those which deal with the customs of adjoining tribes in this respect. There are undoubtedly special customs upon special points existing among the various Pathans tribes of the Charsadda and Peshawar Tahsils, but there is a strong presumption that their customs are substantially similar, unless some special reason for divergence can be established. I may remark, however, on this subject, that ruling relating to Pathan residents of other Districts are, in my opinion, entirely irrelevant, and are apt only to be misleading. The history and the conditions of the settlement of Pathan tribes in the five Districts of this Province are widely dissimilar, and in ascertaining the customs of the Pathans of the Peshawar District, no useful inferences can be drawn from customs obtaining in Hazara, Kohat, Bannu or Dera Ismail Khan. I must rule out absolutely the judicial precedents which relate to the latter four Districts.

In civil appeal *Risaldar Firdaus Khan v. Shah Sower*, I have recently had an occasion to discuss in some detail the recorded judicial authorities upon the practice of Will-making in the Peshawar District. That judgment is of some importance on the general question, and will shortly be published*. As I have there pointed out, it cannot be denied that there has been a certain conflict of opinion upon the subject in the highest Court of this Province, and that the present position is not altogether satisfactory. That particular case related to the Kamalzai Tappa. It had been held in Judicial Record 26 of 1905 that among Kamalzais the power of Will-making was absolutely unrestricted. The importance of that judgment lay in the fact that although it referred only to the Kamalzai Tappa with which we are not now concerned it was based largely upon two considerations (a) the weight attaching to Mr. Lorimer's Record of 1895, and (b) the general theory of what Mr. Bunbury described as the "absolutism of the Pathan ownership." For many years this ruling was followed as an

* See 69 Ind. Cas. 853—[Ed.]

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unchallenged authority in support of the unrestricted power of bequest among Pathans of the Peshawar District. Some seven years later, however, Mr. Barton, the Judicial Commissioner, upset the premises upon which his predecessor's judgment had mainly been based. The tendency of all subsequent rulings was both to discredit Mr. Lorimer's Customary Law and to impugn the theory of the absolutism of Pathan ownership. From that time onwards Courts have admitted restricted power of bequest, and the question before them for decision has been the exact extent of restrictions alleged in each particular case. The general tendency has been to disregard the statements of custom recited in Mr. Lorimer's Customary Law and to establish various restrictions based upon grounds of equity, upon inferences drawn from previous rulings, upon special enquiries, made from the members of the tribes concerned; or upon the negative evidence of the absence of actual Wills inconsistent with the alleged restrictions. Generally speaking, the earlier record of custom, the *Riwajnama* of 1870, has been, to a large extent, ignored.

I now turn to the rulings which affect the Muhammadzai tribe to which the present parties belong. In Judicial Record 14 of 1903 Mr. Bunbury laid down that among Muhammadzais the power of gift *inter vivos* was unrestricted. I have mentioned, above what I believe to be the correct view of the analogy of the power of gift as bearing upon that of bequest. The analogy is not conclusive, but it is always relevant. The only qualifications laid down in that judgment were that the gift to be valid must be embodied in a written document; and that it must be followed by the delivery of possession. It might be argued, of course, that the condition of delivery of possession is fatal to the completeness of the analogy when applied to Wills. The essential of a Will is, that it is revocable up to the death of the testator, and that possession is not transferred until his death. But it is clear that the two conditions laid down to validate a gift are not prescribed with the object of limiting in any way the donor's power, but are aimed at preventing any possibility of dispute arising. The idea clearly is that,

so long as a man is alive, he may attempt to repudiate a gift, and that it is essential that it should be put beyond his power to do so. It would be almost impossible for him to repudiate a transaction when once it had been reduced to writing and when effect had actually been given to it by the delivery of possession. In the case of a written Will, it is obvious that the danger of repudiation has come to an end when the testator has died. On the theory that the condition requiring delivery of possession is simply aimed at ensuring the irrevocability of the transaction, a Will does not require such a condition, because the testator's death equally ensures its irrevocability. There is, therefore, much to be said for the view that the unrestricted power of gift *inter vivos* in the Muhammadzai tribe laid down in Judicial Record 14 of 1903 is, if that judgment is correct, strong presumptive evidence of an equally unrestricted power of Will. As against this, we have the very important ruling of Mr. Barton, published as Judicial Record 62 of 1912, which laid down that, among Muhammadzais, a proprietor had not power to Will away his entire estate to his widow to the exclusion of his sons. There had been a previous ruling of the same Judicial Commissioner, published as No. 59 of 1912, which held that in the Kamalzai tribe minor sons could not be disinherited. This last ruling is one of several authorities for the view that, when the practice of Will making establishes itself, it is the sonless proprietor who obtains the first power of bequest. It is important to keep this principle in mind; and to remember that restrictions placed upon testamentary disposition, with a view to safeguarding the interests of sons, have little force as presumptive evidence that a sonless proprietor is governed by similar restrictions safeguarding the interests of mere reversoners. It will be as well, however, before dealing in detail with precedents which relate to other tribes, to summarise first those which relate to the Muhammadzai tribe with which we are now concerned. There is an unpublished ruling by Mr. Barton, No. 6 of 1916, which deals with a case in which a proprietor had made a Will providing the devolution of his property in accordance with the shares which they

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would have received under Muhammadan Law. The testator's son sued to upset the Will as the sole heir under custom. It was held that the son could not be said to be disinherited, and the bequest in favour of a daughter was upheld on the ground that bequest should be allowed to dependents or near relatives of the testator up to a reasonable limit. The term "dependent," and the qualifications of a reasonable limit are, as will be shown below, of considerable importance as affecting subsequent judicial rulings. In 1919 a case, where a sonless Muhammadzai proprietor had bequeathed his whole property to two widows to the exclusion of his collaterals, came before the Divisional Court (*Faqir v. Mussammatt Shamso* Civil Appeal No. 219 of 1918) the Divisional Judge, quoting an unpublished Revision (No. 51 of 1917) as authority, held that a sonless Muhammadzai proprietor could only dispose of a *portion* of his estate, and could not disinherit distant collaterals. The value of this judgment, as a precedent, is not very great, as it was not fought out in the Judicial Commissioner's Court, where it was compromised. So far as the above rulings go, and the same thing will be apparent from precedents relating to other tribes, the power of a sonless proprietor to make a bequest in favour of his daughters is established, and the real question is whether that power is limited to a portion only of the estate, and whether any restrictions are involved.

Rulings relating to neighbouring tribes are naturally of considerable importance. One of the earliest rulings is *Kalandar Khan v. Ataullah* (2) which laid down that among Khalils a Will in favour of daughters could not be upset by collaterals in the fourth degree. Judicial Record 17 of 1903 deals with the question of a gift made by a sonless proprietor of the Daudzai tribe. The more important case, however, was a simultaneous one in which the ruling was not published, dealing with the question of the validity of the Will by the same proprietor in favour of his widow and daughters. The unpublished ruling in question is No. 49 of 1903 by Mr. Bunbury. Its

importance lies in the fact that the reversioners, who were attacking the result of the Will, never contended in their pleadings that the testator was incompetent by custom to make such a Will. On the contrary, they attempted to set up a rival Will in their own favour. The fact is almost startling when we find, some thirteen years later, that the competency of a sonless proprietor to make a Will in favour of a widow and daughters was successfully challenged. It is difficult to understand why in 1903 the reversioners should have omitted a plea which, if the subsequent view of the Courts be correct, was by far their most potent weapon. The Daudzai tribe adjoins the Muhammadzai, and there is a presumption that their customs are parallel, or rather, as I shall show below, that the Muhammadzais have even wider powers than the Daudzais in this respect. I have already alluded to Judicial Record 26 of 1903 which laid down an unrestricted power of bequest among Kamalzais. There is no necessary presumption that the customs of the Muhammadzais and Kamalzais are parallel, but, as I have shown above, the importance of that ruling lay in the fact that it was based upon a general theory of the character of testamentary power among *Pathans* of the Peshawar District. The ruling published as Judicial Record 50 of 1910 which relates to the testamentary competency of a sonless proprietor in the Khalil tribe deserves only a passing reference. The question before the Court was whether, when the legatee under the Will had also died sonless, the reversioners of the original testator were entitled to oust the beneficiaries under the legatee's Will. The curious feature of that case was that the competency of the original testator was not denied, and that, nevertheless, the learned Judicial Commissioner eventually found that it was operative, only to the extent of one-third, i.e., that fraction allowed by strict Muhammadan Law. That ruling has never been followed, and, as pointed out by Mr. Barton in a latter ruling, Judicial Record 87, it really amounted to a compromise.

In Judicial Record No. 66 of 1913 Mr. Barton dealt with a case in which a sonless

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Daudzai proprietor had made a Will in favour of his daughter and step-mother. The Will was set aside as regards the step-mother but upheld in favour of the daughter. This was the first occasion on which the principle was definitely laid down that a Will ordinarily was only valid when in favour of dependents and near relatives of the testator, and these were then defined as sons, daughters, sons-in-law and wives. The grounds on which the finding was based may be summarised as follows:—(1) The history of the genesis of Will-making was regarded as fatal to the theory of the absolutism of *Pathan* ownership. (2) In the case of Wills, as opposed to sales and mortgages, the influence of family opinion must be reckoned with where a disposition of property affects reversionary rights. Public opinion, it is stated, would stigmatise the free exercise of the practice of Will-making. (3) The Daudzais, unlike the Muhammadzais and others, did not, in 1895, assert an unrestricted power of Will-making but referred Wills to the test of Muhammadan Law. (4) Enquiry showed that in some forty-two years there had only been six Wills in the Daudzai tract, and they had not conformed to Muhammadan Law. (5) The conditions of a valid Will were not easy to ascertain, but the power being restricted and Muhammadan Law not being followed, the only conclusion to be safely drawn was that Wills were only valid when in favour of dependents or near relatives. I have dealt with the above case at some length, because it was the basis for the ruling quoted above (Civil Appeal No. 6 of 1916 unpublished) which relates to Muhammadzais, and directly bears upon the case now before me. In Civil Appeal No. 6 of 1916, Mr. Barton went on to hold that among Muhammadzais also, a bequest should only be allowed when in favour of dependents or near relatives, and then only up to a reasonable limit. But I am constrained to remark that the extension of the principle from the Daudzai to Muhammadzai tribe seems hardly justified when the ground for applying it, in the first instance, to the Daudzais are closely examined. Of those grounds which are recited in detail above, Nos. 3 and 4 are peculiar to the Daudzai tribe, No. 3 in particular would justify

a contrary rather than a similar inference as regards Muhammadzais. Unlike the Daudzais, Muhammadzais in 1895 did assert an unrestricted power of bequest. The other grounds are merely in the nature of general assumptions than facts based upon evidence. The greatest weight is naturally to be attached to my learned predecessor's authority and experience, but his dictum that public opinion would stigmatise the free exercise of the power of Will-making is really no more than personal observation. When applied to the Muhammadzai tribe, it is to a large extent contrary to our records of Muhammadzai public opinion as shown in 1870, in 1895, and also in 1921, when (as I shall show later) a special inquiry was made in the present suit. I may further add that the restrictions laid down for special reasons for the Daudzai tribe were not only adopted in their entirety for the Muhammadzais, but were actually extended, the condition of "reasonable limit" being added. This condition was possibly implied in Judicial Record No. 66 but was certainly not specifically stated. There had, however, been an intermediate ruling, Judicial Record 78 of 1915, which held that among Awaras of the Khalsa tract only a small portion of an estate could be bequeathed to a distant relative as against sons and grandsons. The particular Will dealt with was upheld in that case as "not altogether unfair." In an unpublished ruling (Civil Appeals Nos. 37 and 40 of 1918) relating to a Will in favour of daughters and a widow, to the exclusion of sons and grandsons, Mr. Barton reiterated the principle that bequests were only valid when reasonable and when in favour of dependents and widows. But he extended the restriction by excluding married daughters from the benefit of bequests. No reasons are given for the distinction made between married and unmarried daughters. It must be presumed that the distinction rests on the theory that married daughters are "not dependents." This ruling was followed by Mr. Rennie in an unpublished ruling (Civil Appeal No. 8 of 1920) which related to Daudzais, and accepted as established principles (1) that only a fraction of the estate could be bequeathed and (2) that married daughters were not dependents. A Will in favour of married daughters

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in that case was set aside in its entirety. In a later case (Civil Revision No. 52 of 1920 unpublished) relating to the Khalil tribe it was held by the same Judge that, where the whole estate had been willed to a sister-in-law and sisters, the bequest to the sisters was invalid on the grounds that it was not a reasonable portion, and that sisters were not dependents. Now, with the greatest respect for the authority of my predecessors, I cannot help thinking that the two restrictions accepted by them (a) that only a small portion or "reasonable" portion can be bequeathed, and (b) that while unmarried daughters may receive a bequest, married daughters cannot; both rest on the very slenderest foundation. Restriction (a) was based primarily on a finding which related only to the Daudzai tribe, which had asserted, unlike others, that conformity to Muhammadan Law was the test of the validity of Wills. Yet this precedent was followed as binding upon other tribes who had never suggested the existence of such a test. When the rulings in this respect relating to other tribes are closely examined, no other ground for the findings is apparent except the existence of that obviously inapplicable precedent, and general considerations of equity. Small bequests have been allowed because, *inter alia*, they are not inequitable. Though this equitable consideration was only one ground for validating a particular Will, it was assumed, I think, almost hastily, that bequests of more than small portions were conversely invalid. This converse proposition was not nearly a justifiable inference, and, though a Court may reasonably consider the question of equity when dealing with a particular case, it is, in my opinion, exceeding its legitimate functions when it assumes that that principle of equity qualifies the custom in all other cases and that it must be regarded as an integral feature of the custom itself. As regards restriction (b), which disqualified married daughters from benefiting under a Will, I have some difficulty in understanding how the conclusion was arrived at. It appears simply to be based upon a somewhat meticulous interpretation of the word "dependent." Now, the word dependent was not originally introduced upon any real evidence of custom, but simply to explain the general theory that a proprietor,

whose power would be otherwise restricted, should be equitably allowed to make bequests in favour of those who were near and dear to him. The expression first used was "dependents or near relatives," and it is a little difficult to see why daughters have now been given the character of dependents to the extent of disqualifying them, if they cannot be actually dependents. I can see nothing to justify this amplification of the original theory. As I have already pointed out, it seems to depend upon the strict interpretation of a mere expression used somewhat vaguely and loosely in the first instance. Further, the theory that unmarried daughters have a status entirely different from married daughters as regards bequests, seems to me, when closely examined to rest upon a fallacy. The idea presumably is that when a daughter is married, she ceases to be dependent for her maintenance upon her father. But this fact can hardly be relevant unless such bequests were conditional or implied the creation of a limited interest expiring at death or re-marriage. The bequests with which we are dealing are in no way of this character. It has never been suggested that they are anything but out and out bequests, conferring an absolute title upon the beneficiaries. If it is assumed that a distinction exists between the status of married and unmarried daughters, we may reasonably ask the question, what would happen if an unmarried daughter was to marry after the date of the Will, but before the testator's death? Would she lose the bequest because she had meanwhile married? It could hardly be argued that she would lose it, inasmuch as the bequest is simply one to her personally and is not in any way conditional upon her retaining the status of an unmarried daughter. Or, again, a daughter might marry after she had actually inherited on the testator's death. Could it be argued that she would have, on marriage, to relinquish the estate which she had already obtained? Certainly, this could not be argued for a moment unless the Will laid down expressly or by implication that the bequest should be null and void in the event of marriage. It does not seem to have been suggested in any of the cases, where unmarried daughters have been allowed to take under a Will, that they have been given a

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limited and not an absolute interest. To my mind, it is perfectly clear that the distinction laid down in these precedents rests really upon no foundation. It is based either upon general considerations of equity which represents only a personal opinion, however weighty, or upon an incorrect inference drawn from the interpretation of "dependent," when the use of that term itself had no sound justification.

Before leaving the question of judicial precedents, I may remark, though the question as regards this case is perhaps of academic interest only, that in Judicial Record 98 of 1917 Mr. Barton finally overruled Judicial Record No. 26 of 1903, and held that the testamentary power of a Kamalzai proprietor was subject to the restriction that he could not disinherit minor sons, or adult sons except for disloyalty. I say that the question is here of academic interest only, inasmuch as we are now concerned with the power of a sonless proprietor as against the interest of collaterals. As I have already pointed out, a restriction in favour of sons is not authority for applying similar restrictions in case of reversioners, and we have good authority for the view that when the practice of Will-making establishes itself, it is the sonless proprietor who obtains freedom first.

3. There remains the material to be gathered from the special inquiry made in 1921 in the present case. The enquiry was made by the Assistant Commissioner of the Charsadda Sub-Division, an officer who had naturally special opportunities for ascertaining the feeling of the Muhammadzai tribe, and of estimating the relative importance of opinions which were expressed. That enquiry shows definitely to my mind that there is, among the leaders of the tribe and among those members who were not personally interested in the present case, an overwhelming opinion that a sonless Muhammadzai proprietor is perfectly free to will away the whole of his estate to his daughters. It is often argued in such cases that the opinions of the leading members of the tribe are apt to represent rather what they consider that the custom should be than what it actually is. But these opinions cannot, possibly be disregarded, and, as Mr. Barton remarked in Judicial Record No. 66, "custom

is a mere crystallization of public opinion in matters affecting the social and economic life of a community." The statement of custom now put forward carries enhanced weight by the fact that it is directly in accordance with that which the leading members of the same tribe put forward by implication in 1870, and categorically in 1895.

It is possible now to review as a whole the evidence which we have as material for deciding the present case. I consider that it completely establishes the theory that a sonless Muhammadzai proprietor has an absolutely unrestricted power to will away the whole of his estate, if he wishes, to daughters whether married or unmarried. I am even inclined to think that we have no real evidence of any restriction upon the powers of a Muhammadzai proprietor except those now firmly established which prohibit him from disinheriting his minor sons, or his adult sons on grounds other than disloyalty. If judicial precedents alone are considered, I have already pointed out that the theory that bequests to daughters are limited to a small or reasonable portion of the estate and that married daughters cannot receive bequests at all, is based upon what I consider to be an unwarranted inference and an unsound line of argument. In saying this I do not wish to detract from the weight and authority which attaches to the interesting analysis of the history and genesis of Will-making so ably expounded by my learned predecessor Mr. Barton. That analysis forms undoubtedly a most important contribution to the case-law on the subject. Further, the restrictions which he evolved upon the power of a Pathan proprietor as regards the disinheritance of sons, are now fully established, and have remained practically unchallenged. There can be no doubt that the general view of Pathan ownership taken in Judicial Record No. 26 of 1903 was too wide, and its amendment was justified fully by the results of special inquiries, by instances and illustrations, and by the continued acceptance, by the members of the tribes, of the protection of the interests of sons. To extend that protection to the interests of mere reversioners is, I think, to emphasise only one side of

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the theory of Pathan Will-making. It has been argued that sons are protected, because a tribe, prior to the advent of British rule, could hardly tolerate the introduction of women or of outsiders. As a matter of fact, I am now inclined to think that Mr. Barton went perhaps rather far in saying, that the practice of Will-making could not have existed at all before the advent of British rule. In any case, the protection of the interests of sons is clearly to be attributed also to another consideration. A father has, towards his own flesh and blood, a natural and moral duty, which does not extend to collaterals. To allow a father to disinherit his own sons for trivial or futile reasons may be to open the door to the destruction of family life, and to its invasion by intrigue and undue influence. I am unable to see that restrictions against the disinheritance of sons raise, in themselves, any presumption that reversioners must be similarly protected. To assume that it does is to ignore even the principle enunciated by Mr. Barton that sonless proprietors are the first persons to obtain the right of Will-making. It appears to me that in every case, where Courts have restricted testamentary bequests in the interests of reversioners, there has been a complete absence of real evidence, and that too much weight has been allowed to purely personal views upon what appears equitable, and what seems to harmonize with a preconceived idea of Pathan sentiment. In other words, custom has been interpreted more by a view of what it ought to be than what it is. I regard as extremely important the case referred to above where, in 1903, reversioners attacking a Will which excluded them in favour of daughters could not deny the validity of the Will, and were driven to set up an imaginary rival Will in their own favour. One might almost be inclined to infer that in 1903 the Pathan public hardly imagined that it was possible for reversioners to challenge the power of a testator to bequeath to his daughters, and that the practice of challenging their power arose out of nothing more than the prevalent idea that Courts had adopted a new policy towards Wills and that they now looked favourably upon the extension of restrictions on

bequests. Again, when we come to the evidence of the tribesmen themselves we find that they speak, and always have spoken, with no uncertain voice. It is almost startling to observe that on every occasion on which the tribe has been consulted in 1870, in 1895 and in 1921, their exposition of their own custom has been exactly the same. It is impossible to over estimate the value of this evidence, and it is not in the least upset by the merely negative evidence of any lack of instances of unrestricted bequests. In fact, it may almost be said that when a tribe, as a whole, publicly enunciates the theory that the power of bequest is unrestricted, it does so, because it is aware that this power has not been abused in the past and will not be abused in the future. The infrequency of its exercise is, in my opinion, no bar whatever to its existence. I have already stated that I am inclined to think that no restriction exists upon the testamentary power of a Muhammadzai proprietor except that which prohibits, in certain circumstances, the disinheritance of sons. This wider question, however, is not at issue in the present suit, and the above can only be regarded as an *obiter dictum*. For the purposes of this suit I hold that a sonless Muhammadzai proprietor is competent to bequeath the whole of his estate to his daughters, married or unmarried, and I, therefore, agree with the two Courts below that the present suit must fail. I dismiss this appeal with costs.

Z. K.

Appeal dismissed.

NADUVIL EDOM KARNAVAN-V. CHERIYA PARVATHI NETHIYAR.

MADRAS HIGH COURT.**FULL BENCH.**SECOND CIVIL APPEALS NOS. 286 AND 287
OF 1920.

January 13, 1923.

Présent.—Sir Walter Schwabe, Kt.,
Chief Justice, Justice Sir Francis Oldfield,
Kt., and Mr. Justice Coutts-Trotter.

IN S. A. NO. 286 OF 1920.

NADUVIL EDOM KARNAVAN, AND AN-
OTHER—DEFENDANT NO. 15—APPELLANTS
versus.CHERIYA PARVATHI NETHIYAR, AND
OTHERS—PLAINTIFFS NOS. 3 TO 23. AND
DEFENDANTS NOS. 3 TO 10—

RESPONDENTS.

IN S. A. NO. 287 OF 1920.

MEENAKSHI NETHIAR AMMA—
DEFENDANT NO. 14—APPELLANT*versus*CHERIYA PARVATHI NETHIAR AND
OTHERS—PLAINTIFFS NOS. 3 TO 23. AND
DEFENDANTS NOS. 11 TO 13. AND 15.

—RESPONDENTS.

*Suits Valuation Act (VII of 1887), s. 11—Ob-
jection as to valuation—Trial Court exceeding juris-
diction—Change of forum of appeal, effect of—
“Appellate Court,” what is.*Under section 11 of the Suits Valuation Act,
the disposal of a suit cannot be deemed to have
been prejudicially affected on the merits, merely
because of a change of the *forum* of appeal con-
sequent upon the under-valuation. [p. 95, cols.
1 & 2.]*Raghava Chariar v. Raghava Chariar*, 8 Ind. Cas.
545; 20 M. L. J. 726; 8 M. L. T. 404.
Narayani Ammal v. Secretary of State, 41 Ind. Cas.
167, *Ammalu Ammal v. Krishnan Nair*, 62 Ind.
Cas. 715; 30 M. L. T. 38, followed.*Mohini Mohan Misser v. Gour Chandra Rai*,
56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2
U. P. L. R. (Pat.) 123; (1921) Pat. 105, dissented
from.Section 11 of the Suits Valuation Act when re-
ferring to an under-valuation or over-valuation “pre-
judicially affecting the disposal of a suit or appeal
on its merits” is not considering at all the different
rules of procedure that there may be an appeal
from one Court to another. [p. 95, col. 1]The mere fact of under-valuation of a suit by the
plaintiff involving a trial by a District Munsif
instead of by a Sub-Judge's Court cannot be
deemed to be “prejudice” within the meaning of
section 11 of the Suits Valuation Act to the unsuc-
cessful party on account of the party being re-
stricted to a right of second appeal to the High
Court on questions of law only instead of a regular
appeal on questions of facts also. [p. 95, col. 1.]*Per Coutts Trotter, J.*—The object of section 11 of
the Suits Valuation Act is to provide a machinery
for curing the original lack of jurisdiction. Theexpression “Court of first instance” in sub-section
(1) (a) of section 11 means not the Court in which
the suit ought to have been started but the Court
in which it was in fact started. Similarly, the ex-
pression “Appellate Court” in sub-section 1 (b)
of the section means not the Court in which the
appeal should have been started in the first instance,
but the Court to which it did in fact go and ought
to have gone, if the lack of jurisdiction were to be
condoned. [p. 95, col. 2; p. 96, col. 1.]Second appeals against decrees of the
District Court, South Malabar at Calicut,
in Appeals Nos. 25 and 24 of 1918, respective-
ly, preferred against the decree of the Court
of the District Munsif, Alatur, in Original
Suit No. 328 of 1916.These second appeals came on for hearing
on the 3rd and 9th November 1922. Upon
perusing the grounds of appeal, the judg-
ments and decrees of the lower Appellate
Court and the Court of first instance and
the material papers in the suit and upon
hearing the arguments of Mr. K. V. Madha-
van Nayar, permitted to appear for Mr.
K. P. M. Menon, for the Appel-
lant; and of Mr. C. Madhavan Nayar,
for the Respondents on the 23rd
November 1922 the Court (Oldfield and
Devadoss, JJ.), made the following**ORDER OF REFERENCE TO A FULL
BENCH:**

IN S. A. 286 OF 1922.

Oldfield, J.—The first question we have
to decide is whether this suit was beyond the
pecuniary jurisdiction of the District Munsif,
by whom it was tried: The valuation for
the purpose of jurisdiction is under section 8,
Suits Valuation Act (VII of 1887), the same
as the valuation for the computation of
Court Fees. The reliefs asked for and to be
valued are, as appears from the pleadings
which are given at unnecessary length
in the District Munsif's judgment, three:—1. Removal of first defendant from
tavazhi management.2. A declaration that a Karipanayam
dated 2nd July 1916 is not binding on any
of the seventeen items in A Schedule and a
direction to defendants in respect of Items
Nos. 1 to 15, which (it is not disputed)
would be equivalent to a decree for delivery
thereof.3. A declaration in respect of another
Karipanayam and a decree for surren-
der of it and connected documents.

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There is no dispute as to the valuation of the first and third of these; and the question, it is agreed, is only whether the second should be valued as plaintiffs have valued it at Rs. 500 for delivery of Items Nos. 1 to 15 with reference to the revenue payable thereon under Court-Fees Act, section 7-V (b) and Rs. 10 for the declaration asked for, regarded as one relating to all the seventeen items under Schedule II, Art. 17 (iii) or whether it should be valued, as defendants contend, under section 7-V (b) for Items Nos. 1 to 15 and under section 7-IV (c) for the relief asked for in respect of Items Nos. 16 and 17, at which the relief sought is valued in the plaint. The importance of the latter contention lies in the fact, which is not disputed, that it entails enhancement of the total valuation of the suit beyond the District Munsif's pecuniary jurisdiction, since, as appears from the reference in plaint paragraph 11-B (2), the value of the buildings on Items Nos. 16 and 17 is over Rs. 3,000.

The lower Appellate Court decided for plaintiffs, partly on the ground that the inclusion of a prayer in respect of Items Nos. 16 and 17 was, as alleged by plaintiff's Vakil before it, a mistake and that no relief was asked for in respect of them. But it is sufficient that the plaint was not in fact amended consistently with any such statement and that here Mr. Madhavan Nayar for plaintiffs was ready to withdraw the claim to relief in respect of these items, which is certainly made in the plaint, only in case our conclusion as to jurisdiction should be against him. On the merits, the matter is concluded by the decision in *Shidappa Venkatrao Jadhav v. Rachappa Subrao Jadhav* (1), in which I respectfully concur. That decision is based on the application of section 17, Court-Fees Act; and that section is applicable to the case before us, since there is, to my mind, no reason for following the opinion expressed in *Durga Prasad v. Purandar Singh* (2), and holding that the "distinct subjects" referred to must necessarily be distinct causes of action. It further does not seem to me that the

conclusion as to valuation in the Bombay case cited is affected by the judgment of the Privy Council in appeal, *Rachappa Subrao v. Shidappa Venkatrao* (3). The reference to the real value of the property in suit as undisplaced for purposes of jurisdiction by the notional value was made in connection with the portion of the claim for which the fixed fee was payable under Schedule II; and it was in that connection there, as it is here, that the admissibility of the real value as determining jurisdiction was material, the succeeding paragraph relating to the other part of the suit. And in fact the decision in plaintiff's favour was given not on the ground that the technical objection relied on by defendant was unsubstantial, but because, owing to the failure to take it earlier, a merely technical objection could not prevail.

The valuation adopted by plaintiff in the present case being incorrect for purposes of jurisdiction and the District Munsif, therefore, incompetent to try the suit, the question is whether this entails the success of the second appeal. In *Rachappa Subrao v. Shidappa Venkatrao* (3) it was sufficient that objection had not been taken to the jurisdiction on this ground until the argument in the High Court and it was, therefore, unnecessary for the Judicial Committee to refer in its judgment to the provision of law, section 11, Suits Valuation Act, on which our decision must turn. For it is not disputed here that an objection was taken and an issue framed regarding it before the District Munsif, although (for reasons which are not clear) he said that an adjudication was unnecessary.

Section 11, Suits Valuation Act, provides that, where objection to the jurisdiction has been taken by reason of over or undervaluation in the Court of first instance, it shall receive effect, only if the Appellate Court is satisfied that "the over or undervaluation has prejudicially affected the disposal of the suit on its merits." That language is general and certainly it is difficult to understand what special circumstances are contemplated in it or to say whether it can be applied to a case, such as that before

(1) 16 Ind. Cas. 1005; 36 B. 628; 14 Bom. L. R.

(2) 27 A. 186; A. W. N. (1904) 210.

(3) 50 Ind. Cas. 280; 46 I. A. 24; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 43 B. 407; 10 I. W. 274; 24 C. W. N. 33 (P. C.).

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us, in which no prejudice to the disposal of the suit has been specified in the Memorandum of Appeal or in the argument. Yet, in accordance with the ordinary canons of construction, that language cannot be deprived of effect, as though the intention were that in all cases of incorrect valuation the proceedings in the Court of first instance should be treated as invalid. The test contemplated in the language used cannot ordinarily be supposed to be the convenience or preference of the parties since they will seldom agree on those matters and it will be impossible to decide between conflicting local and personal considerations of an indefinite nature. It is then argued that, when (as in the present case) actual prejudice is not demonstrated, the Appellate Court must consider whether it can be presumed. But if prejudice based on presumption is contemplated by the section, it is still necessary to consider how any presumption can be made. None can be made, because the Court of a District Munsif is substituted for that of a Subordinate Judge or *vice versa* in consequence of the incorrect valuation, since, the powers of both to deal with litigation legitimately before them being the same, there is no substantial reason for presuming that the decision of one is more likely to be right than that of the other, this being particularly exemplified in cases, such as the present, where the objection to valuation is sustained first in second appeal and the decision of both Courts on fact and law are the same; and this view has, in fact, been taken in *Raghava Chariar v. Raghava Chariar* (4). This failing, application may, perhaps, be found for the words of the section in cases in which the incorrect valuation entails that the Small Cause, instead of the ordinary procedure will be followed, although it is doubtful whether both procedures being regarded by the Legislature as affording a satisfactory method of trial, there can be any question of prejudice to the disposal on the merits. The last suggestion made is that prejudice is contemplated as arising from the difference in the course of appeal and the number of appeals, which incorrect valuation will

entail, and in particular from the loss in cases of under-valuation of the right of appeal on the facts to the High Court. This possibility no doubt has not been considered in the decisions we have been shown. But first the forfeiture of a particular right of appeal, arising after the disposal of the suit, cannot be regarded as in the words of the section "prejudicially affecting the disposal of the suit on the merits." Next, this possibility is irrelevant in cases of over-valuation; and necessity for separate reference to them is on the assumption involved wanting. And, thirdly, this explanation is based on a presumption that adjudication on the facts must be prejudicially effective if the hearing is by an inferior Court which is no more sustainable with reference to appellate than original proceedings. This also failing, it must be supposed that the very general wording was adopted to provide *ex abundanti cautela* for any exceptional cases, in which prejudice to disposal on the merits may be demonstrable, but of which the nature cannot be more exactly defined. In the present case no such prejudice has been alleged or shown to have occurred. I would, therefore, proceed with hearing of the second appeal.

But as my learned brother differs and as the difference between us relates to a preliminary point requiring decision before we can proceed to disposal on the merits, I agree to refer to a Full Bench the question whether the second appeal should be heard on the merits or whether the plaint should be returned.

In Second Appeal No. 287 of 1920. Our judgments also apply to this point, as it arises in the connected second appeal No. 287 of 1920. We make a similar reference in that case also.

Devadoss, J.—This is an appeal by the 15th defendant against the decree of the District Judge of South Malabar, affirming the decree of the District Munsif of Alatur in Original Suit No. 328 of 1916, in which the plaintiffs sued for the removal of the *karnavan* of their *tavazhi*, the first defendant, and for a declaration that certain alienations were not binding on the family, and that certain properties were the properties of the family of the plaintiffs and the first defendant. The District Munsif granted decree

(4) 8 Ind. Cas. 545; 20 M. L. J. 726; 8 M. L. T. 404.

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in favour of the plaintiffs, and the District Judge has upheld it.

In the plaint several reliefs were claimed: (1) the removal of the first defendant from the *tavazhi* management; (2) the appointment of the second plaintiff or any other plaintiff as manager; (3) a declaration that a Karipanyom deed executed by the first defendant to the second defendant, dated 2nd July 1916, for Rs. 4,823-8-0 was not valid and binding on the plaintiffs and for possession of Items Nos. 1 to 15; (4) a declaration that the amount of the Karipanyom deed executed by defendants Nos. 11 to 13 to the 14th defendant, belonged to the *tavazhi* of the plaintiffs; (5) a direction to the first defendant to deliver to the plaintiffs all documents, accounts, etc., and some other reliefs. The plaintiffs valued the first relief at Rs. 1,233-5-4, the third at Rs. 500 being five times the annual assessment, the fourth at Rs. 100 and the fifth at Rs. 5.

The defendants pleaded that the suit was under-valued; that for the purpose of declaration, the valuation was the full value of the property, and that Items Nos. 16 and 17, in respect of which a mere declaration was prayed for, were worth more than Rs. 3,000.

The District Munsif valued the first relief at Rs. 2,182-12-9, but held that the other reliefs were properly valued, and that he had jurisdiction to try the suit, and took evidence and decided it on the merits.

The 15th defendant who appealed against the decree of the District Munsif, raised the contention that the District Munsif had no jurisdiction to try the suit and that the suit ought to have been dismissed on that ground, but the District Judge overruled the contention, holding that the under-valuation, if any, did not prejudicially affect the disposal of the suit on the merits.

It is argued before us that the District Munsif had no jurisdiction to try the suit, as the value of the reliefs claimed was over Rs. 5,000 and that the decree of the District Munsif, should, therefore, be set aside.

It is admitted by the respondents that the value of all the reliefs claimed exceeded Rs. 5,000, that Items Nos. 16 and 17 are worth more than Rs. 3,000, and that, as a mere declaration was asked for in respect of them, the valuation for the purpose of juris-

diction should have been at their market-value, and that, in respect of the other items plaintiffs claimed a consequential relief, and, therefore, they were justified in valuing them at any figure which they thought proper under the Court-Fees Act, section 7, clause 4 (c).

The point for decision is whether the District Munsif's decree should be set aside on the ground that the value of the suit exceeded the pecuniary jurisdiction of the District Munsif. The appellant, in support of his contention, relies upon a case reported as *Shidappa Venkatrao Jadhav v. Rachappa Subrao Jadhav* (1). In that case, the plaintiff valued for the purpose of declaration his plaint at Rs. 135 and filed it in the Court of the First Class Subordinate Judge who passed a decree in his favour. On appeal to the District Court a preliminary objection was taken that the appeal lay to the High Court as the value of the subject-matter of the suit was above Rs. 5,000. The District Judge held that there was no failure of justice consequent on the lower Court's erroneous assumption of jurisdiction and that neither party was entitled to complain of want of jurisdiction and heard the appeal on the merits and dismissed it. The defendant preferred a second appeal to the High Court, Chandavarkar and Batchelor, JJ., held that the plaintiff had not properly valued the suit, and that the valuation for the purpose of jurisdiction was Rs. 69,016-9, and that, therefore, the appeal lay to the High Court. They set aside the decree of the District Judge and directed the appeal to be presented to the High Court, which was done. The learned Judges heard the appeal on the merits and dismissed it. Against this decree of the High Court, the defendant preferred an appeal to the Privy Council and the judgment of the Privy Council is reported as *Rachappa Subrao v. Shidappa Venkatrao* (3). Their Lordships of the Privy Council dismissed the appeal, holding that the plaintiff's valuation was incorrect, that the proper valuation for the purpose of declaration exceeded Rs. 60,000 and that "no objection was taken to the Court's jurisdiction in the written statement or the issues and it was not even suggested in the Memorandum of Appeal to the District Judge or the High Court," and that it was "be

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cause the defendant did not take the objection at the proper stage that he has been able to prolong the litigation commenced so far back as 1909 by an appeal to this Board." "Their Lordships are of opinion that they would not be justified in assisting an objection of that type; and more than that, they hold that even the technicality on which the defendant relied could not prevail."

Under the Madras Civil Courts Act, District Munsifs have jurisdiction up to Rs. 3,000 and appeals against their decisions lie to the District Court and Subordinate Judges have unlimited pecuniary jurisdiction, but appeals from their decisions lie to the District Court "except when the amount or value of the subject-matter of the suit exceeds five thousand rupees in which case the appeal shall lie to the High Court." In this case, the valuation of the properties being admittedly over Rs. 5,000, if the suit had been brought in a Subordinate Judge's Court, the unsuccessful party would have had the right to appeal to the High Court.

The respondents' Counsel relies upon section 11 of the Suits Valuation Act which is in these terms—I shall extract only portions of it:—

"(1) Notwithstanding anything in section 578 of the Code of Civil Procedure, an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless (a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the Memorandum of Appeal to that Court, or (b) the Appellate Court is satisfied for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

"(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned

in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

"(3) If the objection was taken in that matter and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to hearing of the appeals."

This section enacts that no objection on the ground of over-valuation or under-valuation shall be entertained unless (1) the objection is taken in the Court of first instance at or before the first hearing, or (2) the Appellate Court is satisfied for reasons to be recorded by it in writing that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits and if the Appellate Court is satisfied as to both these matters, then, and then only, it shall proceed to deal with the appeal as regards the question of jurisdiction. In the present case the objection was taken in the First Court in the written statement and before the first hearing and in the Memorandum of Appeal to the Appellate Court also the objection to jurisdiction was raised. It cannot be said that the disposal of the suit has in any way been prejudicially affected by the under-valuation. It is not easy to conceive of a case where the disposal of a suit or appeal would be prejudicially affected merely by reason of over-valuation or under-valuation. Mr. Madhavan Nayar found it difficult to suggest any instance where the disposal on the merits could be said to be prejudicially affected by reason of over-valuation or under-valuation. He suggested that by proper valuation a suit may be brought in a Sub-Court which may be able to enforce the attendance of witnesses of either party. It is difficult to see how a Court of a Subordinate Judge could enforce the attendance of witnesses which a District Munsif could not do. If it is suggested that the change of venue would be more convenient to one party or the other, that would not depend upon

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the pecuniary jurisdiction of a Court, so that instance is no instance at all. He relied upon a case reported as *Raghava Chariar v. Raghava Chariar* (4). In that case the facts were: the plaintiff and the defendant were executors of the Will of one Krishnaswami Ayyangar. Under the Will they were appointed co-trustees for the two widows and the minor adopted son of the deceased and also for carrying on a charity. The plaintiff sued to remove the defendant from the co-executorship and co-trusteeship on the ground of his misappropriation of the trust funds and his failure to co-operate in the execution of the Will and the trust. The defendant objected to the suit being within the Court's jurisdiction both under the Trusts Act of 1882 and on account of the whole of the trust property being of more than the Court's pecuniary limits. The plaint was returned for presentation to the proper Court, but the District Court reversed the order of the District Munsif and directed the Court of first instance to receive the plaint and dispose of it on the merits. The District Munsif entertained the suit and found that the defendant had failed to account for two sums of Rs. 1,306 and Rs. 115, and passed a conditional decree that, if the defendant did not pay the amount within three months, he would be removed from office. On appeal, the District Court affirmed the decree of the District Munsif. On second appeal it was contended that the subject of the trust being admittedly above Rs. 20,000 in value the District Munsif had no jurisdiction to try the suits. Sir T. Muthuswami Aiyar and Handley, JJ., held that "the value of the trust property ought to have been taken as a guide to the determination of the question of jurisdiction. The objection was taken both in the Court of first instance and in the lower Appellate Court. According to section 11 of the Suits Valuation Act we are precluded from entertaining the objection unless we are satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The mere change of *forum* consequent on the under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of the section, for that is the very case premised and provided for by the

section. Reading the section together with section 578 of the Code of Civil Procedure, we consider that the words 'prejudicially affected the disposal of the suit on the merits' must be construed in the same way as they would be construed with reference to any error, defect, or irregularity contemplated by that section. The effect of section 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by section 578 except that the objection must be taken either in the Court of first instance or in the lower Appellate Court. In the present case we do not consider that the under-valuation has prejudicially affected the disposal of the suit on the merits." This case was followed by the Madras High Court in *Ammalu Ammal v. Krishnan Nair* (5) and *Vedaji Baskara Tirumal Rao v. Subramania Gurukkal* (6), and in *Narayani Ammal v. Secretary of State* (7).

The question that presents a real difficulty is this:—Is the plaintiff justified in under-valuation a suit and bringing it in a Court which would not have jurisdiction over it, if properly valued, and thereby deprive the other party of the right to appeal on facts to the High Court? If a suit were valued at more than Rs. 5,000 it would have to be brought in the Subordinate Judge's Court and an appeal against the decree of the Subordinate Judge in such a suit would lie to the High Court on facts. But, by bringing such a suit in the District Munsif's Court, the right of appeal to the High Court is taken away, and the appeal in fact lies to the District Court, and a second appeal to the High Court lies only on questions of law. The object of the Madras Civil Courts Act, in limiting the jurisdiction of Civil Courts, is not without an object, and the defendant should not be deprived at the whim and fancy of a plaintiff of his right to appeal to the highest Court in the land on facts. If section 11 of the Suits Valuation Act is strictly interpreted, an Appellate Court would be unable to interfere with the decree of a District Munsif,

(5) 62 Ind. Cas. 715; 30 M. L. T. 33.

(6) 52 Ind. Cas. 992.

(7) 41 Ind. Cas. 167.

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whatever might be the value of the property in suit, on the ground that the party appealing against the decree is unable to show that the disposal has been prejudicially affected by under-valuation. It is not easy to conceive of cases where the disposal could be said to be affected prejudicially on the merits merely by reason of under-valuation or over-valuation. It is strongly urged by the respondents' Counsel that the Legislature in enacting section 11 in those terms did not want the decrees of Courts to be interfered with merely because the subject-matter exceeded the pecuniary jurisdiction of such Courts. No doubt, a literal interpretation of clause (1) (b) of section 11 would lead to that result. But it is difficult to hold that the Legislature intended to give a plaintiff the right to sue in whatever *forum* he might choose, and thereby to take away the right of appeal on facts to the High Court. Under the Madras Civil Courts Act, Courts of different pecuniary jurisdictions are established. The very object of having Judicial Officers of different cadres would be defeated if the Court of the lower pecuniary jurisdiction could be allowed to try and dispose of suits, the subject-matter of which exceeds its pecuniary jurisdiction. A defendant is entitled as a matter of right to have his case heard by a Judge of a higher grade and of greater experience, if the value of the claim against him exceeds the pecuniary jurisdiction of the Court in which the suit is brought. Where there are two Legislative enactments, one creating and regulating the jurisdiction of Civil Courts and the other mainly intended for fiscal purposes, the provisions of the former should not be lightly treated in dealing with questions of jurisdiction affecting rights of parties. Under section 21 of the Civil Procedure Code an objection to territorial jurisdiction should be taken at the earliest opportunity, and an Appellate Court will entertain it only if there is a consequent failure of justice. In *Hamidunnissa Bibi v. Gopal Chandra Malakar* (8), the learned Judges after referring to various cases before and after the passing of the Suits Valuation Act, observe thus:—"It is, no doubt, a sound rule that Courts should not allow

parties to evade the law relating to matters of jurisdiction, and that, where it is found that a party is intentionally exaggerating his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it, before the merits of the claim have been gone into the plaint should be returned to be presented to the proper Court. But, this rule must be taken with qualifications; and the one important qualification is that embodied in section 11 of the Suits Valuation Act, which is this, *viz.*, that where the suit has been tried on its merits by the First Court, and the over-valuation or under-valuation of the suit is not found by the Appellate Court to have prejudicially affected a suit on its merits, the objection as to jurisdiction should not be given effect to. A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him; but it would not, in our opinion, conduce to promote the ends of justice, if an Appellate Court were to set aside a decision which is found to be correct on the merits, simply because the valuation of the suit had been designedly increased, or diminished to evade jurisdiction."

Considering the high authority of Sir T. Muthuswami Ayyar, who decided the case reported as *Raghava Chariar v. Raghava Chariar* (4), and that of Mr. Justice Bannerjee in *Hamidunnissa Bibi v. Gopal Chandra Malakar* (8), one would be very reluctant to differ from their opinion. But, in none of the cases, so far as I have been able to examine them, the question of right of appeal on facts was raised. That question was specifically raised only in *Shidappa Venkatrao Jadhav v. Rachappa Subrao Jadhav* (1), where the learned Judges reversed the decree of the District Judge and directed the appeal to be presented to the High Court. This judgment of the Bombay High Court, was affirmed by their Lordships of the Privy Council. If their Lordships thought that section 11 of the Suits Valuation Act was an answer to the defendant's contention, I think they would not have rested their judgment on other grounds. While their Lordships refer to section 8 of the Suits Valuation Act as regards the mode of valuation and also to section 7 as regards the computation of fees payable for certain

(8) 24 C. 661; 1 C. W. N. 556; 12 Ind. Dec. (N. S.) 1110.

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suits, and sections 6 and 7 of the Court-Fees Act as regards the fees payable in respect of reliefs, they rest their decision upon the fact that the objection was not taken at the proper time and that a defendant who did not choose to take the objection in the Court of first instance should not be helped. But for their Lordships' decision reported as *Rachappa Subrao v. Shidappa Venkatrao* (3), I would have felt very great difficulty in not following the decision in *Raghava Chariar v. Raghava Chariar* (4), and other cases. It has not been shown by the appellant that the disposal of the suit on the merits has been prejudicially affected by the under-valuation. At the same time, I feel strongly that the right of appeal to the High Court, which the defendant would have had if the suit had been instituted in the Subordinate Judge's Court, had been improperly taken away by the suit being instituted in the District Munsif's Court; and no party should have the right to take away the right of his adversary to appeal to the highest Court in the land on facts. It might be said that he got the right of a second appeal, which he would not have had, if the suit had been filed in the Sub-Judge's Court in the first instance. I do not think this argument needs serious consideration. A decision of a Bench of two Judges of the High Court on facts, I consider, would be more satisfactory than the decision of a single Judge of the District Court. On this ground, the under-valuation of the suit has prejudicially affected the defendant's right of appeal. Relying upon the decision of their Lordships of the Privy Council in *Rachappa Subrao v. Shidappa Venkatrao* (3), I respectfully dissent from the decision of Sir T. Muthuswami Ayyar and other learned Judges in the three Madras cases referred to above, and hold that the District Munsif had no jurisdiction to try the suit. Mr. Madhavan Nayar offered to withdraw the suit so far as Items Nos. 16 and 17 are concerned. I think in the view I take he should not be allowed to cure the want of jurisdiction by withdrawing the suit in respect of a few items at this stage, depriving the defendant of the undoubted right to have his appeal on facts heard by the High Court and the suit tried by a Subordinate Judge.

The plaint should be ordered to be re-

turned to the plaintiff, for presentation to the proper Court.

These Second Appeals came on for hearing in pursuance of the above order of reference to a Full Bench.

Mr. C. V. Ananthakrishna Iyer, for the Appellants:—It is admitted in this case there has been an under-valuation which enabled the plaintiff to sue in the District Munsif's Court. The proper value was more than Rs. 5,000 and the proper forum would be the Sub-Court, against whose decree an appeal would lie to the High Court even on questions of fact. The defendant has been deprived of this right by plaintiffs under-valuation. The question before your Lordship is whether this under-valuation has not prejudicially affected the disposal of the suit or appeal on the merits.

My submission is it has. The decision in *Shidappa Venkatrao Jadhav v. Rachappa Subrao Jadhav* (1) and *Mohini Mohan Misser v. Gour Chandra Rai* (9) support my position. The judgment of their Lordships of the Judicial Committee of the Privy Council tends also to show that if the objection had been taken at the proper time it would have been sustained. If the objection as to under-valuation does not apply to a case like this, it is difficult to see to what other cases it, could apply.

[SCHWABE, C. J.—The decision in *Raghava Chariar v. Raghava Chariar* (4) and the other cases which have followed that decision in this High Court are against your contention.]

The exact position I take up is not covered by those decisions. On principles also, it is submitted, it ought not to be possible for the plaintiff to deprive the defendant of the right of appeal to the High Court on facts.

The respondent was not called upon.

OPINION.

Schwabe, C. J.—In this case the suit was commenced before the District Munsif and it appears that there was an under-valuation of the suit. If it had been properly valued, the case would not have gone to the District Munsif but would have

(9) 56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (PAT) 123; (1921) PAT. 105.

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gone to the Subordinate Judge in the first instance, and thence an appeal to the High Court instead of to the District Court and on second appeal to the High Court, as is the case in the decisions from District Munsifs. This objection to jurisdiction by reason of under-valuation was taken before the District Munsif who held that he had jurisdiction and heard the case. There was an appeal from him to the District Court, the lower Appellate Court in this case. The District Judge held also that the suit was not under-valued but he also held that, if the suit were under-valued, still its valuation had not prejudicially affected the disposal of the suit on its merits. That decision on appeal comes to this Court by way of second appeal and there having been a difference of opinion, it is referred to a Full Bench.

The question turns on the proper interpretation of section 11 of the Suits Valuation Act of 1887 which provides that objections to jurisdiction, by reason of over-valuation or under-valuation of a suit or appeal, are not to be entertained by an Appellate Court, unless the objection is taken in the Court of first instance or in the lower Appellate Court and the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits. It is contended before us that the District Judge was wrong because the mere fact of under-valuation, involving a trial before the District Munsif, must be prejudicial to the unsuccessful party, because an appeal from him lies to a District Court and then to the High Court by second appeal where questions of fact are not open to discussion, whereas, if the suit had been brought originally before the Subordinate Court, it would come by first appeal to this Court where questions of fact are open to discussion. In my judgment, the clause of the Suits Valuation Act, when referring to prejudicially affecting the disposal of a suit or appeal on its merits, is not considering at all the different rules of procedure that there may be an appeal from one Court to another Court. If, as has been contended before us, the mere fact of there being some different rules in the procedure on appeal must prejudicially affect the dis-

posal of a suit on its merits, the section has really no meaning at all, because in every case from a District Munsif to a lower Appellate Court, where there has been under-valuation the appeal would have to be allowed and a new trial ordered, because the trial on its merits was prejudiced and that, in my judgment, is absurd. There is ample authority of this Court that the lower Appellate Court in such a case not only has jurisdiction to hear the appeal from a District Munsif who has exceeded his jurisdiction but that it must do so unless it is satisfied, as required by section 11 of the Suits Valuation Act, first, that the point was taken, and secondly, that the decision on the merits was prejudicially affected. [See *Raghava Chariar v. Raghava Chariar* (4), *Narayani Ammal v. Secretary of State* (7), *Ammalu Ammal v. Krishnan Nair* (5).] There is a decision to the contrary in *Mohini Mohan Misser v. Gour Chandra Rai* (9). With that decision I do not agree. The point was also discussed in *Shidappa Venkat-rao Jadhav v. Rachappa Subrao Jadhav* (1), but the point at present before the Court is not decided there.

Our answer to the question, therefore, is that the second appeal must be heard on its merits. The same point arises in Second Appeal No. 287 of 1920 which is also referred to us and our answer in that case must be the same.

Oldfield, J.—I agree.

Coutts-Trotter, J.—I am of the same opinion, and I should have thought that the contention put before us was absolutely unarguable were it not that it apparently has commended itself to at least one Bench of Judges in this country. I take it that the object of section 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances. If it does not do that, it does nothing else: yet, it is argued before us that, if you once start a suit in one Court which decides prejudicially on the merits, the section has no power to cure the original lack of jurisdiction which remains uncured to the end; that is to say, that the section gives you something with one hand and immediately takes it away with the other. Mr. Ananthakrishna Ayyar did not contend

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otherwise than that the "Court of first instance" referred to in sub-section 1 (a) of section 11 must mean not the Court in which the suit ought to have been started, but the Court in which it was, in fact, started. It seems to me to follow from that, beyond a possibility of question, that, in sub-section 1 (b) when we get to talking about "Appellate Court," that means not the Court in which the appeal should have been started in the first instance but the Court to which it did, in fact, go and ought to have gone if the lack of jurisdiction were to be condoned. In this case in fact it was condoned. In my opinion, the only possible answer to this reference is the one proposed by my Lord.

V. N. V.

Order accordingly.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS.
1710, 1830, 1854, 1870, 1908 and 1930
OF 1920.

November, 23, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt.,
and Mr. Justice Cuming.

MANJURI DASSI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KHETRAMANI DASSI AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI,
r. 27—Evidence fresh in appeal—Document filed
after close of arguments, whether admissible.*

Where a document is filed by a party in the Appellate Court after arguments have been finished on both sides and judgment is reserved; it ought not to be admitted in evidence without giving the other party an opportunity to raise any objection which he might have to its admissibility in evidence. [p. 97, col. 2.]

Appeals against decrees of the District Judge, Nadia, dated the 8th of

April 1920, reversing in Nos. 1710 and 1830 of 1920 and affirming in Nos. 1854, 1870, 1908 and 1930 of 1920 the decrees of the Munsif, First Court, Krishnagar, dated the 27th of September 1918.

Babu Sarat Chandra Roy Chowdhry (with him Babu Sarat Chandra Khan); for the Appellant in Second Appeals Nos. 1854, 1870, 1908 and 1930 and for the Respondent in Second Appeal Nos. 1710 and 1830.—The decree created a judicial lien or charge, so that any transfer was void. See section 64, Civil Procedure Code. In cases like the present the Court should come to a definite finding, as to the *bona fides* or otherwise of the transfers. Lastly, the copy of the deposition of Mukundalal in the claim case ought not to have been accepted and admitted in evidence in the way in which it was done.

Babu Rupendra Kumar Mitter.—With regard to section 64, Civil Procedure Code, the transfer is not void against all the world but is only voidable. Refers to *Anund Loll Doss v. Jullodhur Shaw* (1); *Umesh Chunder Roy v. Raj Bullubh Sen* (2).

A covenant not to alienate does not create a charge. Refers to *Kamini Kumar Roy v. Hira Lal Pal Chowdhury* (3). Smith's Leading Cases, Vol. I, (12th Edition) p. 87. A compromise decree has no greater effect than a compromise. See *Kandarpa Nag v. Banwari Lal Nag* (4). The covenant merely created a personal liability. It created no interest in land. Refers to *Gunoo Singh v. Lataful Hossain* (5). As to the admissibility of Mukundalal's deposition in evidence, refers to O. XLI, r. 27, Civil Procedure Code.

Babu Baranashi Basi Mukerjee, for the Respondent in Second Appeals 1854 and 1870.—Although the Judge bases his finding on probabilities, it is nonetheless a finding of fact and is consequently not open to attack in second appeal.

Babu Mohendra Nath Roy, for the Respondent in Second Appeal Nos. 1908 and

(1) 14 M. I. A. 543; 17 W. R. 313; 10 B. L. R. 134; 2 Suth P. C. J. 559; 3 Sar. P. C. J. 81; 20 E. R. 888.

(2) 8 C. 279; 10 C. L. R. 204; 4 Ind. Dec. (N. S.) 178.

(3) 51 Ind. Cas. 736; 23 C. W. N. 769.

(4) 60 Ind. Cas. 864; 33 C. L. J. 244.

(5) 3 C. 336; 1 C. L. R. 91; 1 Ind. Dec. (N. S.) 801.

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1930.—The findings are that the debt was real and that the consideration was paid. The transfer was to satisfy the debt of a creditor. The findings of the Appellate Court are sufficient in affirming the judgment of the Trial Court.

Babu Sarat Chandra Roy Chowdhury, replied.

S. A. Nos. 1710, 1830 OF 1920.

JUDGMENT.—These two appeals, along with four others, arise out of suits for declaration that certain properties which had been attached and sought to be sold were not liable to attachment and sale on the ground that the judgment-debtors in each case had no interest and that the plaintiffs in each case had title to the same.

The properties attached belonged to a family consisting of four brothers, Nikunja, Kunja, Hira Lal and Makhan. The first three became involved in debt and transferred their interest in the properties attached separately to the plaintiff in each case.

It appears that suits were instituted against the three brothers and there was attachment of the properties before judgment on the 16th July 1907. On the 4th August 1907 there was a conveyance by Nikunja of his interest in the properties to his father-in-law Mukunda. Subsequently, on the 24th August 1907, there was a compromise between the parties and a petition of compromise was filed, Nikunja and Kunja undertaking not to transfer their interest in the properties until repayment of their debts.

Kunja transferred his interest to his brother Makhan and Hira Lal having died, his widow transferred her interest to her brother Kishori. These transfers took place after the petition of compromise had been filed on the 24th August 1907. Subsequently, when the creditors (Khetra Moni Dasi and the Majumdars) executed their decrees and in execution the properties were attached, claims were preferred by the transferees. The claims, however, were disallowed and thereupon the six suits were instituted out of which these six appeals have arisen.

The Court of first instance in all these cases found that there was consideration for the transfers and that they were *bona fide*. In that view, all the suits were decreed.

On appeal the learned District Judge allowed the appeals in the two cases which gave rise to Second Appeals Nos. 1710 and 1830 of 1920 and affirmed the decrees of the Court of first instance in the other suits. The plaintiffs are the appellants in Second Appeals Nos. 1710 and 1830; while the defendants are the appellants in the other four cases.

We take up these three sets of cases separately. In the first set (S.A. 1710 and 1830), as already stated, the transferee was Mukunda who was the father-in-law of Nikunja. The District Judge has found that the consideration money, namely, Rs. 1,414, was paid by Mukunda to Nikunja and that that was the exact amount required by Nikunja to meet his liabilities to the Kush-tea Swadeshi Bhandar. It was found that the money was applied by Nikunja in payment of his debt due to the Swadeshi Bhandar. The learned Judge, however, observed that: "It is very improbable that it really represented the consideration for the purchase by Mukunda of his son-in-law's share in his dwelling house and the other properties included in the *kobala*." He was also of opinion that the transaction was not *bona fide*. His conclusions are mainly based upon certain statements made by Mukunda in the claim case.

It is strongly urged before us that the deposition of Mukunda ought not to have been used by the learned District Judge; at any rate without giving the plaintiff an opportunity of raising objections thereto.

It appears that arguments in the lower Appellate Court were finished and judgment was reserved on the 24th March and that on the next day, 25th March, the defendants filed a copy of the deposition of Mukunda in the claim case and that was accepted by the learned Judge. So far as it appears from the record, there is nothing to show that the plaintiff had any notice of the document having been filed, or having been used in evidence. We are of opinion that the learned Judge ought not to have admitted this document in evidence after arguments had been finished on both sides and judgment reserved. An opportunity should have been given to the plaintiff to raise any objection which he might have to

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the admissibility of this document in evidence.

In these circumstances, we think that the cases should go back to the lower Appellate Court in order that such an opportunity might be given to the plaintiff and the question of the admissibility of the document considered after hearing both sides on the point. The appeals will then be reheard by the lower Appellate Court on all the points necessary to be decided in the appeal.

Costs to abide the result.

S. A. Nos. 1854 AND 1870 OF 1920.

In these cases, Kunja transferred his interest to his brother Makhan. It is found that Kunja wanted this money very urgently, to pay Counsel's fees for his defence in the Alipur Bomb Case in connection with which he had been arrested. The learned Judge has also found upon the evidence that the money was actually paid by the purchaser Makhan, and that he has since been in occupation of Kunja's portion of the joint house. The learned Judge further found as follows: "Up to the time of the transaction, there is evidence that Makhan and Kunja were not on very good terms; but it was imperatively necessary for Kunja to raise money and it is probable that rather than let a stranger occupy a portion of the joint premises Makhan purchased them, they would also be more valuable to him than a stranger and Kunja would naturally see where he could get the highest price even if he was not anxious to keep the house in the hands of the family." This would have been sufficient for the disposal of the case; but Makhan was not a creditor and it was necessary to come to a definite finding that the transfer was a *bona fide* one. The learned District Judge, however, says: "Thus I think that the transaction was most probably *bona fide* even though on the evidence I think it extremely probable that Makhan knew of the compromise...." Then, again, he goes on to say: "But I do not think the circumstances show positively that Makhan was lending his name to the transaction in order to defeat the creditors; it seems to me that his object was probably

to assist Kunja in raising the money etc., etc."

It appears, therefore, that the learned Judge has not come to a definite finding upon the question of *bona fides* in these cases. We are accordingly of opinion that these two cases should go back to the lower Appellate Court for re-hearing the appeals and disposing of them according to law after coming to a definite finding upon all the points necessary for the determination of the appeal.

Costs to abide the result.

S. A. Nos. 1908 AND 1930 OF 1920.

In these cases, Hira Lal's widow transferred her interest to her brother Kishori. The transfer was made to pay off a mortgage-debt due by Hira Lal and the consideration money was partly applied in payment of the debts. The learned Judge observes with reference to the *kobala* that it was apparently executed to pay off a mortgage-debt. He says: "In this case the circumstances have been exhaustively discussed by the learned Munsif and I agree with his conclusions." The learned Munsif no doubt, decided the question of *bona fide* in favour of the plaintiff after placing the onus of proof upon him; and if the learned Judge, by saying "I agree with his conclusions" meant to refer to all the conclusions arrived at by the Court of first instance, including his conclusions on the question of *bona fides*, then there is nothing to be said against the judgment of the learned District Judge.

It is contended, however, on behalf of the appellants that the observation refers only to the passing of the consideration and payment of the mortgage-debt and not to the question of the *bona fides* of the transaction which is referred to in the next passage where the learned Judge says: "The appellants have not been able in these cases to show conclusively that the transaction was not *bona fide* but was intended to defeat the creditors. No doubt the circumstances are very suspicious. The vendor was heavily in debt and closely related to the vendee (her brother) and that the property after sale was let to the son-in-law of the vendor at a nominal sum and remained practically in possession of the vendor and

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his wife. Further on, the learned Judge says: "The evidence shows conclusively that the debt was a real one and that the consideration passed." But lower down, he refers to the fact that "there are a number of circumstances as pointed out by the learned Munsif indicating that this was probably a genuine transaction." It is accordingly contended that the learned Judge has not come to a definite finding upon the question of *bona fides*. The observation of the learned Judge that he agrees with the conclusion of the Court of first instance might refer to all the confusions, or only to the conclusion with regard to the passing of consideration and payment of the mortgage-debt. The matter cannot be said to be free from doubt. In these circumstances, these two cases also should go back to the lower Appellate Court for re-hearing of the appeals after coming to a definite finding upon the point.

We may mention that another contention was raised before us, namely, that the attachment, so far as Hira Lal was concerned, was not withdrawn under the terms of the *solenama* and the decree passed thereon, as Hira Lal was not a party to the *solenama*.

This question does not appear to have been raised in the grounds of appeal to this Court. In the Court of first instance, the question was decided in favour of the plaintiff. It appears to have been taken in the grounds of appeal to the lower Appellate Court; but it is not clear whether it was pressed before the learned Judge and the learned Judge has not considered this point in his judgment. As, however, these cases are going back to the lower Appellate Court, that Court will consider the question whether the attachment had been withdrawn, and if not, the effect thereof having regard to the terms of the decree.

Costs will abide the result.

B. N.

Appeals remanded.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 141-23 OF 1921.

February 5, 1923.

Present:—Mr. Pipon, J. C.

YUSAF KHAN AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MISAL KHAN AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Construction of document—Will or gift—Invalidity of one clause, whether affects whole Will—Muhammadian Law—Rule against perpetuities, applicability of.

In dealing with the internal evidence of a document which purports to be a Will upon its own character, neither the reservation of property to the testator nor the alleged delivery of possession to the legatees are in themselves sufficient to destroy the apparent character of the document. [p. 102, col. 2.]

Actual delivery of possession to a beneficiary is not fatal to the character of a testamentary bequest. It is evidence against the disposition being testamentary but it is not a fact which *per se* annuls its testamentary character. As evidence it can be rebutted by other evidence. [p. 102, col. 1.]

It is a natural and intelligible position that a testator may wish to put his legatees in immediate possession to test the success of the disposition, to avoid disputes as to the interpretation of the Will and to familiarise the beneficiaries with their eventual properties. Courts must necessarily recognise such temporary possession as not incompatible with a Will, provided that the disposition to which such possession gives effect is unmistakably revocable and that possession is not intended to confer a permanent title during the testator's lifetime. [p. 103, col. 1.]

The essential of a gift is that the donor should intend immediately to divest himself of the property. [p. 103, col. 1.]

The rule against perpetuities does not rest solely on the religious laws of Hindus or Muhammadans but on general considerations of public policy. [p. 104, col. 2.]

With the exception of a *wakf*, or a charitable devise, the Muhammadan Law does not favour a perpetuity. [p. 104, col. 2.]

A testator directed by his Will that certain property should always be held by the senior member in his line of descent provided he possessed certain qualifications, and that the property should not be the subject of an alienation:

Held, that the devise offended against the rule against perpetuities and was invalid.

Kristoromoni Dasi v. Narendra Krishna Bahadur, 16 C. 383; 16 I. A. 29; 13 Ind. Jur. 90; 5 Sar. P. C. J. 285; 8 Ind. Dec. (N. S.) 252 (P. C.), referred to.

The invalidity of one clause in a Will does not invalidate the whole, if that clause does not affect other provisions of the Will. [p. 105, col. 2.]

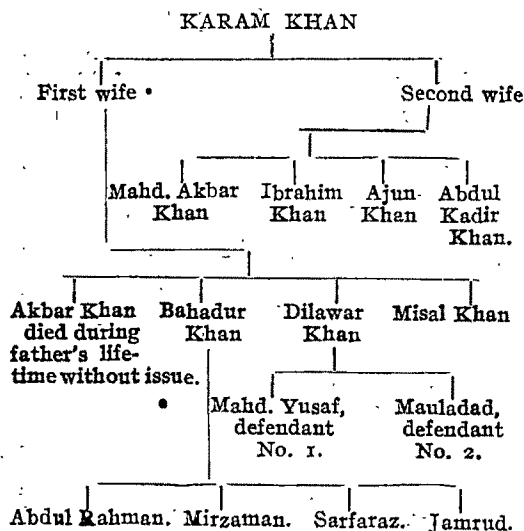
First civil appeal from the judgment and decree passed by the Sub-judge, Mardan, dated the 31st October 1921.

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Messrs. Saadudin Khan, K. S., and Mir Ahmad, for the Appellants.

Mr. Raja Singh, for the Respondents.

JUDGMENT.—The parties to this suit are the descendants of the late Karam Khan, a Pathan of the Sadhum valley in Yusafzai, who owned a large estate in Charguli and other villages. They are related as shown below :—



Karam Khan executed in his lifetime a series of deeds described by the documents themselves as Wills. It is a point in issue in these suits whether one at least of these deeds represents a Will or a gift *inter vivos*. For the sake of brevity they are all now alluded to as Wills, without prejudice to the decision on this issue. The first Will executed by Karam Khan was unregistered and was admittedly revoked by a subsequent document, and need not be further reconsidered. The second Will was executed on 21st September 1904 and was registered. This deed divided the estate into two portions one for the descendants by the first wife and one for those by the second wife. The parties to the present suit are all descendants by the first wife and we are concerned with the property allotted to this branch only. Bahadur Khan, the eldest son, with male issue had died, leaving four

sons. These were given one-third jointly—Dilawar Khan one-third, and Misal Khan one-third. But Dilawar Khan, the eldest surviving son, was given, in addition, certain property over and above that divided in three shares between him and his brother and nephews. The deed recited that he would have no power to alienate this property by sale or mortgage, since it would be held by him as a "seniority trust" for a succession. The actual words are "*Kiunki yih chiz bataur-i-amanat-i-kalani ja nishin Dilawar pisran ka ho ga.*" An extra share was similarly given to Mohammad Akbar, the eldest son, in the group by the second wife "on the above conditions." On 22nd August 1905 Karam Khan executed a third Will, which was also registered modifying that of 21st September 1904. The document gave three reasons for the necessity of modification (1) that the death of Karam Khan's nephew, Abdul Jabar, had given the testator a reversionary interest not provided for in the earlier Will; (2) that Karam Khan in that Will had "left no share for himself" and that he might, on account of illness, find it necessary to alienate some of the property; (3) that the conditions under which the eldest son of each branch received property in excess of the others required to be more accurately defined. These conditions were then defined in the Will of 23rd August 1905 "as the performance of Government services, the management of the village and the entertainment of the friends and guests." The Will went on to recite that "the senior member present in the village will be entitled to this excess share provided he renders the said services. If the senior member is absent from the village owing to his being in service or for some reason incapable of performing those services, the senior member present will be entitled to the excess share on conditions that he renders the said services." The Will specifies the special property assigned on the above conditions to Dilawar Khan and Akbar Khan, the senior members of each branch. The land now in suit, *viz.*, 365 *kanals* 12 *marlas* of land, one-fourth of a water-mill, and a *hujra* in Charguli is a portion of the special property thus assigned to Dilawar Khan.

On 28th March 1906 mutations were entered up transferring to Dilawar Khan the

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ownership of the land assigned to him. They were described as based upon the "registered Will," but it was stated in the proceedings that Karam Khan verified the "gift" and the mutations were attested as giving effect to a gift. In 1908 certain correction mutations were entered and attested in 1909. On 23rd April 1914 Karam Khan executed a fourth Will, which was registered. In this he withdrew from the *kalani* share given to Dilawar Khan certain property including a hill known as Badam. The Will stated that the testator had sold the land so withdrawn to his son Misal Khan. The increased value of land due to the advent of the canal is given in the Will as the reason for decreasing Dilawar Khan's share. The conditions attaching to the "*kalani*" share are again defined but with greater clarity: "This *kalani* share shall not devolve upon the heirs of the *kalani* person, nor shall he be competent to mortgage or sell that share of land. The *kalani* share shall always belong to the person who renders Government services, entertains guests and performs other duties of *kalani* according to the custom of Pathans of this region." The Will also prescribed that correction mutations should be entered regarding certain land which Dilawar Khan had got mutated in his favour against the terms of the 1905 Will. It amended certain other provisions of the 1905 Will. One of these amendments was to re-distribute the house property in Charguli (which by the earlier Will went to the testator's descendants by his first wife only) among all the sons, specific houses being allotted to each. In some cases separate deeds were executed gifting the houses to the legatees. Another provision was to cancel the creation of a *kalani* share for the branch of the family from the second wife. The share fixed for this purpose by the 1905 Will was gifted outright to Muhammad Akbar Khan without conditions, a separate deed of gift being executed. Certain houses were gifted to Misal Khan by a separate deed of gift on the same day.

The sale by Karam Khan to Misal Khan of a portion of the estate originally given to Dilawar Khan was entered up in mutation and attested by the Revenue Authorities. Dilawar Khan appealed to the

Collector against the attestation on the ground that he had become a full proprietor by gift in 1905, though mutation in his favour had not been effected. His appeal was dismissed and he was directed to seek his relief in a Civil Court. He did not, however, do so. The land so sold to Misal Khan is not now in suit. In 1917 Misal Khan sued, under the gift of 1914, for possession of a house against one of the tenants and called Karam Khan as a witness. On that occasion Karam Khan verified the Will of 1905 and in particular the clause in it by which he reserved to himself the right of modifying it.

Dilwar Khan on 6th January 1918 predeceased his father, leaving two sons Muhammad Yusaf and Mauladad. Karam Khan died the same year, on 17th May 1918. After the death of both a mutation was entered and attested recording Muhammad Yusaf and Muladad as owners of the property which had stood in the name of Dilawar Khan since the attestation of the mutations made in his favour in 1906 under the Will of 22nd August 1905, as amended by subsequent mutations of correction.

Two suits for possession of this property have been instituted, No. 59 by Misal Khan and No. 67 by Abdul Rahman. Both are based upon the provisions of the Will of 1905, as amplified by that of 1914. Both suits proceed on the contention that this property on the death of Dilawar Khan devolved, not upon his natural heirs but, under the Wills, upon the senior member of the family. The position of the two plaintiffs *inter se* is that Misal Khan is the senior surviving member of the family in respect of age, while Abdul Rahman has succeeded his father as *lambardar* and *Inamkhor* and claims to be the senior qualified member in respect of the public services and hospitable duties upon which the Wills make succession to this property conditional. Both suits are resisted by Muhammad Yusaf and Mauladad, who contend (1) that the transfer of possession to their father Dilawar Khan in 1906 was one of gift and conferred upon him a full proprietary title; (2) that the suits are time-barred, the cause of action having arisen on the attestation of the mutations in Dilawar Khan's favour in 1906; (3) that Karam Khan was incompetent in any

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case to make a "gift over" by bequest and to control the future devolution of an estate to persons not then in existence and that, if the documents in suit are Wills, they are thereby invalid. The Trial Court held that the deed of 2nd August 1905 was a Will, and that the transaction following upon it by which Dilawar Khan was put in possession did not alter the essentially testamentary character of the bequest, possession being delivered as a temporary arrangement subject to the testator's power to cancel or modify it during his lifetime. It found that a cause of action did not accrue to the plaintiffs until Dilawar Khan's sons succeeded to his interest after his death and contrary to the terms of the Will. The third contention of Muhammad Yusuf and Mauladad respecting the invalidity of the Will as controlling the future devolution of the estate was not definitely fought out in the Trial Court though the first issue concerned the question of the competency of Karam Khan to make a Will of this nature.

As between Misal Khan and Abdul Rahman the Trial Court found that Misal Khan, the senior in age, fulfilled also the conditions laid down to qualify the senior member for succession to the special "*kalani*" estate and gave him a decree for possession of the property in suit.

Appeals have been referred by the sons of Dilawar Khan defendants and also by the rival plaintiff Abdul Rahman. This order will dispose of both appeals.

It will be necessary to dispose first of the appeal by the sons of Dilawar Khan which is resisted equally by both the plaintiffs, and on the same grounds. I take in order the three main contentions set up, as shown above, by the defendants-appellants.

The argument that Dilawar Khan acquired a full and unqualified proprietary title in 1906 falls into two parts (a) that the deed of 22nd August 1905 was in itself a deed of gift acted upon as such and not a Will; (b) that even if the deed was a Will, the testator revoked it and subsequently conferred on Dilawar Khan a full title by gift. It cannot be contended that the deeds of 21st September 1904 and 23rd April 1914 are other than Wills. The document in issue is that of 22nd August 1905. It, too, in form, is unmis- take-

ably a Will. It describes itself throughout as a *wasiatnama*. It concludes with the clause "I have power to modify or cancel this Will at any time in changed circumstances. If I do not exercise this power, this Will will be binding on my sons, because it is valid by custom and more-over previous to this my ancestors acted upon Wills." So far as the internal evidence of the document itself is concerned, the only clause which could be regarded as incompatible with a true Will is that in which the testator remarks that, in the former Will, he had left nothing for himself and the provisions by which he excludes special property for his own enjoyment or alienation. It cannot, in my opinion, be argued that a clause of this nature *ipso facto* destroys the testamentary character of a disposition of the property. It is a clause with which Courts in this Province have long been familiar in documents which are clearly revokeable, and which do not divest the testator of his proprietary title in any of the property dealt with. Civil Appeal No. 67 of 1904 of this Court *Taj Muhammad v. Abdul Jabar* is an authority for this view. The document dealt with in that case recited that the executant had "given" the land to the beneficiaries, and that possession had been delivered to them and also included a clause by which he retained certain lands for himself. My learned predecessor, Mr. Bunbury, laid stress on the fact that the deed described itself as a Will and that the stamp-vendor's endorsement showed that the stamp-paper had been purchased for a Will. As regards the clause that possession had been given, he held that this phrase alone cannot preclude the document from being treated as a Will. It would seem, however, that in that case possession had not actually been delivered. We have, nevertheless, the clearest authority for the view that, in dealing with the internal evidence of a document upon its own character, neither the reservation of property to the testator nor the alleged delivery of possession to the legatees are in themselves sufficient to destroy the character of a document which purports to be a Will. Nor, again, can I see any authority for the proposition that actual delivery of possession to beneficiaries is fatal to testamentary

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bequest. It is no doubt *evidence* against the disposition being testamentary but it is not a fact which *per se* annuls its testamentary character. As evidence, it can be rebutted by other evidence. It is a natural and intelligible position that a testator may wish to put his legatees in immediate possession to test the success of the disposition, to avoid disputes as to the interpretation of the Will and to familiarise the beneficiaries with their eventual properties. Courts must necessarily recognise such temporary possession as not incompatible with Will, provided that the disposition to which possession given effect is unmistakeably revocable and that possession is not intended to confer a permanent title during the testator's lifetime. The essential of a gift is that the donor should intend immediately to divest himself of property. In the present case the executant specifically reserved to himself in the deed the right of modification and did not so divest himself. The document was a Will and the contention that it was not acted upon as such because possession was given under it cannot be maintained.

There remains, however, the alternative contention that the Will was revoked when Karam Khan got Dilawar Khan entered as a full proprietor by mutations in the Revenue Record. Stress is naturally laid upon the order of the Assistant Collector attesting the mutations as one of gift. It is also pointed out that the change in the column of proprietorship is incompatible with anything else. An examination of the revenue proceedings does not convince me that Karam Khan ever intended at that time to confer an irrevocable title by gift on Dilawar Khan. It is clear that the mutation itself was specifically based upon the Will. There is no statement by Karam Khan explaining that he had modified his original intention as expressed in the document. If he had really, as alleged, revoked it and converted the disposition into one of gift one would have expected something more explicit that the mere substitution of *hiba* for *wasiat* in the Assistant Collector's order. There is not the least doubt, to my mind, that the word *hiba* was simply introduced carelessly and loosely following the confusion often

observed in this Province between Wills and gifts *inter vivos*. The mutation, indeed, was labelled in the first instance as *hiba barue wasiat*, a contradiction in terms. Further, any argument based upon the action of the Revenue Authorities in recording a transfer by gift is materially weakened by their later action in allowing Karam Khan to enter up correction mutation at his pleasure. This is irreconcilable with the argument that he had finally divested himself of the proprietary title. It has been asserted by the defendants that other beneficiaries actually alienated land of which they had been given possession in Karam Khan's lifetime, but there is nothing upon the record except the assertion. There is, lastly, the evidence of Karam Khan recorded on the 6th May 1917 in the suit of *Misal Khan v. Sahib Gul*, to the effect that he never intended to transfer a proprietary title when he gave possession. I hold, agreeing with the Trial Court, that Dilawar Khan held solely under a Will and that he never acquired a proprietary title during the testator's lifetime.

The question of limitation is also disposed of by the above finding. Dilawar Khan himself cannot be shown to have asserted an irrevocable proprietary title before 1914. It was not, indeed, until his sons claimed the right to succeed to the property in suit, as against the terms of the Will which provided that it should not devolve upon the natural heirs of Dilawar Khan, that the plaintiffs acquired a cause of action to contest the proprietary possession of the defendants. The suits are clearly within time.

The third contention set up by the defendants, that Karam Khan was incompetent in Indian Law to create a special estate and to control its future devolution is more formidable. The intention of the testator in the present case is unmistakeable. In terms current among a Pathan community he intended to create a permanent *khard* or Chiefship, the person most qualified to be the Chief and actually recognised as such, apart from any customary rules of succession, to have a special estate to enable him to maintain his position as Chief. In more legal phraseology, he intended to create in perpetuity an estate in tail according to a rule of primogeniture, qualified by

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conditions of each legatee's fitness to succeed. There is overwhelming authority for the view that the creation of such an estate among Hindus is invalid. The law on the subject is dealt with exhaustively on pages 71 *seq.* of Asutosh Mukhopadhyaya's *Law of Perpetuities in British India*. The ruling of the Privy Council in the case of *Krishtomoni Dasi v. Narendro Krishna Bahadur* (1) relates to a case where a Hindu testator had attempted to limit the succession of an estate to male issue of the immediate donee. Their Lordships remarked: "Finding no gift to the brother, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling an English estate in tail male. That cannot take effect." There is, further, authority for the view that the same principle applies to attempted creation of special estates in perpetuity among Muhammadans. This view is expressed, though perhaps in qualified terms by the learned author in the *Law of Perpetuities in British India*. He says: "I propose to conclude this lecture with a brief reference to the Muhammadan Law on the subject. The matter is involved in some obscurity, as many of the most important works on Musalman jurisprudence still lie entombed in their original Arabic, and the cases which have come before our Tribunals for decision have been comparatively few and mostly connected with questions on the validity of the endowments. An eminent Muhammadan jurist, however, who had access to all the original authorities, broadly states that the Muhammadan Law distinctly recognises perpetuities and that, so long as commencement is made with a life in being, it is not necessary in the case of a settlement or devise that the persons who take the remainder should be in existence. The same learned author further maintains that original texts of the Muhammadan Law unquestionably support the creation of perpetual family settlements under the veil of religious trusts. The Judicial Committee, however, in a recent case, declined to accept this proposition on the ground that it is based

upon an absolute and extravagant application of abstract precepts taken from the mouth of the Prophet. It is extremely doubtful, therefore, how far our Courts would support a disposition by a Muhammadan which tended to create a perpetuity; for you will remember that, although the technical details of the English system might not apply, yet it has been held that perpetuities, as they make property inalienable, are opposed to public policy, and must be discouraged, unless they are for objects which are in some way useful or beneficial to the community."

Dr. Gour, again, in his *Commentary upon the Transfer of Property Act* enunciates the same principle: "With the exception of a *wakf* or a charitable devise Muhammadan Law does not favour a perpetuity." Further, the rule against perpetuities does not rest solely on the religious laws of Hindus or Muhammadans but on general considerations of public policy. It is embodied in the *Transfer of Property Act*, sections 13, 14, 15, 16 and 17, and the principles at least of that Act, are followed in this Province. In such bequests one of the main features opposed to public policy is the attempt to restrict for all time the alienability of property. In the present case the property was made clearly inalienable by each Chief, who was to hold in trust for his successor.

Against this principle, the learned Counsel for the plaintiffs-respondents has not adduced any arguments which can be very seriously considered. He has urged that the invalidity of the bequest as offending against the rule of perpetuity was not pleaded in the Trial Court. I must override this objection, as there was distinct pleading that the testator was incompetent to make a bequest of this kind. It is urged again that the question does not arise between the present parties who are living persons. This argument necessarily fails. If the question at issue was the validity of the bequest to the immediate donee, Dilawar Khan, there might be reason for holding, as was held in the Privy Council ruling quoted above, that the testator intended to benefit the immediate donee and that the latter could not be ousted. But what is now in issue is the claim of

(1) 16 C. 388; 16 I. A. 29; 13 Ind. Jur. 90; 5 Sar. P. C. J. 285; 8 Ind. Dec. (S. S.) 252 (P. C.).

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persons to succeed on the ground that Dilawar Khan was holding in trust for persons not then ascertained, and who, so far as the present claims of the rival plaintiffs to succeed as *de facto* Chiefs are concerned, had no legal existence at the time of the Will. The plaintiff cannot succeed at all unless it is assumed that there is a special estate in perpetuity assigned to the *de facto* Chief. To find (a) that there is no special estate in perpetuity and (b) that plaintiffs succeed with a full title with power of alienation would simply be to invent a new Will for the testator. A more ingenious argument put forward is that the bequest must be regarded as property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind within the meaning of section 17 of the Transfer of Property Act. It is urged that the special estate is one attached to one Khans' *hujra* or guest house and that this *hujra* represents an institution for the public benefit. It is difficult to regard this argument very seriously. The upkeep of a *hujra* may to a certain extent benefit the public, but it is an obvious straining of language to call a *hujra* an institution which advances religion, commerce, health or safety, or is otherwise beneficial to mankind. A *hujra* is a private guest-house in which a leading man entertains his guests. The extent to which he throws it open to all and sundry depends entirely on his personal idiosyncracies. It is not a public institution in any sense of the word. Nor, indeed, does the Will now in suit in any way attach the special estate to the *hujra*. It attaches to the senior member for the time being, and the up-keep of a *hujra* is simply one of several conditions which the beneficiary must fulfil in order to show that he is keeping up the proper position of the senior member. Section 17 of the Transfer of Property Act obviously does not apply to the estate in suit. I find that the testator was incompetent to control the future devolution of the estate and that the Will is inoperative as regards the land in suit as offending against the rule of perpetuity.

It remains to consider the effect of the findings (i) that the land in suit was be-

queathed by Will and was not gifted outright to Dilawar Khan, (2) that the testator was incompetent to control its future devolution. There is good authority for the view that the invalidity of a single clause in a Will does not necessarily invalidate the whole, if that clause does not affect other provisions. A similar case was dealt with by a ruling of this Court published as Judicial Record No. 66 (Civil). While other bequests made by the Will are not invalidated I can only regard the land now in suit as intestate property. The provisions of the Will in its respect are invalid and inoperative and Courts cannot construct fresh provisions to cover it. The land in suit, therefore, must devolve by the ordinary rules of succession obtaining among the parties. Counsel for all parties have agreed before me that, by ordinary rules of succession, the parties would succeed as follows:—

Muhammad Yusaf and Mauladad, sons of Dilawar Khan, one-third jointly; Misal Khan one third; Abdul Rahman and his three brothers one-third jointly. The three brothers of Abdul Rahman, Mirzaman, Sarfraz and Jamrud are not parties to the present suit, but no objection is made to Abdur Rahman being granted a decree for one-third as against the other parties, on behalf of himself and his brothers. I, therefore, accept the appeals of Abdul Rahman and of Mohammad Yusaf and Mauladad to the extent that decrees be passed in the suits of Abdur Rahman for possession of one-third of the land in suit representing the share also of his brother, and on the suit of Misal Khan for possession of one-third of the land in suit. The parties will pay their own costs throughout.

Z. K.

Appeals accepted.

GIAN SINGH-BAHADUR SINGH v. EMPEROR. SECY. OF STATE v. CHELLASANI VENKATARATNAM.

LAHORE HIGH COURT.

CIVIL REFERENCE CASE NO. 20 OF 1922.

February 10, 1923.

Present:—Mr. Justice Martineau.

MESSRS. GIAN SINGH-BAHADUR
SINGH OF CHICHAWATNI, DISTRICT
MONTGOMERY—PETITIONER

versus

EMPEROR—RESPONDENT.

Excess Profits Duty Act (X of 1919), s. 18, rules framed under, Rule 24 (3)—“Proceedings for the recovery of any sum,” meaning of.

The words “proceedings for the recovery of any sum” in sub-rule (3) of rule 24 of the rules framed under section 18 (1), (2) of the Excess Profits Duty Act, mean the proceedings taken under sub-rule (1) of that rule after default has been made in payment.

Case referred under section 51, sub-section (1) of the Income Tax Act (VII of 1918), by the Financial Commissioner, Punjab, with his No. 721-914-D-9696, dated the 18th November 1922.

Dr. Gokal Chand Narang, Lala Amin Chand Mehta and Bhai Man Singh, for the Petitioners.

ORDER.—This is a reference from the Financial Commissioner, made on the application of Messrs. Gyan Singh-Bahadur Singh under section 51 of the Income Tax Act, VII of 1918, the provisions of which apply to the Excess Profits Duty Act, X of 1919 by virtue of section 15 of the latter Act, for a decision as to the interpretation of sub-rule (3) of rule 24 of the rules made under section 18 (1) and (2) of Act X of 1919, and published in Finance Department Notification No. 1549-F, dated the 23rd June 1919. Sub-rule (3) of rule 24 provides that, save in accordance with the provisions of sub-rule (1) of rule 11, no proceedings for the recovery of any sum payable under the Act or these rules shall be commenced after the 31st of March 1921, and the question for decision is whether the words “proceedings for the recovery of any sum” refer to proceedings taken after default has been made in payment or whether such proceedings begin when a notice of demand has been served on the assessee. The learned Financial Commissioner is inclined to the opinion that the presentation of the demand statement to the assessee is the beginning of the proceedings for the recovery of the tax whereas the petitioners

contend that this is not a correct interpretation of the rule.

It seems to me clear that the view for which the petitioners contend is the correct one. Rule 24 (1) describes how the Excess Profits Duty is to be recovered when default has been made in payment. This is the only rule dealing with the mode of recovery, and the subject of the rule is entered as “mode and time of recovery.” Also rules 23 and 24 are classed under the heading “recovery of duty,” whilst rule 13 which is the rule providing for a notice of demand being served on the person assessed, is put under the heading “demand.” From this it is evident that the demand made on the assessee is treated in the rules as something quite distinct from the recovery of the duty, the proceedings for which begin when default has been made. The same distinction is made in the Income Tax Acts VII of 1918 and XI of 1922, where the notice of demand is provided for in a Chapter, the subject of which is “Deductions and assessment,” whilst there is a separate Chapter dealing with the subject of the recovery of the tax.

My decision, therefore, on the point referred is that the words in sub-rule (3) of rule 24 “proceedings for the recovery of any sum” mean the proceedings taken under sub-rule (1) of that rule after default has been made in payment.

The petitioner's costs in this case will be borne by the Government.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 26 OF 1922.

January 19, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL, REPRESENTED
BY THE COLLECTOR OF KISTNA—
DEFENDANT—APPELLANT

versus

CHELLASANI VENKATARATNAM—
PLAINTIFF—RESPONDENT.

Madras Revenue Recovery Act (II of 1864), s. 59

SECRETARY OF STATE FOR INDIA *v.* CHELLASANI VENKATARATNAM.

—*Madras Irrigation Cess Act (VII of 1865), s. 1—Limitation Act (IX of 1908), Sch. I, Art. 16—Cess paid under protest—Suit to recover amount paid—Limitation—*

A person who pays under protest water-cess under the Madras Irrigation Cess Act when a demand is made and then claims to recover it back by suit is not a "person aggrieved by any proceeding" within the meaning of section 59 of the Madras Revenue Recovery Act. [p. 112, col. 2.]

The period of limitation for such a suit is one year under Art. 16 of Schedule I to the Limitation Act and not six months under section 59 of the Madras Revenue Recovery Act. [p. 113, col. 1.]

Ravula Vengala Reddi v. Secretary of State, 15 Ind. Cas. 328, followed.

Ory v. Secretary of State, 23 M. 571; 10 M. L. J. 261, dissented from.

Appeal against an order of the Court of the Subordinate Judge, Masulipatam, dated 7th September 1921, in Appeal Suit No. 92 of 1921 (Original Suit No. 431 of 1919 on the file of the Court of the Additional District Munsif, Gudivada).

This appeal against order coming on for hearing on the 11th, 12th and 13th of September 1922 and having stood over for consideration till the 12th of October, 1922 the Court (Krishnan, J. and Venkatasubba Rao, J.) delivered the following

JUDGMENT.

Krishnan, J.—The question that arises for decision in this case is one of limitation. Plaintiff sues the Secretary of State for India in Council for the refund of excess water cess collected from him for certain lands of his on the ground that he had unauthorisedly used Government water for their irrigation. He contends that he did not take any water unauthorisedly and that he was not liable for the cess so collected from him. The cess was imposed on him under section 1 of the Irrigation Cess Act, VII of 1865. Section 2 of that Act provides that, "water cess payable under this Act shall be realised in the same manner as arrears of land revenue are or may be realised by law." The reference is to the Revenue Recovery Act, II of 1864. The water-cess in question here was paid by the plaintiff under protest when a demand notice by the Collector was served on him under the latter Act; he now seeks by the

present suit to get a refund of it with interest. The suit was filed within eight months from the date of payment but beyond six months therefrom.

The District Munsif applied the six months' rule in section 59 of Act II of 1864 and rejecting the argument that plaintiff was entitled to deduct in his favour under section 15, clause (2) of the Limitation Act the two months' period of the notice he had to give under section 80, Civil Procedure Code, before bringing his suit he dismissed the suit as barred by limitation. The Subordinate Judge on appeal took a different view and held, relying on *Srinivasa Aiyangar v. Secretary of State* (1), that plaintiff was entitled to the deduction claimed and that the suit was in time. He reversed the decree of the first Court and remanded the case for disposal on the merits. The present appeal to us is by the Secretary of State against that order.

Before deciding whether plaintiff is entitled to the deduction claimed or not, it is necessary to consider what rule of limitation applies, for it is argued that the limitation applicable is not the six months' rule under section 59 but the one year's rule under Art. 16 of Limitation Act. If this argument is correct the suit is well within time. Though the lower Courts have decided this point against the respondent it is no doubt open to him to support the order of the Subordinate Judge on the ground urged. It seems to me, however, that the argument is not sound; for, in my opinion, the suit is one falling within the very words of section 59 and if that view is correct the application of Art. 16 will be excluded even if the suit fell within the words of that Article also, for the former is the Special Law and as such it must prevail. Section 29 (b) of the Limitation Act also expressly enacts so.

The water-cess we are concerned with in this case was, as already stated, imposed on the plaintiff under Act VII of 1865. Section 2 of that Act applies the procedure for the collection of land revenue to the

(1) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

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collection of water cess. Now, it was argued for the respondent that the wording of section 2 does not apply all the sections of the Revenue Recovery Act to the collection of water cess but only such of the sections that deal with the method of collection or the procedure prescribed for it and it was contended that section 59 did not fall under that description and was not attracted by section 2 of the Cess Act. Reliance was placed for this argument on certain rulings under the Abkari and Income-Tax Acts where it was held that similar provisions applying the procedure of the Revenue Recovery Act for collection of the arrears under those Acts did not make section 42 of the Act applicable to sales for such arrears. See *Ramachandra v. Pitchaikanni* (2), *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (3). The learned Government Pleader, on the other side, pointed out that it has been held that these rulings are not applicable to the case of water cess in *Veeranan Ambalam v. Karuppayya Pillai* (4) and *Gunnam Dorayya v. Vadappalli Ayyamacharyulu* (5), the reason given being that the Revenue Recovery Act, II of 1864, itself by the definition of the term Public Revenue in section 1 made that term include water cess; so that all the provisions of that Act by their own force would apply to the collection of arrears of water cess. The respondent in answer has drawn our attention to the fact that section 1 of Act II of 1864 deals only with water cess imposed for water supplied by the Government for irrigation and he has contended that it cannot, therefore, apply to water unauthorisedly taken and not so supplied. Assuming that the respondent's contention is correct and that the view expressed in *Gunnam Dorayya v. Vadappalli Ayyamacharyulu* (5), that section 2 is a mere surplusage is incorrect, and that we must rely upon that section to make Act II of 1864 applicable to the collection of arrears of water-cess charg-

ed for water unauthorisedly taken, I am still of opinion that the words of section 2 are sufficient to make section 59 applicable to this case, whether section 42 applies or not, section 59 applies by its own language to all suits brought by parties aggrieved by any proceedings taken under the Revenue Recovery Act, whether such proceedings were taken to collect arrears of water cess or dues authorised to be collected under it. As pointed out by Sadasiva Aiyar, J., in *Ramasami Aiyar v. Secretary of State for India* (6), the ambit of section 59 is very different from that of section 42. The period of limitation provided under section 59 was applied in that case and not Art. 16, to a suit arising under the Kudimaramath Act, I of 1858, which authorised the Collector to recover the value of labour which the plaintiff had to contribute "in accordance with the procedure prescribed under Act II of 1864." The same view was taken by the late Chief Justice, Sir Arnold White, and and Mr. Justice Benson in *Orr v. Secretary of State* (7) with reference to fees payable to village servants collectable under section 52 of Act II of 1864 itself "in the same manner as arrears of land revenue." It will also be noticed in connection with the next argument that in that case money was paid under protest and no further proceedings were taken. The case in *Sankarappa Naicken v. Secretary of State* (8) also takes the same view; following these rulings I hold that section 59 applies.

It was next argued that as money was paid on demand being served on the plaintiff under Act II of 1864, and nothing further was done, there were no "proceedings" under the Act about which plaintiff was complaining in this suit but he is only seeking to get a refund of his money under the general law and, therefore, section 59 does not

(2) 7 M. 434; 2 Ind. Dec. (N.S.) 886.

(3) 26 M. 230; 12 M. L. J. 368.

(4) 19 Ind. Cas. 386; 37 M. 49; 24 M. L. J. 511.

(5) 25 Ind. Cas. 797; 27 M. L. J. 295; 16 M. L. T. 226; (1914) M. W. N. 648.

(6) 26 Ind. Cas. 863; (1915) M. W. N. 154 at p. 156.

(7) 23 M. 571; 10 M. L. J. 261.

(8) 7 Ind. Cas. 339; (1910) M. W. N. 404; 8 M. L. T. 201; 20 M. L. J. 977.

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apply. Certain unreported decisions in Second Appeals Nos. 838 and 844 of 1910 and the rulings of this High Court reported as *Ravula Vengala Reddi v. Secretary of State* (9) and *Ravala Nagamma v. Secretary of State* (10) were cited in support of this argument. With all respect, I am quite unable to follow these rulings. As against them there are the cases in *Orr v. Secretary of State* (7) and *Sankarappa Naicken v. Secretary of State* (8) already cited. It seems to me the proceedings begin by the distraining officer producing a demand in writing from the Collector giving the name of the defaulter and the amount of the water-cess payable by him and showing it to the defaulter. That is a part of the proceeding under section 8 of the Act; in fact, it is the first step. I see no reason to hold that the proceedings mentioned in section 59 refer only to subsequent proceedings after demand and not to the demand itself. There does not seem to be any justification for making such an artificial distinction. The cases referred to by the respondent have never been followed or treated as good law. It is clear to my mind that the plaintiff in this suit is a person who deems himself aggrieved by proceedings under the Revenue Recovery Act by which he was compelled to pay water cess for which, according to this case, he was not liable and that he is seeking redress in this suit by suing for a refund of the money. The case falls, in my view, exactly within the language of section 59 and the rule of limitation provided in it applies.

The next question is whether the plaintiff is entitled to the deduction he claims. No doubt the ruling in *Srinivasa Aiyangar v. Secretary of State* (1) is exactly in point in his favour but after the ruling in the Full Bench case reported as *Kopparthi Lingayya v. Araveti Chinnarayana* (11), that case cannot be considered to be good law, though it was not formally overruled. The principle adopted in that Full Bench case

is directly against the reasoning on which *Srinivasa Aiyangar v. Secretary of State* (1) is based. It has now been taken as settled that the application of the general provisions of the Limitation Act in sections 5 to 25 to the limitation prescribed by special or local laws would "affect or alter" the periods so prescribed and is, therefore, prohibited by section 29 of the Limitation Act. The distinction sought to be made in *Srinivasa Aiyangar v. Secretary of State* (1), between Special Acts which do not contain "a complete body of provisions with regard to limitation of suits coming within their purview" and other Acts which do contain them was rejected in the Full Bench case and I have, therefore, no hesitation in holding that plaintiff was not entitled to the deduction he claims under section 15, clause (2). The Calcutta High Court has taken the same view in *Secretary of State for India v. Shib Narain Hazra* (12). The point is, however, of little importance hereafter as the amending Act X of 1922 has made provision for it. But it is not argued that that Act applies to the present case for the suit here was barred before that Act came into force. In the view I take, the plaintiff's suit is barred by limitation. I would, therefore, reverse the order of the Subordinate Judge and restore the decree of the District Munsif with costs here and in the lower Appellate Court.

Venkatasubba Rao, J.—The Government recovered from the plaintiff penal assessment under the Madras Irrigation Cess Act (VII of 1865) for unauthorised use of water and the plaintiff claimed in this suit refund of the amount so recovered from him. The Government pleaded that suit was barred by limitation. The District Munsif accepted the contention and dismissed the suit. On appeal the Subordinate Judge reversed the decision of the District Munsif on the question of limitation and remanded the suit for disposal on the merits. The present appeal is by the Government against the order of remand.

On behalf of the plaintiff it is argued—

1. That the provision of law applicable is Art. 16 of the Limitation Act

(9) 15 Ind. Cas. 328.

(10) 18 Ind. Cas. 699; (1913) M. W. N. 75.

(11) 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J.

566; 7 L. W. 443 (F. B.).

(12) 47 Ind. Cas. 502; 46 C. 199; 22 C. W. N. 802.

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under which the period of limitation is one year and not section 59 of the Madras Revenue Recovery Act (II of 1864) under which the period is six months.

2. Where there was a mere demand by the Government and money was paid and no further proceeding was taken, that section 59 of the Revenue Recovery Act is not applicable because there was no proceeding under that Act.

3. Should the period of limitation be held to be six months under section 59 of Act II of 1864, that the plaintiff is entitled to exclude the period of notice prescribed by section 80, Civil Procedure Code, in computing the said period of six months. In my opinion, the provision of law applicable is Art. 16 of the Limitation Act and not section 59 of the Revenue Recovery Act. I shall presently state my grounds for this opinion and as I entertain no doubt on the point, I consider it unnecessary to deal with the other two contentions urged before us. As already stated, the penal assessment was collected from the plaintiff under the Irrigation Cess Act (VII of 1865). Section 1 of the said Act, so far as it is relevant for the present purpose enacts.

“(a) Whenever water is supplied or used for purposes of irrigation from any river.... belonging to or constructed by Government and also,

“(b) Whenever water by direct or indirect flow or by percolation or drainage from any such river, irrigates any land under cultivation or flows into a reservoir, and is thereafter used for irrigating any land.... it shall be lawful for the Government.... to levy.... a separate cess for such water.”

Section 2 provides “arrears of water-cess payable under this Act shall be realised in the same manner, as arrears of land revenue are, or may be realised by law in the Madras Presidency.”

Arrears of land revenue are realised under the Madras Revenue Recovery Act (II of 1864) and the reference in the section above quoted is to the provisions of the said Act.

Section 2 may be rendered thus—

“Arrears of water-cess payable under this Act shall be realised in the manner

prescribed by the Revenue Recovery Act in regard to arrears of land revenue.” In my opinion, the meaning of section 2 is, that all the sections of the Revenue Recovery Act that relate to the manner of realising arrears of land revenue, shall be read as if they form part and parcel of the Irrigation Cess Act.

Section 59 of the Revenue Recovery Act runs as follows:—

“Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act..... from applying to the Civil Courts, for redress; provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose.”

The learned Government Pleader argues that section 59 is applicable to this case and this argument implies that the said section deals with the manner of realising arrears of revenue. Section 59 does nothing of the kind. It presupposes that the revenue had been realised and it prescribes the remedy to an aggrieved person against the Government. It refers to parties aggrieved by any proceedings “under this Act” that is, under the Revenue Recovery Act. It refers to a suit instituted by “such parties” and for “such cause of action” “such parties” being parties deeming themselves aggrieved by any proceedings under the Revenue Recovery Act and “such suit” and “such cause of action” can only refer to what is contemplated by the section.

I fail to see how section 59 can come within the group of sections which refer to the manner in which land revenue is realised. If the Legislature, instead of merely saying “arrears shall be realised in the same manner as arrears of land revenue are under the Revenue Recovery Act,” had re-produced *en bloc* all the sections of the latter Act which deal with the mode of realising revenue and re-enacted them in the Irrigation Cess Act could it for a moment be contended that section 59 of the Revenue Recovery Act would be applicable to suits filed for the refund of penal assessment collected under the Irrigation Cess Act? To my mind, I have no doubt whatever that section 2 of the

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Irrigation Cess Act merely incorporates by reference only those sections of the Revenue Recovery Act that deal with the manner of realising of land revenue. Section 59 is clearly not one of those sections.

Let me now turn to Art. 16 of the Limitation Act "against Government to recover money paid under protest in satisfaction of a claim made by the Revenue Authority, on account of arrears of revenue or on account of demand recoverable as such arrears *one year*.....when the payment is made."

This Article in terms applies to the present suit. The only argument advanced on behalf of the Government against its applicability is, that a special rule is enacted in section 59 of the Revenue Recovery Act and that an Article in a general Act should not be applied when a section of a Special Act is applicable.

It will be noticed that the Article of the Limitation Act is quite general in its terms. It refers to arrears of revenue. Land revenue alone is removed from the scope of the said Article by reason of the fact that a special provision is enacted in respect of it by section 59 of the Revenue Recovery Act.

Section 66 of the Madras Forest Act (V of 1882) provides that all money payable to the Government under that Act may be recovered "as if it were an arrear of land revenue." Similarly, section 84 of the Madras Salt Act (IV of 1889) provides that all sums recoverable under that Act, may be recovered "as if they were arrears of land revenue." Again, section 28 of the Madras Abkari Act (I of 1886) enacts that certain sums due to the Government may be recovered "as if they were arrears of land revenue." It is unnecessary to refer to various other Acts in which similar provisions occur. Does it then mean that section 59 of the Revenue Recovery Act applies to suits instituted for recovery of the money paid to the Government on account of alleged arrears of revenue under any of these Acts? If this view should be taken, Art. 16 of the Limitation Act would practically be a dead letter. I fail to see why the plain provisions of Art. 16 of the Limitation Act should not be given effect to and why a forced construction should be placed upon

section 2 of the Irrigation Cess Act for the purpose of enabling the Government to plead a rule of limitation in bar of an admitted right to sue.

Land revenue being the most important item of revenue due to the Government, the Legislature has in the Revenue Recovery Act enacted in detail the procedure for realising it. When the Legislature came to deal with other sources of revenue like Salt Abkari, Income-tax, irrigation cess, the Legislature thought it sufficient to enact that all sums payable to the Government in respect of each particular head of revenue could be recovered as if it were an arrear of land revenue. The Legislature could not have intended, by mere reference to the procedure for realisation of land revenue, that a provision of the Revenue Recovery Act which does not deal with such procedure should be incorporated in the Special Acts.

The District Munsif refers to section 1 of the Revenue Recovery Act, and by some argument which I am unable to follow, comes to the conclusion that by reason of the wording of that section, section 59 applies to this case. The material portion of section 1 is as follows:—

"Public revenue due on land shall for the purposes of this Act be taken to include cesses or other dues payable to Government on account of water supplied for irrigation." Whether section 1 of the Revenue Recovery Act and section 2 of the Irrigation Cess Act overlap each other or not, it is unnecessary for me to discuss. But one thing is certain; in this case water-cess was not levied for water *supplied* for irrigation. On the other hand, as the District Munsif remarks at the close of his judgment, it was the in unauthorised *use* of water that entailed penal assessment. The Revenue Recovery Act refers not only to water supplied but also to water *used*. In this suit we are concerned only with water used and not with water supplied and the reference by the District Munsif to section 1 of the Revenue Recovery Act seems altogether irrelevant.

For these reasons I have come to the conclusion that the suit is not barred by limitation and I would, therefore, dismiss the appeal with costs.

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By the Court.—As we have differed on a point of law, *viz.*, whether the suit is barred by limitation or not, we refer the point under section 98, Civil Procedure Code, to the decision of a Third Judge.

The Government Pleader, for the Appellant.

Mr. V. Krishna Mohan, for the Respondent.

This appeal came on for hearing in pursuance of the Order of Reference to a Third Judge, dated 12th October 1922, the Court (Sir Walter Schwabe, Kt., Chief Justice) delivered the following

JUDGMENT.—In this case claim was made for water-cess. The assessee paid under protest, gave notice claiming the amount he paid and commenced this suit seven months after the payment but within eight months of it. It is contended by the Crown that the suit is barred by limitation under section 59 of the Revenue Recovery Act, II of 1864. That section runs thus: "Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act from applying to the Civil Courts for redress: provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." I will assume that that section applies to cases arising out of the collection or imposition of cess under the Madras Irrigation Cess Act, VII of 1865. By Art. 16 of the Limitation Act a period of one year is given for suits "against Government to recover money paid under protest in satisfaction of a claim made by the Revenue Authorities on account of arrears of revenue or on account of demands recoverable as such arrears." That section applies in terms to this case unless there is something in section 95 of the Rent Recovery Act which prevents its applying. Section 29 (1) (b) of the Limitation Act says: "Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, ... by any special or local law now or hereafter in force in British India." There is a further provision in section 15 (2) of that Act that, in comput-

ing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment of the time being in force, the period of such notice shall be excluded, and, under section 80 of the Code of Civil Procedure no suit can be instituted against the Secretary of State in Council unless two months' notice is given. It has, therefore, to be contended for the Crown that section 59 of the Revenue Recovery Act, by reason of section 29 of the Limitation Act not only excludes Art. 16, but also by reason of the same section, prevents the application of section 15 of the Limitation Act so that the period of two months is not in this particular instance to be excluded. In my judgment this is not a case under section 59 of the Revenue Recovery Act at all, because it is not the case of a party deeming himself aggrieved by any proceeding under that Act. I doubt very much whether a demand of payment is a proceeding under the Act at all as contemplated by that section. I am quite clear that a person, who pays under protest when a demand is made and claims to recover back, is not a person aggrieved by any proceeding under the Act. He has taken a wise course, which prevents his having a grievance.

There is direct authority in support of this view in *Ravula Vengala Reddi v. Secretary of State* (9) which followed a series of appeals, Second Appeals Nos. 838 and 844 of 1910 and 240 to 244 of 1911, the judgments in which, I regret, have not been published, because the point is fully discussed there and decided. The only authority to the contrary is the case of *Orr v. Secretary of State* (7). In that case, without giving any reasons the Court expressed a view that, in the circumstances of that case, section 59 applied where there had been a payment under protest to the exclusion of Art. 16 of the Limitation Act. It was unnecessary for that decision (which, no doubt, explains why no reasons were given) because in that case, the Court held on the merits that there was no case. That case was considered by the Bench in *Ravula Vengala Reddi v. Secretary of State* (9) and in the case

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therein referred to and distinguished. *Ravula Nagamma v. Secretary of State* (10), which was also referred to, does not touch this point.

In this state of authorities, sitting alone, I should have considered myself bound to follow the decision in *Ravula Vengala Reddi v. Secretary of State* (9) but it is open to me, sitting as I am now, to express my own views, and I agree with the decision in *Ravula Vengala Reddi v. Secretary of State* (9) for the reasons given in that case and in the unreported cases referred to therein, and I disagree with that part of the judgment in *Orr v. Secretary of State* (7) which is to the contrary.

That being my view, it is enough to dispose of the case: but although I have not heard the matter fully argued, I think it right to say that I should find it very difficult to hold that section 29 of the Limitation Act, even if it has any application in this case, operates to exclude the two months' time given by section 15 of that Act, for there is nothing in section 59 of the Revenue Recovery Act to suggest that the six months limited there is to include the period which is by the general law excluded.

The appeal will be dismissed with costs including the costs of this reference.

V. N. V.

Appeal dismissed.

OUDE JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL, APPEAL No. 67 OF 1921.

February 27, 1923.

Present:—Mr. Dalal, A. J. C. and
Mr. Simpson, A. J. C.

LUTAR RAM AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

LAL RANJIT SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family, litigation by—Separate representation of minor co-parceners—Manager, compromise of suit by, validity of—Mortgage—Subrogation—Intention of parties—Subrogation by co-mortgagor—Transfer of Property Act (IV of 1882), s. 89, construction of—Priority.

A compromise of a suit by the Manager of a joint Hindu family without obtaining the consent of minor co-parceners who are separately represented in the suit is unlawful and fails not only as regards the minor co-parceners but as regards the Manager as well. [p. 116, col. 2.]

Where one of several mortgagors has redeemed a mortgage under which all are equally liable, he is subrogated to the rights of the mortgagee whose debt he discharges and, as an assignee of the security which he pays off, can enforce it by a suit for sale. [p. 117, col. 2.]

Har Prasad v. Raghunandan Prasad, 1 Ind. Cas. 825; 31 A. 166; 6 A. L. J. 67, 832 and *Kashi Ram v. Het Singh*, 26 Ind. Cas. 417; 37 A. 101; 13 A. L. J. 34, referred to.

A claim to subrogation can be sustained when there is an agreement, either express or implied, with the debtor, that the lender shall be subrogated to the rights of the mortgagee. Such an agreement may be express or may be presumed from the circumstances of the case. The question to ask in each case will be, whether the new lender was lending the money on the personal security of the borrower or on the understanding that he would be substituted in place of the former mortgagee. [p. 118, col. 2.]

Apaji Bhirav Rayrikur v. Kavji, 6 B. 64; 3 Ind. Dec. (N. S.) 499 and *Gangadhara v. Sivarama*, 8 M. 246; 9 Ind. Jur. 146; 3 Ind. Dec. (N. S.) 170, referred to.

Mohesh Lal v. Mohant Bawan Das, 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 and *Gokaldas Gopaldas v. Puranmal Premsukh Das*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 5 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), followed.

An order made under section 89 of the Transfer of Property Act for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. Therefore there can be no right of priority in respect of a payment made after the passing of such an order. [p. 119, col. 2; p. 120, col. 1.]

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Het Ram v. Shadi Ram, 45 Ind. Cas. 798; 48 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 (P. C.) and *Matru Mal v. Durga Kunwar*, 55 Ind. Cas. 969; 47 I. A. 71; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; (1920) M. W. N. 328; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.), followed.

Shyam Lal v. Bashir-ud-din, 28 A. 778; 3 A. L. J. 630; A. W. N. (1906) 220, *Purnamal Chund v. Venkata Subbarayalu*, 20 M. 486; 7 M. L. J. 198; 7 Ind. Dec. (N.S.) 344 and *Vanmihalinga Mudali v. Chidambaram Chetty*, 29 M. 37, referred to. *Bibijan Bibi v. Sachi Bewah*, 31 C. 863; 8 C. W. N. 684 discussed from.

Appeal against a decree of the Sub-Judge, Rai Bareilly, dated the 28th February 1921.

Messrs. *M. Wasim* and *Gokul Prasad*, for the Appellants.

Mr. *Zahur Ahmad*, for Respondents Nos. 2 to 10, 12, 25 to 28.

Mr. *Ali Mohammad*, for Respondents Nos. 2, 3 and 12.

Mr. *S. M. Ahmad*, for Respondents Nos. 11 and 14.

JUDGMENT.—This was a suit for foreclosure in the Court of the Subordinate Judge of Rae Bareilly. The plaintiffs were Lotar Ram and his three minor nephews under the guardianship of their mother, *Musammal Surtaja*. The defendant No. 1, Lal Ranjit Singh, was the mortgagor and defendants Nos. 20 to 24 were his sons. At the date of the decree, there were 22 other defendants on the record as prior or subsequent mortgagees. The lower Court passed a preliminary decree for foreclosure against all the defendants with a direction that if and when the final decree for foreclosure is passed, the relationship between the plaintiffs and defendants, Nos. 20 to 24 shall be governed by the compromise into which they had entered. Against the other defendants the decree was passed on contest.

The mortgage-deeds in suit were 4:—

Exhibit 1 of Rs. 16,000 of 10th December 1909.

Exhibit 2 of Rs. 2,000 of 27th June 1910.

Exhibit 3 of Rs. 1,800 of 20th October 1910.

Exhibit 4 of Rs. 8,000 of 19th January 1911.

There was a dispute about priority regarding two sums of money. As regards the consideration of Rs. 14,011-13-0 of Exhibit 1, the plaintiffs claimed priority as from 11th December 1891, and as regards a sum of Rs. 5,300 part of the consideration of Exhibit 4, priority was claimed as from 25th January 1899. The learned Subordinate Judge disallowed these two claims for priority.

The plaintiffs appealed to this Court and arguments were addressed to us on their behalf on the three following points:—

(1) that the compromise bearing date 20th December 1920 ought not to have been accepted and acted upon by the lower Court;

(2) that the sum of Rs. 14,000 odd, part of the consideration of Exhibit 1, should be given priority as from 11th January 1891;

(3) that the sum of Rs. 5,300, part of the consideration of Exhibit 4, should be given priority as from 25th January 1899.

A preliminary objection was raised by Mr. Zahur Ahmad, Counsel for the mortgagee defendants, that the pleas regarding priority were not raised in the grounds of appeal and should not be allowed. It may be conceded that the grounds of appeal are not clear on the subject, but the ground of appeal No. 5 would seem to include these pleas. Though the ground of appeal No. 5, that the Subordinate Judge should have on the materials before him held that none of the documents relied on by the defendants had any priority over any of the plaintiffs' documents, is indefinite, the defence must have known that it related to the two items mentioned above, because no other item was in dispute between the parties as regards priority. At the very commencement of the arguments, the ap-

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pellant's Counsel indicated these two items and as the respondents were not called upon to answer till next day, the respondents were in no way prejudiced by the vagueness of the grounds of appeal.

All the proceedings of the 16th of February 1921 dealing with the compromise are not printed in the paper-book, so reference will be made to the original record for a complete statement of what took place in the lower Court. On 20th December 1920 a petition of compromise was filed in the lower Court purporting to emanate from plaintiff No. 1 and the next friend of the other plaintiffs on one side, and the defendant's Nos. 1 and 20 to 24 on the other. This was duly verified on the same date by all the parties mentioned in the petition, with the exception of defendant No. 1 Ranjit Singh. The conditions worth noting are:—

(1) that the compromise purported to be one between all the plaintiffs and the sons of the mortgagor as well as the mortgagor;

(2) that the right of the redemption by the mortgagor and his sons was to be extinguished at once, meaning evidently from the date of the preliminary decree, and not postponed to the final decree;

(3) heritable and non-transferable occupancy rights in all the properties in suit (Mahanandpur) Ninawan and a portion of Bara) with the exception of the groves were conferred on the mortgagor's sons on certain conditions:

(a) that the mortgagor and his sons relinquish at once ex-proprietary rights in their *sir*;

(b) that the sons of the mortgagor pay Rs. 4,000 per annual rent;

(c) that the plaintiffs pay off all the prior encumbrances, the mortgagor and his sons helping to determine the exact amount received by the mortgagor in respect of every encumbrance;

(d) that even if the defendants claim and obtain ex-proprietary rights in any area of land, the rent payable by the mortgagor's sons shall not be less than Rs. 4,000 per annum;

(e) that the mortgagor and his sons shall not acquire any *sir* rights in any area of lands cultivated by them as *khudkasht*.

The suit was postponed for the presence of defendant No. 1, Lal Ranjit Singh, to verify the compromise. On 10th February the defendant No. 1 did not appear. The proceedings then continued:—

"The petition for compromise wants immediate foreclosure as against the defendants Nos. 1 and 20 to 24. This is impossible as a preliminary decree for foreclosure shall have to be framed in any case in view of the existence of other defendants as prior and subsequent mortgagees. The compromise shall, therefore, remain a part of the preliminary decree if any is framed. "When and if that decree becomes final, the compromise shall represent the final decree between the plaintiffs and the defendants Nos. 1 and 20 to 24."

"I have mentioned the above terms of my proposed order to the plaintiffs and the defendants Nos. 21, 22 and 23. This proposal is in favour of the defendants and they, of course, accept it."

"The plaintiffs say it seems inevitable under the circumstances of the case, but their Pleader says he shall give final acceptance on behalf of his clients to-morrow after he has fully consulted law on the point."

The suit was postponed to next day for verification and acceptance of the compromise. It came up for hearing on 16th February and the following proceedings were recorded:—

"The defendant No. 1 has failed to accept the compromise. His acceptance is not necessary as the main acceptance is as against the other defendants who are parties to it and have already accepted it. The plaintiffs still accept it as against the defendant No. 20 to 24. They also accept the modifications mentioned by me in my proceedings of the 10th instant. These modifications are necessary to make the compromise legal under the circumstances of the case. The plaintiffs Nos. 2 to 4 are minors. Their mother is their next friend. She applied to me in December 1920 through her Pleader for sanction under O. XXXII, r. 7, Civil Procedure Code, to enable her to enter into the compromise on behalf of the minor plaintiffs. I am requested by the plaintiffs' Pleader to grant that pe-

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tition now, as there is no more hope that the defendant No. 1 shall come forward to accept it.

"ORDER.—The compromise of the case as against the defendants Nos. 20 to 24 is advantageous to the minor plaintiffs even with the modifications mentioned in my proceedings of the 10th instant and accepted by the plaintiffs. I, therefore, do hereby permit their mother, next friend, under O. XXXII, r. 7, Civil Procedure Code, to enter into it on behalf of the minor plaintiffs Nos. 2 to 4."

After this, the Court proceeded to hear arguments, in the course of which Lotar Ram, plaintiff No. 1, and Munshi Gaya Prashad Shukla, Pleader of the next friend of the other plaintiffs, put in an objection to the conferring of occupancy rights under the compromise on the mortgagor's sons. This objection was rejected by the Court.

The points of difference between the compromise originally proposed by the plaintiffs and that finally accepted by the Court are :—

(1) the defendant, Lal Ranjit Singh, was left unhampered to prosecute his claim to under-proprietary right and to ask for time to put off final foreclosure ;

(2) he was not bound to render any help to the plaintiffs to settle the amounts due to the prior mortgagees ;

(3) the plaintiffs' right to foreclose was postponed to the final decree.

Obviously, the plaintiffs were given a decree for far less value to them than what they desired to have on 20th December 1920. The plaintiffs were prepared to grant occupancy rights to the mortgagor's sons, if they obtained immediate possession without the worry of constant adjournments to enable the mortgagor to pay up, received the help of the defendant, Lal Ranjit Singh, the actual borrower in determining the amount actually borrowed by him from prior mortgagees, and escaped subsequent litigation in Rent and Revenue all Courts about the mortgagor's tenancy rights and the rent payable by him and his sons. They lost the advantages by Lal Ranjit Singh's refusal to verify the compromise, while they were put to the disadvantage of granting occupancy rights, to which the mortgagors and his sons were not entitled. Under these circumstances,

it cannot be said that the plaintiffs now desire to escape from the compromise on technical grounds. The plaintiff, Lotar Ram, accepted the modifications on 16th February, though it may be doubted whether he fully understood the purport thereof. He may have accepted the compromise even though it did not bind the principal defendant, Lal Ranjit Singh. It is clear, however, that the minor plaintiffs are in no way bound by the compromise. What their next friend accepted was the compromise of 20th December 1920, and her Pleader, whose name is not noted on the record of the lower Court, had no authority to accept on her behalf a totally different compromise. The altered compromise was sanctioned by the lower Court under O. XXXII, r. 7, but that fact is not sufficient to bind the minors specially when the lower Court was not correct in holding that the non-joinder of defendant No. 1 in the compromise made no difference to the interest of the minors.

It was argued on behalf of the respondents (defendants Nos. 20 to 24) that it was not necessary that there should be a written petition of compromise before a Court to satisfy it that a suit had been adjusted by a lawful agreement. In the present case, however, that is not the real difficulty.

The omission, which makes the agreement unlawful, is that of the consent of the next friend of the minor plaintiffs to a compromise which was totally different from the compromise accepted by her. In our opinion the compromise finally accepted by the lower Court was not lawful. As the plaintiffs, Lotar Ram and his nephews, the minor plaintiffs, are members of a joint Hindu family, we cannot discriminate between their separate interest and as the compromise fails as regards the minors it must fail as regards Lotar Ram as well. The minors were separately represented in the suit, so Lotar Ram's consent cannot bind them though he is presumably the manager of the joint family made up of himself and his nephews. For these reasons the compromise shall be set aside.

The other two pleas in appeals require an examination of the doctrine of sub-

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rogation. Lal Ranjit Singh had two brothers, and his father had mortgaged some property to the Raja of Amethi on 11th December 1891 (Deed Exhibit 6). After the death of the father, Bisbeshwar Bakhsh, one of the brothers of the defendant, Lal Ranjit Singh, mortgaged his 1-3rd share in the property to one Ganga Bakhsh to pay off one-third of the mortgage lien of the Raja. The Raja refused to split the mortgage, so Ganga Bakhsh Singh redeemed the whole of it, and sued Lal Ranjit Singh, his two brothers and a subsequent mortgagee for a contribution and obtained a decree for sale on 29th February 1908. These proceedings are described in the mortgage-deed, Exhibit 1. At that time Ranjit Singh's other brother, Chattarpal Singh, had also paid up his share, and only the balance of the decree remained due from Ranjit Singh to the amount of Rs. 14,011-13. Out of consideration of the mortgage-deed Exhibit 1, this sum was left with the mortgagee in order that he, as the representative of the mortgagor, should pay up the amount and save the property from sale. There was also a covenant that the mortgagor shall be liable to re-pay any sum paid by the mortgagee in excess of the amount above-mentioned to satisfy the decree. It is admitted that this sum was paid by the mortgagee, Ausan Shah, in satisfaction of the decree of Ganga Bakhsh Singh on 13th January 1910 (Exhibit 17). The lower Court's opinion was, that the plaintiffs have no right to be substituted in place of Ganga Bakhsh with respect to this sum, because they did not pay up any mortgage-money, but paid up Ganga Bakhsh who had only an equitable charge against his co-mortgagor. In its opinion such a charge cannot be enforced against property in the hands of a *bona fide* purchaser for value without notice; and as the plaintiffs did not prove any notice to the subsequent mortgagees, it refused to give the plaintiffs priority with respect to the payment.

The question is, what rights did Ganga Bakhsh obtain by paying off the Raja of Amethi. This is a case, where one of several mortgagors has redeemed a mortgage under which all were liable. When this happens, he is entitled to be treated as an assignee of the security which he pays off and his

remedy would be to enforce that security in the usual way by a suit for sale. In this matter, a learned Commentator on the Law of Mortgage in India has made the following observation at page 372 of his book (Ghosh, Volume I, 5th Edition) "It is true, section 95 of the Transfer of Property Act allows only a charge on the interest of the co-mortgagors. But whatever may be the true construction of this unskillfully drawn and clumsily worded section, I venture to think it does not impose any new burden, and the charge would have the same priority as the security which has been redeemed on the principle that the benefit of subrogation may be claimed by any person who redeems a mortgage on an estate in which he is only partially interested." This matter is elaborately considered by a Bench of the Allahabad High Court in *Har Prasad v. Raghunandan Prasad* (1). According to the learned Judges, the rule of subrogation is founded on equitable principles, and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee, whose debt he discharges, a co-mortgagor is equally subrogated. This principle was approved by another Bench of the same High Court in *Kashi Ram v. Het Singh* (2). Thus, Ganga Bakhsh was in the position of the Raja of Amethi, while his remedy to enforce his right of contribution was the same as that of the Raja under his mortgage.

The next stage of the enquiry relates to the position of Ausan Shah, when he paid off the decretal amount due to Ganga Bakhsh. The application of the doctrine of subrogation has varied considerably in different High Courts in India. In Bombay the trend of the decisions was that there would be no subrogation in the absence of an actual assignment by the prior mortgagee in favour of the persons who paid him off. *Apaji Bhivrao Rayrikur v. Kavji* (3). At the other extreme were the decisions of the Madras High Court where a claim for subrogation was allowed, though there was no agreement, either express or implied, with the mortgagor for such substitution.

(1) 1 Ind. Cas. 825; 31 A. 166; 6 A. L. J. 67 & 832.

(2) 26 Ind. Cas. 417; 37 A. 101; 13 A. L. J. 34.

(3) 6 B. 94; 3 Ind. Dec. (N. S.) 499.

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and the payment was made not by the lender but by the mortgagor. *Gangadhara v. Sivaram* (4). The Privy Council, however, has laid down in successive cases a principle of law to guide us in determining cases of subrogation. The first case was that of *Mohesh Lal v. Mohant Baiwan Das* (5). In that case a person who had put himself forward as the owner of a certain estate borrowed money on mortgage, and with the money thus raised paid off an encumbrance by which the property was bound. There was no assignment of the mortgage, nor any expression of an intention in the subsequent mortgage to keep the former charge alive for the benefit of the lender. In the recital, the mortgagor claimed to be the owner of the estate, and there was no intermediate mortgage between the one paid off and that in favour of Mahesh Lal. On these facts their Lordships held that the former charge was extinguished as the circumstances did not raise any presumption that it was the intention of the parties to keep that charge alive. The next year their Lordships held in *Gokuldas Gopaldas v. Purnamal Premsookh Das* (6), that the former charge was kept alive. The mortgagor's right, title and interest in certain immovable property subject to a first and second mortgage were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage. Their Lordships distinguished the rules in the English Court of Chancery from the practice in India, where a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed. Their Lordships observed: "The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is, that

a man having a right to act in either of two ways, shall be assumed to have acted according to his interest." It would appear, therefore, that a claim to subrogation can be sustained when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagees. Such an agreement may be express or may be presumed from the circumstances of the case. The question to ask will be, whether the new lender was lending money on the personal security of the borrower or on the understanding that he would be substituted in place of the former mortgagee. Applying these principles to the present case, we are of opinion that it was the intention of Lal Ranjit Singh and Ausan Shah that the Raja's mortgage shall be kept alive for the benefit of Ausan Shah. In the deed, Exhibit 1, itself, the burden on the property of an intermediate debt due to Shambhu Dayal is mentioned. The presumption is that Ausan Shah who was paying off a mortgage prior to that of Shambhu Dayal would want to keep it alive as a shield against the claim of Shambhu Dayal. The whole history of the debt of the Raja and the subsequent decree of Ganga Bakhsh are narrated in the deed, which would not have been necessary if Ausan Shah had been advancing money on the personal security of Ranjit Singh, and had no concern with the Raja's mortgage.

It was argued on behalf of the respondents, that the passing of a decree in favour of Ganga Bakhsh extinguished his charge as a mortgagee based on the Raja's mortgage.

This is true where an order absolute for sale is passed under section 89 of the Transfer of Property Act. Therein lies the distinction between the two payments, with regard to which priority is claimed by the appellants; Ganga Bakhsh was paid before he obtained an order under section 89 of the Transfer of Property Act, while the payment of Rs. 5,300 was made to Shambhu Dayal after such an order was made in his favour.

It is not clear whether the final decree in favour of Shambhu Dayal was passed before or after 1st January 1909 when the Code of Civil Procedure came into force and repealed the provisions of sections 88 and 89 of the Transfer of Property Act,

(4) 8 M. 246; 9 Ind. Jur. 146; 3 Ind. Dec. (N. S.) 170.

(5) 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291.

(6) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 5 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

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But as the preliminary decree was passed under section 88, Transfer of Property Act, the legal proceedings would be taken to have continued under the Transfer of Property Act, according to the provisions of section 6 of the General Clauses Act, X of 1897, and the final decree for sale will have the effect of an order absolute under section 89 of the Transfer of Property Act.

The distinction between the decrees under sections 88 and 89 of the Transfer of Property Act arises out of the recent ruling of the Privy Council in *Het Ram v. Shadi Ram* (7). It will be convenient at this stage to examine its effect.

In that case there had been a mortgage dated the 28th February 1880. Then came the respondent's mortgage dated the 15th October 1881. In 1891 the prior mortgagee brought a suit on his mortgage and in 1895 he obtained a decree absolute for sale. He took no further steps, and his decree ceased to be operative under the Limitation Act. The appellant succeeded to the title of the mortgagor and had also succeeded to the title of the prior mortgagee. The puisne mortgagee was not made a party to the earlier suit. He afterwards sued upon his own mortgage and obtained a decree for sale. The question was, whether the property ought to be sold subject to the prior mortgage. It was decided on a construction of section 89 of the Transfer of Property Act, that the decree absolute had extinguished the mortgage, and that nothing remained except the right of sale conferred by the decree. It is to be noted, that in that case no equity had arisen in favour of a subsequent mortgagee. No body had paid off the mortgage. The rights of the prior mortgagee, whatever they were, had come into the hands of the mortgagor himself. The decision was, that these rights were non-existent, because the mortgage had been extinguished by the decree and that the decree itself had become inoperative.

The decision itself presents no difficulty just as a mortgage is destroyed by the sale

of the property under the mortgagee's decree, so it would be extinguished by the decree for sale becoming barred by limitation. But the judgment does not proceed upon this ground. It proceeds on the ground that, on a true construction of section 89 of the Transfer of Property Act, the passing of decree absolute for sale extinguished the right to redeem. This is contrary to a current of decisions of the Indian Courts. Some of these may be referred to. There is *Shyam Lal v. Bashir-ud-din* (8). In that case the sale had actually taken place but it had not been confirmed, when the judgment-debtor borrowed the money and paid it and the sale was then set aside by the Court. The money was borrowed on a fresh mortgage, and it was held that that mortgagee could claim priority over the original mortgage. This decision was founded upon an interpretation of section 89 of the Transfer of Property Act. The Court followed the ruling in *Bibijan Bibi v. Sachi Bewah* (9) in which it was held that the concluding words of section 89 of the Transfer of Property Act "and thereupon the defendant's right to redeem and the security shall both be extinguished), related to the actual" sale and distribution of the proceeds, and not merely to passing of an order absolute for sale.

It is impossible to reconcile this construction with the construction put on the same words by the Privy Council; for in the case before the Privy Council, there had been no sale and no distribution of assets. There had merely been a decree which by the lapse of time had become inoperative.

The interpretation put on the words of section 89 of the Transfer of Property Act in *Het Ram v. Shadi Ram* (7) was affirmed a year later by the Privy Council in *Matru Mal v. Durga Kunwar* (10). Their Lordships said "*Het Ram's case* (7) decided that an order made under section 89 of the Transfer of Property Act

(8) 28 A. 778; 3 A. L. J. 630; A. W. N. (1906)

230.

(9) 31 C. 863; 8 C. W. N. 684.

(7) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 (P. C.).

(10) 55 Ind. Cas. 969; 47 I. A. 71; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; (1920) M. W. N. 338; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.).

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for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished."

Following this view of the law, we hold that as regards the item of Rs. 5,300 there was no decree to which Ausan Shah may be subrogated when he made the payment on 23rd January 1911, or that he is not entitled to any priority with respect to that sum.

As regards the sum of Rs. 14,011-13-0 we decide that it has priority as if borrowed on 11th December 1891 with respect to the properties included in the mortgage of 1891. We are of opinion that the Allahabad and Madras cases are still good law where an order absolute for sale had not been passed. *Puranmal Chund v. Venkata Subbarayalu* (11), *Vanmikalinga Mudali v. Chidambara Chetty* (12) and *Shyam Lal v. Bashir-ud-din* (8).

The lower Court held that the payment of Rs. 5,300 by Ausan Shah to Shambhu Dayal was not proved to have been made to save the sale fixed for 20th January 1911. We do not agree with this finding but need not give our reason as the claim to priority fails on another ground.

The lower Court has not decided Issues Nos. 5 and 7 because of the compromise, and Issues Nos. 12 and 13 were decided without giving priority to the items of Rs. 14,011-13-0. Those four issues will have to be decided over again by the lower Court in the light of our findings above.

In the result, we set aside the decree of the lower Court and its findings on Issues Nos. 3, 7, 12 and 13 and remand the suit to it under O. XLI, r. 23 of the Code of Civil Procedure for trial of those issues and the passing of a decree in accordance therewith. The other issues including Issues No. 1 (a) are concluded, and shall not be re-opened. Issues Nos. 12 and 13 have already been decided, but they shall be decided over again with reference to our findings in favour of the priority of the item of Rs. 14,011-13-0. We have not

worked out the effect of this priority on the different deeds of the defendants, this shall be done by the lower Court.

Costs here and heretofore shall abide to result.

G. H. & N. B.

Case sent back.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 33 OF 1922.

February 3, 1923.

Present:—Mr. Pison, J. C.

KABAL SHAH—PLAINTIFF—PETITIONER
versus

MUHAMMAD BAQA—DEFENDANT—
RESPONDENT.

Transfer of Property Act (I V of 1882), ss. 6, 43, application of—Transfer of reversionary rights, validity of—Possession, transfer of effect of.

Although the general principles contained in the Transfer of Property Act are binding upon the Courts in the Punjab and the N.-W. F. Province the Act itself with its technicalities has no force as such in these Provinces. [p. 122, col. 2.]

Bhagwati v. Chaoli, 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79, relied on.

In the Punjab and the N.-W. F. Province a transferor of reversionary rights is bound by his act when succession opens to him. Even if section 6 of the Transfer of Property Act is to be regarded as making such a transfer illegal and, therefore, a nullity from which no equity can arise, as the Act itself is not in force in these Provinces, the section constitutes no statutory bar to a contract which would otherwise be enforceable in equity. [p. 124, col. 2.]

Annada Mohan Roy v. Gour Mohan Mallick, 65 Ind. Cas. 27; 48 C. 536; 25 C. W. N. 496; 33 C. L. J. 457; *Malik Ali Bahsh v. Ghulam*, 13 P. R. 1899; *Khairti v. Matab*, 11 Ind. Cas. 211; 135 P. W. R. 1911; 214 P. L. R. 1911; *Attar Chand v. Umar Hayat*, 20 Ind. Cas. 556; 296 P. L. R. 1913; 150 P. W. R. 1913; *Kanhai Lal v. Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.); *Khunni Lal v. Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.); *Hiran Bibi v. Sohan Bibi*,

(11) 29 M. 486; 7 M. L. J. 198; 7 Ind. Dec. (N. S.)

344.

(12) 29 M. 37.

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24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.), referred to.

Bhagwati v. Chaoli, 55 Ind. Cas. 698; 2 U. P. L.R. (L) 79; 2 L. L. J. 689, relied on.

There is no necessary parallel between what a Court can do in execution against a person having merely a *spes successionis* and the equity which such a person can create against himself by binding himself to do something if a certain contingency happens. [p. 123, col. 2.]

A person in possession holding a lien in equity is in a far stronger position than one who is seeking to enforce his equity against a person who holds possession against him. [p. 124 col. 2.]

Petition for revision of an order of the Divisional Judge, Peshawar, dated the 4th November 1921, reversing an order of the Munsif, Third Class, Abbottabad, dated the 25th June 1922.

Mehta Mangal Sain, for the Petitioner.

Mr. Diwan Chand, R. S., for the Respondent.

JUDGMENT.—The facts in this case are as follows:—

Ali Akbar and his nephew Kabal Khan were joint owners of land. Ali Akbar died leaving two widows, *Musammam Ambo* and *Musammam Basri*, who succeeded to his share with a limited life-interest, Kabal Khan being their reversioner. In 1905 a mortgage was made to Muhammad Baqa by both the widows and Kabal Khan. On 5th April 1906, Kabal Khan sold to Muhammad Baqa his proprietary title in certain land and also his reversionary rights, Muhammad Baqa being already in possession as mortgagee. On 14th February 1912 *Musammam Ambo* and *Musammam Basri* made a mortgage for Rs. 99 to Muhammad Baqa for eight years. *Musammam Ambo* died in 1915 and *Musammam Basri* in 1917. On 5th June 1918 Kabal Khan's succession being opened by the death of the life-tenants, sold his title to Kabal Shah for Rs. 1,000. Kabal Shah brings the present suit to obtain possession of the land sold to him on 5th June 1918 by redeeming the mortgage made to Muhammad Baqa by the life-tenants on 14th February 1912. Muhammad Baqa resists the suit on the ground that he is a prior vendee of Kabal Khan's interest and that Kabal Khan had nothing to sell to Kabal Shah. The plaintiff, Kabal Shah, claims to ignore the sale of 5th April 1906, as an invalid transfer of rights in expectancy. The Trial Court found that the sale made before succession had opened was invalid

and decreed the plaintiff's claim. The Divisional Judge on appeal held that the transaction of 5th April 1906 must be regarded as an agreement to sell on succession opening and that it was a contract enforceable in equity by the transferee as against the transferor or persons holding under him. The Divisional Judge further considered that the widows, in referring to the sale by Kabal Khan in the deed of mortgage which they executed in 1912, might be regarded as having at the time relinquished their life-interest and opened succession. On these findings he dismissed the suit.

The present petition for revision is by the plaintiff and has been entertained under section 84, North-West Frontier Province Law and Justice Regulation, as involving an important question of law and custom.

I do not consider that it can be seriously argued that the widows in 1912 stepped aside and accelerated reversion. The mortgage made by them was for eight years only and might, therefore, have been redeemed by them in their lifetime. The object of the reference in the mortgage-deed to the sale of Kabal Khan's reversionary rights to Muhammad Baqa was, no doubt, to show that he would not challenge the alienation by the life-tenants, but this cannot be regarded as simultaneously opening out succession to Muhammad Baqa as transferee of the reversioners' interest.

The question, therefore, for decision is whether the sale of reversionary rights to Muhammad Baqa in 1906 is one which can be enforced when succession has been opened by the death of the life-tenants. In those Provinces of India in which the Transfer of Property Act is in force, it cannot be denied that section 6 of the Act operates to make a sale of rights in expectancy absolutely null and void, and that a transferee of such rights cannot fall back upon section 43 of the same Act and demand that, on succession opening, the transferor's interest so acquired shall be made available to complete the transferee's title. The law and precedents for this view are dealt with at length in the ruling of the Calcutta High Court in *Annada Mohan Roy v. Gour Mohan Mallick* (1). That ruling is

(1) 65 Ind. Cas. 27; 48 C. 536; 25 C. W. N. 496; 33 C. L. J. 457.

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of 1920. It further cannot be denied that the same view is taken by the High Courts of Bombay, Madras and Bengal and that, if the bearing of those rulings upon the present facts be considered, the reversionary right of a male agnate obstructed by a formal tenant holding till death or marriage is regarded by these Courts as "the chance of an heir-apparent succeeding to an estate" within the meaning of section 6 (a) of the Transfer of Property Act. There was formerly some conflict of opinion on this latter point, but it is now finally established in those Provinces that this reversionary interest, both among Hindus or Muhammadans, is, though something stronger than a mere possibility, nevertheless a *spes successionis* and, therefore, inalienable.

The tendency of rulings by the Chief Court of the Punjab and the High Court, Lahore, however, is to the opposite effect. A recent judgment [*Bhagwati v. Chaoli* (2)] published as 55 Indian Cases, 698, upheld the hypothecation of a reversionary interest as against the transferor, where succession had opened. The learned Judges held that a mortgage of a reversionary interest, although a mortgage of non-existent property and, therefore, inoperative as a conveyance, was operative as an executory agreement which attached to the property the moment it was acquired by the mortgagor and in equity transferred the beneficial interest of the mortgagor without a fresh act of confirmation on his part. *Malik Ali Bakhsh v. Ghulam* (3), *Khairati v. Matab* (4), *Attar Chand v. Umar Hayat* (5) are all authorities for the view that a sale of reversionary interests creates a right which Courts will enforce when the estate falls into possession. It was held that such transactions amounted to agreements to sell enforceable under section 18 of the Specific Relief Act. This is the view taken of the present case by the learned Divisional Judge.

It is now argued for the petitioner that there is a greater weight of authority in the findings of the older High Courts of India, that the principles of the Transfer of Prop-

erty Act apply to the Punjab and North-West Frontier Provinces, and that transfers such as that now in suit are illegal and null and void in law and that no equity can be created by a nullity. For the respondent it is contended that the exclusion of the Punjab and North-West Frontier Province from the actual operation of the Transfer of Property Act is vital, that section 6 of the Act creates a statutory and not an equitable bar to alienations of *spes successionis*, and that the principles of the Transfer of Property Act are enforceable only on the ground of equity.

The contention of the respondent has great force, as it appears to me to represent the view taken by the learned Judges of the High Court of Lahore themselves. In the case of *Bhagwati v. Chaoli* (2) quoted above they say:

"Furthermore, it must be remembered that the principles of the Transfer of Property Act are binding upon the Courts of the Punjab, the Act itself with its technicalities has no force as such in the Province, and the learned Counsel for the appellant has urged that the principles of section 43 of that Act apply to this case. That section provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer still subsists. A similar provision is to be found in section 18 of the Specific Relief Act, but that section considers only the cases of sales and leases and not that of mortgages, and that omission is, no doubt, due to the circumstance that no one can be forced to borrow money."

This view seems to me to be confirmed by the High Court of Calcutta in *Annada Mohan Roy v. Gour Mohan Mallick* (1), which was published in the same year (1920). It is remarked:

"The truth is that an attempted conveyance of non-existent property, though it cannot operate as an immediate alienation, may, when made for consideration, be valid as a contract and when the object to which it refers comes into existence,

(2) 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79; 2 L. J. 689.

(3) 13 P. R. 1899.

(4) 11 Ind. Cas. 211; 135 P. W. R. 1911; 214 P. L. R. 1911.

(5) 20 Ind. Cas. 556; 296 P. L. R. 1913; 150 P. W. R. 1913.

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equity taking as done that which ought to be done, fastens upon the property, and the contract to assign thus becomes a complete assignment. This was precisely the point of view of the Judicial Committee in *Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Sing* (6) where Sir James Colville observed: "But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The Bill of Sale in such a case can only be evidence of a contract to be performed in *futuro* and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do," and, further on, after referring to a case in which expectants had agreed to divide certain property in a certain way on the happening of a particular contingency, "The circumstances of the case, which was decided before the Transfer of Property Act, were held to attract the operation of the principle of equity that a fair agreement between expectants or their heirs to divide the property which might be left between them or to any one of them was not contrary to public policy and would be enforced in equity. That case may consequently be deemed to belong, not to the class now before us, but rather to the type of which the decisions of the Judicial Committee in *Kanhai Lal v. Brij Lal* (7), *Khunni Lal v. Gobind Krishna Narain* (8) and *Hiran Bibi v. Schan Bibi* (9) furnish examples. It is thus abundantly clear that whatever be the path selected by the appellant for escape, he is enmeshed in the same difficulty, for he has always to invoke the aid of principles of equity to enable him to defeat the application of a statutory provision,

(6) 12 M. I. A. 292 at p. 307; 2 Suth. P. C. J. 225 at p. 239; 2 Sar. P. C. J. 430; 20 E. R. 359.

(7) 47 Ind. Cas. 277; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

(8) 10 Ind. Cas. 477; 33 A. 356; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.).

(9) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. N. 648 (P. C.).

framed by the Legislature on grounds of public policy, with a view to render inalienable certain categories of property. No Court of Equity will assist him in his endeavour to accomplish this purpose."

In other words, the statutory application or non-application of section 6 of the Transfer of Property Act is vital. But for the existence of that direct provision of law, the holder of a deed transferring a right in expectancy might have an equity enforceable under section 18 of the Specific Relief Act, but he cannot claim it, because the Legislature has passed a law making such rights inalienable. As against this view the learned Counsel for the petitioner urges that the Act was framed, as shown above, on grounds of public policy, and that such public policy, which is to discourage the litigation and uncertainty resulting from sales of rights in expectancy, is one which necessarily affects the whole of India. He would go so far indeed as to contend that section 23 of the Contract Act comes into operation as voiding an agreement opposed to public policy. He quotes section 60 of the Civil Procedure Code as proving that the Legislature declines to allow, on grounds of public policy, the sale under the order of a Court of rights in expectancy and that we cannot have a more authoritative pronouncement upon what is "public policy" than the Acts of the Legislature itself. I think, however, that this argument, if examined closely, is fallacious. Section 60, Civil Procedure Code, is not a pronouncement against the sale of a right in expectancy by a private person. There is no necessary parallel between what a Court can do in execution against a person having merely a *spes successionis* and the equity which that person can create against himself by binding himself to do something if a certain contingency happens. Further, it may reasonably be said that all Acts of the Legislature are dictated by public policy, and it may equally well be argued that the omission to apply a certain Act to a certain Province is also dictated by public policy. The Punjab Alienation of Land Act is now in force throughout this Province, but, until recently, the Peshawar and Kohat Districts were excluded from its operation. That Act makes a mortgage by conditional sale void

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in law, but it could not possibly be argued that mortgages by conditional sale were void in Districts to which the alienation of Land Act did not apply, as being opposed to a rule of public policy enunciated elsewhere by the Legislature. On the contrary, such transactions were regularly enforced in the Peshawar and Kohat Districts prior to the extension of the Act to these Districts. When, therefore, section 6 of the Transfer of Property Act is not binding in law, it cannot be said to override an established rule of equity merely on the ground that it constitutes a Legislative definition of "public policy".

Apart from the fact that the Transfer of Property Act is not in force in the Punjab and the North-West Frontier Province, there is no doubt a certain conflict of view in the interpretation of section 6 of the Act itself. The Punjab Chief Court in the ruling published as *Bhagwati v. Chaoli* (2) has definitely held that "section 6 of the Transfer of Property Act does not prohibit the transfer of a *spes successionis*. All that it provides is that such a transfer cannot be made for the reason that a *spes successionis* is not property and, therefore, the execution of a document purporting to transfer the *spes successionis* purports to transfer property which does not exist." It was in the same year (1920) that the High Court of Calcutta laid down in the ruling published as *Annada Mohan Roy v. Gour Mohan Mallick* (1) that section 6 of the Transfer of Property Act made a *spes successionis* alienable and a nullity and that no equity could arise from the nullity. This was tantamount to holding that section 6 of the Act did actually prohibit the transfer of a *spes successionis*. On no other ground, I think, could it be said that such a transfer was a nullity in law and could not give rise to equity against the transferor. The view held by the Punjab High Court is one which in reality has always been taken by that Court. Even the case published as *Tota v. Abdulla* (10), which related to a District now included in the North-West Frontier Province though its result was to disallow the claim of a transferee of a reversionary right, is really illustrative of the same view. In that case a reversioner

had alienated his right of succession and the alienee claimed to step into his shoes and to prevent the life-tenant from alienating. The learned Judges took the view that a reversioner could not transfer his right of succession, that is to say, that the transfer was at the time inoperative and made no conveyance, but also that the true test of decision in that case was the Customary or Tribal Law. In accordance with Customary Law it was held that only an agnate of the widow and not a stranger claiming as transferee of reversionary rights could challenge the widow's conduct. It was remarked, however, that the proposition that a reversioner who alienates his expected consideration is bound by his act was perfectly sound and beyond dispute. In other words, no conveyance or change of title takes place when reversionary rights purport to be sold, but there may be an agreement to sell by which the transferor is bound, when he obtains a full title to the property which he agreed to sell. There is, therefore, conclusive authority for the view (1) that in the Punjab and North-West Frontier Province it has always been held that a transferor of reversionary rights is bound by his act when succession opens to him even if section 6 of the Transfer of Property Act makes the transfer itself inoperative when made, and (2) that even if section 6 of the Transfer of Property Act is to be regarded as making such a transfer illegal and, therefore, a nullity from which no equity can arise, the Act itself is not in force in the Punjab and North-West Frontier Province and, therefore, constitutes no statutory bar to a contract which would otherwise be enforceable in equity.

It may further be remarked that in the present case the alienee is actually in possession. Although it is argued that his possession must be regarded as that of a mortgagee it is clear that he was in overt possession as a vendee of proprietary title. A person in possession holding a lien in equity is in a far stronger position than one who is seeking to enforce his equity against a person who holds possession against him. It is perfectly clear that the plaintiff Kabal Shah had full notice of the transfer to Muhammad Baqa. His purchase from Kabal Khan was a speculative transaction

(10) 66 P. R. 1897.

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made with the knowledge that Kabal Khan himself would have the greatest difficulty in ousting a vendee to whom he had made a transfer for consideration. It is noticeable that the sale-deed to Kabal Shah was executed just 12 years after the sale to Muhammad Baqa. It is suggested by the learned Counsel for the respondent, with considerable reason, that Kabal Khan and Kabal Shah had some idea that when 12 years had elapsed they could defeat the sale of 1906 on the plea of limitation. No question of limitation, of course, arises as succession did not open until 1917 and the title of Muhammad Baqa as an owner did not mature until succession opened.

On the findings which I have given above the Divisional Court has rightly held that the present suit must fail. The petition for revision is dismissed with costs.

Z. K.

*Petition dismissed.***BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL FROM APPELLATE
DECREE NO. 5 OF 1922.

February 23, 1923.

Present.—Justice Sir Norman Macleod,
Kt., Chief Justice, and Mr. Justice Crump.

BALA bin RAGHU DHANWADE—

PLAINTIFF—APPELLANT

*versus***BHIKU bin GENU JAMBHALE—**

DEFENDANT—RESPONDENT.

Stamp Act (I of 1899), s. 36—Document insufficiently stamped, admitted in evidence—Admission, whether can be subsequently questioned.

Once a document has been admitted in evidence in the Trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped.

Devachand v. Hirachand, 13 B. 449; 7 Ind. Dec. (N. S.) 299 (F. B.), *Shiddapa v. Irava*, 18 B. 737; 9 Ind. Dec. (N. S.) 1000, followed.

Second appeal against the decision of the District Judge, Satara, in Appeal No. 283 of 1920.

Mr. W. B. Pradhan, for the Appellant.**DHUMAN V. RAMJI MAL.**

JUDGMENT.—The learned Judge varied the decree of the Trial Court on account of the promissory-note sued on not being sufficiently stamped. There is no reference in the judgment to the Full Bench decision in *Devachand v. Hirachand* (1) and the decision in *Shiddapa v. Irava* (2), which decided that once the document has been let into evidence in the Trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped, as is provided by section 36 of the Stamp Act, which corresponds with section 34, proviso (iii) of the Act of 1879 on which those decisions were based. We, therefore, allow the appeal and restore the decree of the Trial Court with costs throughout.

W. C. A.

Appeal allowed.

- (1) 13 B. 449; 7 Ind. Dec. (N. S.) 299 (F. B.).
(2) 18 B. 737; 9 Ind. Dec. (N. S.) 1000.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 586 OF 1922.

February 14, 1923.

Present.—Mr. Justice Martineau.**DHUMAN—DEFENDANT—PETITIONER***versus***RAMJIMAL—PLAINTIFF—RESPONDENT.**

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 15—Suit to recover balance of purchase-money, whether suit for specific performance of contract.

A suit by a vendor for recovery of the balance of purchase-money due from the vendee is not a suit for specific performance of a contract within the meaning of Article 15 of Schedule II of the Provincial Small Cause Courts Act and is not excluded from the cognisance of a Small Cause Court.

Sheik Galim v. Sadarjan Bibi, 29 Ind. Cas. 611; 43 C. 59; 21 C. L. J. 532; 19 C. W. N. 1332, distinguished.

Petition, under section 44 of the Punjab Courts Act, for revision of the order of the Senior Subordinate Judge, Jhelum, dated the 20th April 1922, affirming that of the Munsif, First Class, Jhelum, dated the 16th March 1922.

MUKUND V. DIWAKAR.

Lala Kahan Chand, for Pandit Bindra Ban, for the Petitioner:
Lala Amar Nath Chona, for the Respondent.

JUDGMENT.—The plaintiff sold property to the 1st defendant for Rs. 150. He was paid Rs. 87 out of the price, and he sues to recover the remaining Rs. 63.

The suit was tried by a Munsif who exercised the powers of a Court of Small Causes for the trial of cases up to Rs. 100 in value, and he passed a decree in the plaintiff's favour.

The defendants appealed to the Senior Subordinate Judge, who, without deciding whether the suit was one cognizable by a Court of Small Causes, found that the Munsif had tried it in his capacity as such a Court, and that the defendants had not objected to the procedure adopted, and accordingly held that the appeal did not lie and dismissed it.

It is contended in revision that the suit was one for specific performance of a contract, falling under Art. 15 of the 2nd Schedule of the Provincial Small Cause Courts Act, and, therefore exempt from the cognizance of a Court of Small Causes. *Sheth Galim v. Sadarjan Bibi* (1) is relied upon in support of this contention. In that case the plaintiffs, who were mortgagors, were suing to recover the balance of the mortgage-money, and it was held that the claim could only be regarded as one for the specific performance of so much of an agreement to lend money as had not already been performed. That case seems to be distinguishable from the present one. The sale to the plaintiff is complete, and he is only suing for the money that is payable to him under the contract. This cannot, in my opinion, be said to be a suit for the specific performance of a contract. I hold that the suit was cognizable by a Court of Small Causes, and that the decree passed by the Munsif was, therefore, not appealable. I dismiss this application with costs.

Z. K.

Application dismissed.

(1) 29 Ind. Cas. 621; 43 C. 59; 21 C. L. J. 532; 19 C. W. M. 1332.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 263 OF 1921.

October 20, 1922.

Present:—Mr. Prideaux, A. J. C.

MUKUND AND ANOTHER—DEFENDANTS

—APPELLANTS

versus

DIWAKAR—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 35—Hindu widow—Surrender of holding—Reversioners, position of.

A surrender of an estate by a widow, if not impeachable for fraud or on other like ground, is binding on her husband's reversioners.

Dajiba v. Raghunath, 20 Ind. Cas. 920; 9 N. L. R. 126, relied on.

Appeal from the decree of the Additional District Judge, Wardha, in Civil Appeal No. 119 of 1920, decided on the 18th February 1921.

Mr. S. Y. Deshmukh, for the Appellant.

Mr. D. T. Mangalmurti, for the Respondent.

JUDGMENT.—The plaintiff is the *Malu-zar* of *Mouza Maharmajra*, Tahsil Hinganghat. Ordinary field No. 1-12 is said to have belonged to one Jago who died on 19th September 1919. His widow, *Musammam* Janku, surrendered the field to the plaintiff on 17th November 1919. But the defendants who are the brothers of Jago have obstructed the *lambardar's* cultivation, hence the present suit.

It was the story of the plaintiff that in 1916-17 Jago separated from his brothers, the field in suit going to his share. This story has been accepted by both lower Courts and found to have been established. It is objected to in this second appeal by the defendants but there is nothing to vitiate the finding that Jago had separated and that the field came to him. That being so, it is impossible for the appellants to succeed here. The surrender by *Musammam* Janku is also held by both Courts below to have been made. But this finding is impeached here. It is stated that the defendants as reversioners could impeach the finding on the grounds that no consideration passed by the surrender and that the widow was a minor at the time. Both Courts have, however, found that the widow was a major when she surrendered and *Dajiba v. Raghunath* (1) is authority for the proposition

(1) 20 Ind. Cas. 920; 9 N. L. R. 126.

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that such a surrender, if not impeachable for fraud or on other like ground, is binding on the widow's husband's reversioners.

It is next argued that the receipts, Exhibits D-2, and D-3 show that after the alleged date of partition the *malguzar* accepted from the defendants the rent of field in suit thereby constituting them his tenants. Now, this was never the case of the appellants in the Courts below. They did not there contend that though the tenancy of this particular field had passed to Jago by partition yet it had then come to the defendants because the *malguzar* had accepted them as tenants. If that contention had been raised it could have been met, proper issues framed and evidence taken on it. It is certainly far too late in second appeal to advance a question of fact of this nature.

There is no ground for success in second appeal here. The result is that the appeal fails and is dismissed with costs. Appellants will pay respondent's costs.

N. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 54 OF 1922.

March 19, 1923.

Present.—Mr. Kanhaiya Lal, J. C.
Mr. SAMUEL BURGE—APPLICANT—

APPELLANT

versus

THE IMPROVEMENT TRUST,
LUCKNOW—OPPOSITE PARTY—

RESPONDENT.

Land Acquisition Act (I of 1894), s. 18—Application for reference, essentials of—Limitation Act (IX of 1908), ss. 3, 29—Limitation Act (X of 1922), s. 3—Limitation under special law—Waiver.

The conditions prescribed by section 18 of the Land Acquisition Act are the conditions to which the power of the Collector to make the reference is subject and those conditions must be fulfilled before the Court can have jurisdiction to entertain the reference. [p. 128, col. 2.]

In the matter of the Land Acquisition Act, 30 B. 275; 7 Bom. L. R. 697 and Secretary of State for India v. Hakim, 25 Ind. Cas. 448; 64 P. R. 1914; 244 P. L. R. 1914; 158 P. W. R. 1914, referred to.

Where on a compulsory acquisition of his property, a person sends a letter to the Land Acquisition Officer stating that the compensation awarded to him is inadequate and that unless the property is released or proper compensation awarded, he would have the acquisition declared void in a Civil Court, that does not amount to an application for reference under section 18 of the Land Acquisition Act.

A waiver of the question of limitation under any special law is no longer permissible under section 29 of the Limitation Act as amended by Act X of 1922, read with section 3 of the Act. [p. 128, col. 2.]

Appeal against an order of the Tribunal U. P. Improvement, dated the 7th July 1922.

Mr. J. P. C. Bhattacharji, for the Appellant.

Messrs. N. N. Ghoshal and M. P. Asthana, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to certain house property situated in Lucknow, which was compulsorily acquired by the Government under the United Provinces Town Improvement Act (VIII of 1919). On the 27th October 1921 the Land Acquisition Officer awarded Rs. 25,575 as compensation, and notified the award in the presence of the appellant Mr. Burge. On the 28th October 1921 Mr. Burge sent by post an application to the Land Acquisition Office, stating that the compensation awarded was inadequate, and that unless the property was released from the harsh operations of the Act, or proper compensation was awarded, he would be obliged to institute a suit for a declaration in the Civil Court to have the said acquisition declared null and void. The Land Acquisition Officer declined to treat this application as an application for reference under section 18 of the Land Acquisition Act read with section 58 of the United Provinces Town Improvement Act (VIII of 1919), and no action was taken on it. On the 18th January 1922 Mr. Burge sent a letter enquiring whether any date had been fixed by the Tribunal for the hearing of his objection, and on the 27th January 1922 he wrote again, asking that his objection might be referred to the Tribu-

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nal for consideration under section 18 of the Land Acquisition Act.

Section 18 requires that an application for reference should be made within six weeks of the date of the award, made by the Collector, if the person making the application was present, or represented before the Collector at the time when the award was made. That period expired on the 9th December 1921. The Land Acquisition Officer referred the matter to the Tribunal for decision, pointing out that the application of the 28th November 1921, which was received on the next day, could not be treated as an application for reference under section 18, and asked the Tribunal to determine (1) whether the suit was barred by time under section 18, clause 2, sub-clause (b) of the Land Acquisition Act, and (2) what was the amount of compensation that should be awarded. The Court below was of opinion that the application for reference was barred by time.

It is obvious that the Land Acquisition Officer never intended to waive the question of limitation. Under section 18 a reference can only be made by a written application to the Collector requiring that the matter be referred for the determination of the Court. No such demand was made in the application of the 28th November 1921. It mentioned the grounds on which an objection was taken to the compensation awarded by the Land Acquisition Officer and in substance asked him either to release the property in question or award proper compensation therefor or to face a suit for a declaration in the Civil Court to have the said acquisition adjudged null and void. There was no written demand for a reference of the question of compensation to the Tribunal for decision. An application has now been made to have the application of the 29th November 1921 amended; but the application was made to the Land Acquisition Officer in the proceeding then pending before him, and we have no authority to permit amendment to be made in an application made outside the present suit. Whether the Land Acquisition Officer can allow the application to be amended is a matter on which it is not necessary for us to express any opinion. Till such amendment is made, the objection of limitation

must hold good, and the reference made by the Collector for the determination of that question cannot be sustained. As pointed out in *the matter of the Land Acquisition Act* (1), the conditions prescribed by section 18 of the Land Acquisition Act are the conditions to which the power of the Collector to make the reference is subject and those conditions must be fulfilled before the Court can have jurisdiction to entertain the reference. In *Secretary of State for India v. Hakim* (2) a vague petition on an unstamped paper, which did not specify the field area, and was returned as being unstamped, and another subsequently made asking the Collector to review his award and grant the petitioner further compensation were similarly held to be ineffective to justify a reference under that section. Section 29 of the Indian Limitation Act (IX of 1908), as amended by Act X of 1922, lays down, that where any special law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule, the provisions of section 3 of that Act shall apply, as if such period were prescribed therefor in that Schedule. A waiver of the question of limitation is, therefore, no longer permissible.

The appeal fails, and is dismissed with costs.

N. H.

Appeal dismissed.

(1) 30 B. 275; 7 Bom. L. R. 697.

(2) 25 Ind. Cas. 448; 64 P. R. 1914; 244 P. L. R. 1914; 158 P. W. R. 1914.

GHULAM HAIDAR v. EMPEROR.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST APPEAL NO. 38 OF 1923.

March 9, 1923.

Present:—Mr. Pipon, J. C.

GHULAM HAIDAR—APPELLANT

versus

EMPEROR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 69, 70, 75—Appeal from conviction under s. 69, whether civil or criminal.

An appeal heard by the Judicial Commissioner under section 75 of the Provincial Insolvency Act, against an order passed by a District Judge under section 69 of the Act is a first civil appeal heard in the exercise of the civil jurisdiction of the Court. [p 130, col. 2.]

Chiranji Lal v. Emperor, 25 Ind. Cas. 986; 12 A. L. J. 1105; 36 A. 576; 15 Cr. L. J. 658 (F. B.), *Nagindas Bhukhandas v. Ghelabhai Gulabdas*, 56 Ind. Cas. 449; 22 Bom. L. R. 322; 44 B. 673 and *Nawab v. Topan Ram*, 35 Ind. Cas. 494; 110 P. R. 1916 Cr.; 62 P. W. R. 1916; Cr., 145 P. L. R. 1916; 17 Cr. L. J. 318, referred to.

Appeal from an order of the District Judge, Peshawar, dated the 25th January 1923, whereby appellant was sentenced to two months' rigorous imprisonment under section 69 of the Insolvency Act No. V of 1920.

Pandit Mul Chand, R. S., for the Appellant.

Mehta Mangal Sain, for the Respondent.

Mr. Krishna Chandra, for the Appellant in Appeal No. 39 of 1923.

JUDGMENT.—This is an appeal from the order of the District Judge, Peshawar, sentencing the appellant Ghulam Haidar, under section 69 of the Insolvency Act, V of 1920, to two months' rigorous imprisonment for wilful failure to perform the duties imposed on an insolvent by section 22 of the Act. A preliminary question has been raised as to whether this appeal should be heard by this Court on the criminal or the civil side. Rai Sahib Pandit Mul Chand for the appellant argues that the appeal is a civil one. The contrary view is supported by the Public Prosecutor and also by Mr. Krishna Chandra, Barrister, who is appearing for an appellant in a similar appeal. There is not the least doubt that an appeal against an order passed under section 43 of the Act III of 1907 lay to a High Court in the exercise of its civil jurisdiction. Authorities for this view are

Chiranji Lal v. Emperor (1), (in which a Full Bench of the Allahabad High Court very definitely laid down that an appeal from an order under section 43 was a civil appeal), *Nagindas Bhukhandas v. Ghelabhai Gulabdas* (2) and *Nawab v. Topan Ram* (3). It is argued that Act V of 1920 does not materially alter the position. The procedure for the trial of cases under section 69 of that Act is governed by section 70 which provides alternative procedures. The Insolvency Court may either take action itself in its capacity of an Insolvency Court, or it may, under sub-section (5), make a complaint to the nearest Magistrate. Sub-section (3) of section 70 lays down that the procedure to be followed in the trial by the Insolvency Court shall be that prescribed for the trial of warrant-cases by a Magistrate by Chapter XXI of Criminal Procedure Code. Section 5 of the Act prescribes that the Court, subject to the provisions of the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original jurisdiction, and that High Courts shall have the same powers and shall follow the same procedure as they have and follow in regard to civil suits. The words "subject to the provisions of this Act" are important, as it is argued on the other side that section 70 (3) of the Act prescribes a special criminal procedure for the hearing of cases under section 69 and that, therefore, this clause overrides the general principles given in section 5. As against this, it is contended by the learned Counsel for the appellant that section 70 (3) definitely refers to the procedure to be followed by the Insolvency Court in hearing the original case, and that it does not in any way refer to the procedure to be adopted by an Appellate Court. There is considerable force in this contention. The appeal against an order passed under section 20 is governed by section 75 of the Act. The course of appeal, as prescribed by that section, is exactly the same for proceedings under section 69 and purely civil proceedings

(1) 25 Ind. Cas. 986; 12 A. L. J. 1105; 36 A. 576; 15 Cr. L. J. 658 (F. B.).

(2) 56 Ind. Cas. 449; 22 Bom. L. R. 322; 44 B. 73.

(3) 35 Ind. Cas. 494; 110 P. R. 1916 Cr.; 62 P. W. R. 1916; 145 P. L. R. 1916; 17 Cr. L. J. 318.

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in insolvency. The orders appealable under the provisions of section 75 (2) are enumerated in Schedule I of the Act. That Schedule relates in all other cases to orders of a purely civil nature regarding questions arising in insolvency proceedings. It would be extremely difficult to hold that the Legislature intended to lump together in a single schedule orders which were appealable on the civil, and orders which were appealable on the criminal side. Again, it is not contended by the Public Prosecutor that the course of appeal is other than that prescribed by section 75 of the Act. He takes up the position that there has been a radical alteration of the nature of penal proceedings by the introduction of Act V of 1920. He would go so far as to argue that section 47 of the old Act did not really create an offence at all, but merely conferred a certain summary jurisdiction which allowed a Court to remand a person to simple imprisonment, and that no special procedure was prescribed. He contends that, when we find that the new Act confers the power of sentencing to rigorous imprisonment and makes special provision for the adoption of the procedure for the trial of warrant-cases under the Criminal Procedure Code, it must be assumed that the Act, by its silence on the subject of the procedure to be adopted by an Appellate Court, implies that the proceedings are criminal throughout. I do not think, however, that this view can be sustained. The word "offence" actually occurs at the conclusion of section 43, and I am unable to see that any distinction of this nature can be insisted upon. The acts which may give rise to penal proceedings have been amplified and defined by the new Act and the power of the Court has been extended to the infliction of rigorous imprisonment. It was only natural that, in such a case, the Court should also be directed to follow strictly the regular procedure for a criminal trial including the framing of a regular charge. But if the Legislature had intended to imply that the Appellate Court should deal with an appeal in the exercise of its criminal and not of its civil jurisdiction, this would have been distinctly stated. Such a statement was the more necessary in view of the fact that under Act III of 1907 there was in existence a consensus of rulings to the effect that the

Appellate Court should act in its civil capacity. I have already alluded to the fact that purely civil orders and orders passed under section 69 of the new Act are grouped together in Schedule I. Again, the case seems to me very parallel to that of proceedings taken under section 480, Criminal Procedure Code. In such cases the appeal under section 486, Criminal Procedure Code, lies not to a Criminal Court but to whatever Court the sentencing authority is subordinate. The position can best be seen by taking the case of Revenue Courts the Presiding Officers of which have no criminal jurisdiction. In the case of a sentence passed for contempt of Court by a Collector the appeal would lie to the Revenue Commissioner, who is an authority exercising no kind of criminal jurisdiction. It can only be assumed that in such a case the Revenue Commissioner would hear and decide the appeal as a miscellaneous revenue appeal. His Court has no criminal side I may remark that, up to the present time, no ruling has been published by any High Court in India dealing with the position created in this respect by the Insolvency Act, V of 1920. I must assume, therefore, that, for the North-West Frontier Province, an appeal heard by the Judicial Commissioner under section 75 of the Act against an order passed by the District Judge under section 69 of the same is a first civil appeal heard in the exercise of the civil jurisdiction of the Court.

I now turn to the merits of the present appeal. It is argued that the charge does not specifically mention the duties which the appellant has failed to perform under section 22 of the Act. This does not appear to me material inasmuch as the charge also states that the appellant has "wilfully failed to deliver up possession of the sale-proceeds of the crop of *Kharif* 1921 and the actual crop of *Rabi* 1922 to the Official Receiver." It is perfectly clear that the appellant insolvent was warned that he had to pay over to his creditors the amount realized by him for the crop of *Kharif* 1921, and that the Official Receiver was deputed to receive from the insolvent the actual crop of *Rabi* 1922. The insolvent failed to perform either of these acts. It is true that he eventually paid in Rs. 60 on account of the produce of *Rabi* 1922, but he did not

LAGADAPATI VENKATARANGABUSHANAM v. KARELLA RAMASWAMY.

do so until October and that the sum did not represent the produce in question. It is also clear from the file that the insolvent contumaciously obstructed the delivery of his income to the creditors. I see no reason to interfere with the orders passed by the District Judge, and the sentence of two months' rigorous imprisonment appears to me deserved. It was also argued that the appellant was of advanced age and bail was applied for for this reason. He stated in his application that he was 70 years of age but an enquiry from the Superintendent of Jail showed that he was really about 55 years of age. The appellant appears to have made a deliberate mis-statement on this point and the effect must tell against him in considering the equity of the sentence. I maintain the sentence passed and reject this appeal.

Z. K.

*Appeal rejected.***MADRAS HIGH COURT.**

CIVIL, MISCELLANEOUS PETITION NO. 316 OF 1922.

November 29, 1922.

Present :—Mr. Justice Spencer and Mr.

Justice Venkatasubba Rao.

LAGADAPATI VENKATARANGABUSHANAM—PETITIONER

versus

KARELLA RAMASWAMY—RESPONDENT.

Madras Agency Rules, rr. 8, 24, 25—Order of Assistant Agent in execution—Appeal, whether lies—Remedy—Government of India Act (5 & 6 Geo. V, c. 61), s. 107—Powers of superintendence, when to be exercised.

An order of an Assistant Agent in execution proceedings is not a decree within the meaning of the Agency Rules and no appeal lies therefrom to the Agency Commissioner. [p. 131, col. 2.]

Sri Sri Sri Vikramadeo Maharajulam Garu v. Sri Neladevi Pattamadhave Garu, 26 M. 266, *Lagadapati Venkatanagabushanam v. Ovilapati Mahalaxmi*, 42 Ind. Cas. 555; 41 M. 325; 34 M. L. J. 524, *Rani of Tuni v. Maharaja of Jeypore*, 66 Ind. Cas. 115; 16 L. W. 8; 42 M. L. J. 487; 30 M. L. T. 339; (1922) M. W. N. 314; (1922) A. I. R. (M.) 271, followed.

The remedy in such a case is for the aggrieved party to move the Agency Commissioner under r. 25 of the Agency Rules to make a reference to the Government. [p. 133, col. 1.]

Semle.—The High Court will not, in the exercise of its power of superintendence under section 107 of the Government of India Act, interfere with an order of a lower Court when it is not manifestly erroneous and unjust. [p. 132, col. 1.]

Brindaban Chander Choubey v. Gour Chandra Ray, 56 Ind. Cas. 155; (1920) Pat. 56; 1 P. L. T. 467, referred to.

Petition, under section 107 of the Government of India Act, against the order of the Court of the Assistant Agent, Badrachelam Division, in E. P. No. 35 of 1920 in Original Suit No. 12 of 1914.

Mr. A. Krishnaswami Iyer, for the Petitioner.

Dr. S. Swaminadhan, for the Respondent.

JUDGMENT.

Spencer, J.—This is a petition under section 107 of the Government of India Act requesting the High Court to interfere with an order passed in execution proceedings by the Assistant Agent, Badrachelam, directing a warrant to issue for the execution of a decree which the petitioner maintains to have been satisfied. The petitioner first applied to the Court of the Agency Commissioner, but his appeal was returned with the endorsement that no appeal lay from the Assistant Agent's order. Under rule XXIV of the Agency Rules, the petitioner might have preferred a petition to Government against the Agency Commissioner's order, and if he had done so, and if the Government thought fit, they would have referred the petition to this Court. Instead of adopting that course, he has invoked the High Court's extraordinary power of superintendence.

In my opinion, this is not a fit case for our exercise of those powers for the following reasons. Rule VIII provides an appeal to the Court of the Agency Commissioner against the decree of an Assistant Commissioner. The order of an Assistant Commissioner in execution proceedings is not a decree. *Sri Sri Sri Virkamadeo Maharajulam Garu v. Sri Neladevi Pattamadhave Garu* (1) and *Lagadapati Venkatanagabushanam v. Ovilapati Mahalaxmi* (2) and there is no provision in the Agency Rules for appeals against orders passed in execution or in miscellaneous proceedings, see the *Rani of Tuni v. Maharaja of Jeypore* (3). A remedy lies by

(1) 26 M. 266.

(2) 42 Ind. Cas. 555; 41 M. 325; 34 M. L. J. 524.

(3) 66 Ind. Cas. 115; 16 L. W. 8; 42 M. L. J. 487; 30 M. L. T. 339; (1922) M. W. N. 314; (1922) A. I. R. (M.) 271.

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way of petition under rule XXIV. against the order in execution of the Agency Commissioner. See *Maharaja of Jeypore v. Sri Niladevi Pattamahadevi*. (4). In that case there actually was an appeal from the Assistant Agent's order to the Agent; but the decision is not an authority for the proposition that such an appeal lies. It may be that, when these rules were drawn up, the Government intentionally omitted to provide a right of appeal against orders of Assistant Commissioners in order to avoid encouraging litigation among the unsophisticated Agency peoples. If it was an unintentional oversight, it might be remedied by moving the Agency Commissioner under rule XXV to make a reference to the Government as being a case not provided for by the Rules. In *Pedda Vikrama Deo Garu v. Maharaja of Jeypore* (5) an opinion was expressed that the old rule 31 (now rule 24) was intended to provide for cases for which no provision had been made, including orders against which no appeal was provided. It is unnecessary to say more, seeing that the petitioner before us has not adopted either of these courses. The Agency Commissioner was strictly correct in observing that no appeal lay to him, though it was unnecessary for him to return the appeal to the person presenting it.

Where the record of a case before the Court is so erroneous as to manifestly amount to an injustice, the Patna High Court in *Brindaban Chander Choubey v. Gour Chandra Ray* (6) thought fit to exercise the powers of superintendence vested in them under section 107 of the Government of India Act.

The present is not such an extreme case as to call for that unusual course. The Assistant Agent ordered the issue of a warrant, as the judgment-debtor's statement disclosed no valid reasons why it should not be issued. The judgment-debtor's statement contained an allegation that he had paid Rs. 4,052-2-0, which was all that was due under the decree in Original Suit No. 12 of 1914.

The statement was defective in that it did not give reasons to show why he was not liable for interest amounting to Rs. 1,399-14-9 claimed in the decree-holder's petition.

It now appears that after the money was paid into Court, it was prevented from being paid out through an injunction obtained in another suit (Original Suit No. 23 of 1918). The Assistant Commissioner did not appreciate the fact that payment into Court was a good legal discharge of the decree. If he thought that the judgment-debtor was responsible for the decree-holder failing to realise the fruits of his decree and to get interest on the money paid into Court, his proceedings in allowing the decree-holder to claim interest for the period when the money lay in Court, may have been in accordance with the equities of the case. In any case, the decree-holder was entitled to recover the costs of the previous execution petition and the costs incurred in the High Court in the Civil Miscellaneous Petition on the decree of the Agent's Court.

The Assistant Agent's order should have dealt with the claims of the parties in the execution petition and should have adjusted the equities. It did not do so, but I am unable to treat it as manifestly erroneous or unjust. We must, therefore, decline to interfere and dismiss this petition with costs.

Venkatasubba Rao, J.—The Assistant Agent of Bhadrachalam made an order allowing execution at the instance of the plaintiff. The defendant filed an appeal from this order to the Agency Commissioner, and the latter returned the appeal memorandum stating that no appeal lay to his Court from orders made by his subordinates in execution. The Agency Commissioner was right in the view that no appeal lay to his Court. There is no provision in the Agency Rules for appeals against orders in execution. *Rani of Tuni v. Maharaja of Jeypore*. (3).

Rules 8, 9, 13 and 14 refer to decrees and not to orders passed in execution or other orders of a miscellaneous character.

The Agency Commissioner having acted properly in returning the appeal memorandum, the defendant could not present a valid petition against the proceedings of

(4) 27 M. 109; 13 M. L. J. 151.

(5) 36 Ind. Cas. 801; 4 L. W. 499; (1916) 2 M. W. N. 269.

(6) 56 Ind. Cas. 155; (1920) Pat. 56; 1 P. L. T. 467.

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that officer under rule 24. But under rule 25 the petitioner should have requested the Agency Commissioner to make a reference to the Government as, in my opinion, the words "in all cases not provided for by the rules" are enough to cover a case of this kind. If the order in execution is one made by the Agency Commissioner himself under rule 24, the aggrieved party may submit a petition to the Government who may refer it to the High Court. It, therefore, follows that orders in execution or other orders of a miscellaneous character, if passed by an Agency Commissioner, are not absolutely final, but they are liable to be revised by the High Court under rule 24. Can it be said that orders of his subordinates of a similar character are entirely immune from interference by a higher authority? In my opinion, rule 25 provides the remedy, and the defendant was entitled to ask the Agency Commissioner to make a reference to the Government under rule 25. Assuming, but not deciding, that the High Court can exercise its powers of superintendence to revise an order so erroneous as manifestly to amount to an injustice as held in *Brindaban Chander Choubey v. Gour Chandra Ray* (6), I do not think that a case has been made out for our interference under that section.

On the 7th August 1918 the defendant filed a suit against the plaintiff and made an application for the issue of a temporary injunction to restrain the plaintiff from executing the decree in question, and on the 19th August the Assistant Agent passed an order in the following terms:—"The injunction sought for will be issued if defendant pays money into Court. Fifteen days time for payment." Having obtained this order, the defendant paid into Court the full amount of the decree on the 24th August 1918. On the 3rd September 1918 he applied that the plaintiff should be restrained from receiving the amount that had been paid into Court and on the same date a temporary injunction was accordingly issued pending the disposal of the suit instituted by the defendant. The temporary injunction was dissolved in 1920 when the suit filed by the defendant was finally dismissed. The defendant's present contention is that he is not liable to pay interest on the decree amount from the date he

paid it into Court. The plaintiff's contention, on the other hand, is that the defendant made the payment after having first obtained the order dated 19th August which practically operated to prevent the plaintiff from withdrawing the amount from Court and that a payment made in such circumstances is not a valid payment. It must be observed that the defendant did not put forward his case properly before the Assistant Agent, who was not in a position in consequence to direct his mind to the appropriate issue which these rival contentions would raise. The summary disposal of the Assistant Agent may be accounted for by this fact. But, apart from the manner in which it has been disposed of, I am not prepared to say that the order is manifestly unjust. The amount throughout lay in Court and carried no interest. The defendant's suit having been ultimately dismissed it must be assumed that he was accountable for damages to the plaintiff in respect of the temporary injunction obtained by the defendant restraining the plaintiff from withdrawing the amount. In a proceeding properly instituted, the plaintiff would probably be entitled to damages and the measure of damages would be the interest which he lost; and in this view the order of the Assistant Agent is equitable. I, therefore, agree that this petition should be dismissed with costs.

V. N. V.

Petition dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO.

70 OF 1923.

March 28, 1923.

Present.—Sir Norman Macleod, Kt.

Chief Justice, and Mr. Justice Crump.

MR. R. S. NAVALKAR—PETITIONER

versus

MRS. SAROJINI NAIDU AND ANOTHER—
OPPONENTS.

City of Bombay Municipal Act (III of 1888), s. 33—Civil Procedure Code (Act V of 1908), s. 115—Election petition, disposal of, by Chief Judge, Bombay Small Cause Court—Revision.

The Chief Judge of the Court of Small Causes at Bombay, acting under section 33 of the City of Bombay Municipal Act, is a *persona designata*, and not a Court subordinate to the High Court. Consequently, the High

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Court has no jurisdiction, under section 115 of the Civil Procedure Code, to interfere with the decision of such Judge on an Election Petition under that section.

Application praying for reversal of an order of the Election Court in the Court of Small Causes at Bombay, in Municipal Appeal No. M/4 of 1923.

Mr. Navalkar, (Petitioner) in person.

Mr. Bahadurjee (with him Mr. Patel and Mr. S. Y. Abhyankar for Mr. W. B. Pradhan), for Opponent No. 1.—I want to raise a preliminary objection. The High Court has no jurisdiction to hear any revision application against the decision of the Chief Judge of the Small Cause Court, as the decision is conclusive under section 33, clause (3) of the City of Bombay Municipal Act. The Chief Judge acting under the section is the *persona designata* and not a Court subordinate to the High Court. There are a number of decisions which have settled the point, though the majority of them are under the District Municipal Act. The decisions in *Balaji Sakharan Gurav v. Merwanji Nowroji Antia* (1); and *Bhaishankar v. Municipal Corporation of Bombay* (2) have laid down that the Judge acting under the District Municipal Act is not a Court subordinate to the High Court.

[Macleod, C. J.—Is the wording of section 29 of the District Municipal Act similar to section 33 of the Bombay City Municipal Act?]

The observations of Jenkins, C. J., at page 609 of 31 Bombay [Bhaishankar v. Municipal Corporation of Bombay (2)] are exactly in point. This Court has, therefore, no jurisdiction to revise the order of the Chief Judge. The case in *Chunilal Virchand v. Ahmedabad Municipality* (3) establishes the same proposition.

[Macleod, C. J.—There is no decision on the point under the City of Bombay Municipal Act.]

Mr. Bahadurjee.—No, my Lord, only a reference is made to section 33 in *Bhaishankar v. Municipal Corporation of Bombay* (2). My Lord, the case in *Vijayaraghavan Pillai v. Emperor* (4) lays down that the Presidency Magistrate is not a Court subordinate to the High Court for the

purposes of certain sections of the Madras City Municipal Act. *Chunilal Virchand v. Ahmedabad Municipality* (3) a case under section 22 of the District Municipal Act lays down the same proposition.

The petitioners' application is under sections 115 and 151 of the Civil Procedure Code. Neither of the sections applies to the present case, the decision of the Chief Judge is not a decision of a Court, and as such it cannot be called in question by the High Court.

Mr. Navalkar in reply.—The City of Bombay Municipal Act has a history and growth of itself. The Parliament had conferred certain rights on the City as a result of which the Acts of 1884 and 1888 and subsequent amendments were passed. The District Municipal Act cannot, therefore, be looked to from the same standpoint. Unless both the Acts are shown to be strictly analogous, the decisions under section 22 of the District Municipal Act cannot be taken as a guide to interpret section 33 of the City of Bombay Municipal Act. The point to be decided is whether a *persona designata* in a particular Act of the Legislature is to be deemed a legal Tribunal subject to all the incidents of the Judicial Court. The point is considered in *Balakrishna Udayar v. Vasudeva Aiyar* (5). Their Lordships of the Privy Council have laid down the law on the subject at page 722 of 19 Bombay Law Reporter: [*Balakrishna Udayar v. Vasudeva Aiyar* (5).]

[Macleod, C. J.—Your whole argument is that the Chief Judge exercising the powers under the City of Bombay Municipal Act is subordinate to the High Court.]

Messrs. Crawford, Bayley & Co. for Opponent No. 2.

JUDGMENT.—This application purports to be made under sections 115 and 151 of the Civil Procedure Code in the following circumstances:—

The petitioner and opponent No. 1 were candidates in the Bhuleshwar (C) Ward, Municipal General Election held on the 29th January 1923 with 15 others for 16 seats. The petitioner as a result of the poll was not elected, and he then filed an Elec-

(1) 21 B. 279; 11 Ind. Dec. (N. S.) 189.
(2) 31 B. 604; 9 Bom. L. R. 417.
(3) 12 Ind. Cas. 540; 36 B. 47; 13 Bom. L. R. 958.
(4) 25 Ind. Cas. 345; 36 M. 581; 16 M. L. T. 128; 27 M. L. J. 227; 15 Cr. L. J. 593.

(5) 40 Ind. Cas. 650; 19 Bom. L. R. 715; 44 I. A. 261; 15 A. L. J. 645; P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (19 17) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P.C.).

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tion. Petition under section 33 of the Bombay City Municipal Act (III of 1888).

Under section 33 (1) if the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may, at any time, within 15 days after the result of the election has been declared, apply to the Chief Judge of the Small Cause Court. Sub-section (2) section 33 directs what the Chief Judge after making such inquiry as he deems necessary, may decide. Under sub-section (3) the said Chief Judge's order shall be conclusive.

On the 7th March the Chief Judge delivered judgment in the matter of the petitioner's application and dismissed it with costs.

The petitioner applies to this Court on the grounds *viz.*: (1) that the Election Court acted with material irregularity in various ways;

(2) that the Court declined to exercise the jurisdiction vested in it under section 33 of the Bombay City Municipal Act; and

(3) that it erred in trying the petition summarily without framing any issues as requested in order to prevent any miscarriage of justice.

We admitted the petition in order that this matter might be argued as there is no direct authority on the question.

Section 151, Civil Procedure Code, may be easily ruled out as it is clear that the relief which is asked for by the petitioner cannot be granted under that section.

Then under section 115 the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. The real question is whether the Chief Judge in the Small Cause Court, acting under the powers granted him by section 33 of the Bombay City Municipal Act, III of 1888, is a Court subordinate to this Court, so that if a case is made out for our interference within the powers granted to us by section 115, Civil Procedure Code, we may make such order as we may think fit.

A similar question arose in *Balaji Sakharam Gurav v. Merwanji Ncwroji Antia* (1) where it was held that a District Judge acting under section 23 of the Bombay District Municipal Act, Amendment Act (II of 1884), was not a Court within the meaning of the word in section 622 of the Civil Procedure Code (Act XIV of 1882), and that the High Court had no jurisdiction to revise his orders refusing to set aside an election, nor could it interfere with an order made by him that the applicant should pay the costs incurred by the opponent. Section 23 of the District Municipal Act is practically identical in terms, apart from certain immaterial differences with section 33 of the Bombay City Municipal Act. It runs as follows:—

"If the validity of an election of a Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within 10 days after the date of the declaration of the result of the election, apply to the District Judge of the District within which the election has been or should have been held. The District Judge may, after such inquiry as he deems necessary, pass an order for confirming or amending the declared result of the election, or for setting the election aside. For the purposes of the said inquiry the District Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive." The Chief Justice in delivering the judgment said:—

"We are of opinion that a District Judge acting under section 23 of the Bombay District Municipal Act Amendment Act 1884, is not a Court within the meaning of the word in section 622, Civil Procedure Code (Act XIV of 1882), and that this Court has no jurisdiction to revise his order refusing to set aside an election.... For the same reason we cannot interfere with the order he has made that the applicant shall pay the actual costs incurred by the opponent. The Circular Order referred to deals only with District Courts, Courts of Small Causes, Subordinate Courts, and Mamlatdar's Courts. The District Judge in the present case is neither of these, and the order can have no,

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application to him. He is merely a *persona designata*, and if he has jurisdiction at all to award costs, there is nothing to prevent him from awarding them on the scale he has adopted."

We may refer to another decision in *Bhaishankar v. Municipal Corporation of Bombay* (2). That was a suit filed by the plaintiff under section 33 of the City of Bombay Municipal Act against the Municipal Commissioner of Bombay to have it declared that the General Election of Councilors by the Judges on the 21st February 1907 was invalid and to set aside the said election altogether. It was held that the High Court had no jurisdiction to entertain such a suit. The Chief Justice said:—

"But under section 33 the Chief Judge has jurisdiction to determine the validity of a contested election, and so he is the Tribunal appointed by the Act for that purpose. But where a Special Tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive..... Here, not only is the Chief Judge appointed the Tribunal, but it also is expressly provided that his order shall be conclusive, and that every election not called in question in accordance with the provisions of section 33 shall be deemed to have been to all intents and purposes a good and valid election."

The point now in issue did not, therefore, arise in that case, but the decision cannot be said in any way to assist the petitioner in showing that it was considered by the Chief Justice that the Chief Judge of the Small Cause Court, acting as a Special Tribunal under the City of Bombay Municipal Act, was a Court subordinate to the High Court. It seems to us that there is on reason whatever for differing from the decision in *Balaji Saktharam Gurav v. Merwanji Nowroji Antia* (1) as we think there is no distinction between the provisions of section 23 of the District Municipal Act and section 33 of the Bombay City Municipal Act with regard to this particular point, whether or not the Chief Judge acting under section 33 is a *persona designata* or a Court subordinate to the High Court. In our opinion,

therefore, we have no power to interfere with the decision of the Chief Judge in this case and the Rule should be discharged with costs.

W. C. A. & N. H.

Rule discharged.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1931 OF 1922.

February 10, 1923.

Present:—Mr. Justice Moti Sagar.

Musammam HALIMAN AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

NUR MUHAMMAD KHAN—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 20—Appeal—Court, power of, to add stranger as party—Inherent power, when to be exercised.

The powers of an Appellate Court to implead parties to an appeal are circumscribed by the provisions of r. 20 of O. XLI of the Civil Procedure Code, and it is only in exceptional circumstances that the inherent powers of the Court under section 151 of the Code should be invoked. [p. 137, col. 1.]

Under O. XLI, r. 20 of the Civil Procedure Code, an Appellate Court has power to implead only such persons as parties to the appeal as were parties in the Trial Court and were not made parties to the appeal, but not those who are complete strangers to the suit. [p. 137, col. 1.]

Mihin Lal v. Imtiaz Ali, 18 A. 332 at p. 333; A. W. N. (1896) 91; 8 Ind. Dec. (N. S.) 927, relied on.

Hemanigini Debi v. Haridas Banerjee, 46 Ind. Cas. 398; 3 P. L. J. 409; (1918) Pat. 276; 5 P. L. W. 216, distinguished.

Second appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 10th April 1922; affirming that of the Additional Munsif, First Class, Dera Ghazi Khan, dated the 20th December 1921.

Mr. Mukand Lal Puri, for the Appellants.

Sheikh Muhammad Istikhhar Ali, for the Respondent.

JUDGMENT.—The plaintiff, who is a nephew of the defendant, brought this suit for exclusive possession of one-half share in the house in dispute by partition. The defendant pleaded that a partition had already taken place and that the parties had been in separate possession of their shares for more than forty years. It was urged that, in these circumstances, the plaintiff was not entitled to maintain the

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suit. The first Court gave effect to this plea, and dismissed the plaintiffs' suit.

On appeal before the learned District Judge one *Musammam Haliman*, a sister of the plaintiff, came forward alleging that she was a co-sharer in the property and applied that she should be impleaded as a party and that the case should be re-heard in her presence. On the 10th of April 1922 the learned District Judge passed an order to the effect that *Musammam Haliman* should be impleaded as an appellant and after hearing arguments of both parties proceeded to judgment the same day. The Judge found on all the issues in favour of the defendant and, agreeing with the findings of the Trial Court, dismissed the appeal.

Against this decision a second appeal has been preferred to this Court and it has been contended on behalf of *Musammam Haliman* by Mr. Mukand Lal Puri that the course adopted by the learned District Judge was most prejudicial to his client; and that she should either not have been impleaded as a party to the appeal or, if impleaded, she should have been given an opportunity to prove her case. Reliance is placed on *Mihin Lal v. Imtiaz Ali* (1), which certainly supports the learned Counsel in the contention raised by him. In my opinion, it was most improper to implead *Musammam Haliman* as a party to the appeal. She was not a party in the Trial Court and was an entire stranger to the suit. Under O. XLI, r. 20, Civil Procedure Code, an Appellate Court has power to implead only such persons as parties to the appeal as were parties in the Trial Court and were not made parties to the appeal but not those who are complete strangers to the suit. Mr. Mukand Lal Puri relies upon *Hemanigini Debi v. Haridas Banerjee* (2), in support of his contention that an Appellate Court has the power to add as parties even such persons as were not parties in the first Court and also relies upon the inherent powers which a Court possesses under section 151, Civil Procedure Code, to make such orders as may be necessary for the ends of justice. I am unable to agree

with him in this contention. The powers of a Court to implead parties are clearly circumscribed by O. XLI, r. 20, and it is only in exceptional circumstances that the inherent powers under section 151 could be invoked. I do not find any exceptional circumstance in the present case which could have justified the Court below to take action under section 151, Civil Procedure Code. The authority relied on is also not applicable, inasmuch as in that case the dispute related to the Probate of a Will, and it has been repeatedly held that the mere possibility of an interest in such a case is sufficient to entitle a person to become a party to the probate proceedings. I, therefore, hold that the impleadment of *Musammam Haliman* as a party to the appeal in this case was not quite proper and that her name should now be removed from the record altogether. She will, of course, not be affected by any findings that will be given in this case. There is nothing in the appeal of the other appellant, and I dismiss it with costs, but so far as *Musammam Haliman* is concerned the appeal will be accepted to the extent that her name will be removed from the record.

Z. K.

Appeal partly accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 461 OF 1920.

November 8, 1921.

Present:—Mr. Hallifax, A. J. C.

RAMRATAN—DEFENDANT—APPELLANT.

versus

SHIODATTARAI—PLAINTIFF—RESPONDENT.

Acquiescence—Encroachment on land of another—Standing by—Acquiescence, whether question of fact.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to acquiescence in the building on his land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building. [p. 138, col. 2.]

(1) 18 A. 332, at p. 333; A. W. N. (1896) 91; 8 Ind. Dec. (N. S.) 927.

(2) 46 Ind. Cas. 398; 3 P. L. J. 409; (1918) Pat. 276; 5 P. L. W. 216.

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Premji Jivan Bhat v. Haji Cassum Juma Khan, 20 B. 298; 10 Ind. Dec. (N. S.) 758, *Ramsden v. Dyson*, (1866), H. L. 129 at p. 170; 12 Jur. (N. S.) 506; 14 W. R. 926, *Plimmer v. Wellington Corporation*, (1884) 9 App. Cas. 699 at p. 710; 53 L. J. P. C. 104; 51 L. L. 475; 49 J. P. 116, *Dattatraya v. Shridhar*, (1892) P. J. 348, relied on.

It has to be decided in each case whether the special circumstances of that case do or do not amount to such standing by. [p. 138, col. 2.]

Acquiescence is not a question of fact, but of legal inference from the facts found. [p. 139, col. 1.]

Narayan v. Bhalagir, 6 B. H. C. R. 80, relied on.

Appeal from a decree of the Additional District Judge, Raipur, in Civil Appeal No. 8 of 1920; dated 26th of 1920.

Mr. J. C. Ghosh, for the Appellant.

Sir B. K. Bose, Messrs. V. Bose and P. N. Rudra, for the Respondent.

JUDGMENT.—The appellate judgment of the learned Additional District Judge is very far from satisfactory in many respects, but it is entirely vitiated by a complete failure to distinguish between express consent and implied consent or acquiescence. The actual facts found proved are these. Not later than 1912 the defendant began to build a substantial house on a plot of land in the *abadi* of the town of Raipur of which the plaintiff is *malguzar*. The *malguzar* is bound to give permission to a tenant to build on a suitable site in the *abadi* and, ordinarily, especially in a large town like Raipur, does give such permission to persons who are not tenants, with or without payment. There was no building on this plot at the time, but there had been one not long before. (The defendant alleged that he bought the right to occupy the site from the previous occupant, but this allegation has been held not proved. The finding in both the lower Courts appears to rest on a misunderstanding of the facts and pleadings, but is really of no consequence, and it may be taken that the defendant took possession of a vacant house site.) Soon after he started building, the plaintiff's agent Kamta Prasad (P. W. No. 2) told him not to build on that site. He replied that he would go and see the plaintiff and settle the matter with him. Kamta Prasad reported the matter to the plaintiff who took no further action in the matter till he launched this suit in 1919 seven years later.

2. In this Court the learned Counsel for the plaintiff, who is respondent here,

cited *Uda Begam v. Inam-ud-din* (1); *Nannihal Bhagat v. Rameshar Bhagat* (2); *Beni Ram v. Kundan Lal* (3); *Dharma Das Kundu v. Amulyadhan Kundu* (4) and *Premji Jivan Bhat v. Haji Cassum Juma Ahmed* (5). In the last mentioned case Sargent, C.J., said: "It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land *Ramsden v. Dyson* (6); *Plimmer v. Wellington Corporation* (7), and see *Dattatraya v. Shridhar* (8). This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building: *Narayan v. Bhalagir* (9)." The effect of all the other rulings cited is, that it has to be decided in each case whether the special circumstances of that case do or do not amount to such a standing by as that of which the learned Chief Justice speaks in this passage quoted above.

3. In *Beni Ram v. Kundan Lal* (3) it was argued before the Privy Council that the finding of fact of the Courts below in respect of acquiescence was final and could not be disturbed. Their Lordships said: "The argument was palpably erroneous. Their Lordships were bound by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a

(1) 1 A. 82; 1 Ind. Dec. (N. S.) 74.

(2) 16 A. 328; A. W. N. (1894), 99; 8 Ind. Dec. (N. S.) 214.

(3) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(4) 33 C. 1119; 10 C. W. N. 765; 3 C. L. J. 616.

(5) 20 B. 298; 10 Ind. Dec. (N. S.) 758.

(6) (1866) 1 H. L. 129 at p. 170; 12 Jur. (N. S.) 506; 14 W. R. 926.

(7) (1884) 9 App. Cas. 699 at p. 710; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116.

(8) (1892) P. J. 348.

(9) 6 B. H. C. R. 80.

THURUTHEELAKATH THOTTINAKKARA PUTHIA-PURAYIL, THARAYIL PRETIKAYIL KUNHAMMAD.

question of fact, but of legal inference from the facts found; and upon it the judgments of the Appellate Courts are not final." Proceeding on the lines here laid down, I have no hesitation in saying that, from the facts set out above, no inference is possible but that the plaintiff intentionally induced the defendant to believe that he might build on the site without any interference by the plaintiff or any fear of the plaintiff ever attempting to evict him, and on the same terms as all the other holders of sites in the *abadi*. In this view, the plaintiff's suit must be dismissed under section 60 of the Easements Act. The decree of the lower Appellate Court is accordingly set aside. In lieu thereof a decree will issue dismissing the plaintiff's suit and ordering him to pay all the costs of the defendant in all three Courts.

N. K.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1632 OF 1920.
November 15, 1922.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

THURUTHEELAKATH THOTTI-
NAKKARA PUTHIA-PURAYIL,
KUNHI KUTTIALI, KARNAVAN AND
MANAGER OF THE TAVAZHI TARWAD
AND MAIN TARWAD AND OTHERS—

—DEFENDANT NO. 6 & LEGAL REPRESENTATIVES OF 3RD & 8TH DEFENDANTS—
APPELLANTS

versus

THARAYIL PRETIKAYIL,
KUNHAMMAD AND ANOTHER—
—PLAINTIFF AND LEGAL REPRESENTATIVE
OF 2ND DEFENDANT—RESPONDENTS.

*Limitation Act (IX of 1908), s. 14—Dismissal
of suit for non-joinder of necessary parties—
Exclusion of period of litigation.*

Some of the trustees of a mosque sued for the appointment of a Receiver for the properties belonging to the mosque and for the removal of

the manager who, it was alleged, was indebted in a large sum to the mosque. The manager disputed plaintiffs' right to sue and claimed that the mosque was indebted to him. Issues were framed as to this liability and the Court found that a certain sum of money was owing by the mosque to the manager. A Receiver was appointed and was directed to settle accounts with the manager who was thereafter paid a portion of the amount found due. On appeal, however, the plaintiff's suit was dismissed on the ground that some of the trustees alone were not competent to sue. In a subsequent suit by the manager for recovery of the amount due to him from the mosque.

Held, that during the whole period of the previous litigation in the Court of first instance and in appeal, the plaintiff was *bona fide* litigating his rights and that that period must, under section 14, of the Limitation Act be excluded from the period of limitation prescribed for the suit. [p. 141, col. 1.]

The interpretation to be put upon section 14 of the Limitation Act must be a wide one, the principle being that limitation would remain in suspense while a plaintiff is *bona fide* litigating his rights in a Court of Justice. [p. 140, col. 2.]

Nrityamoni Dassi v. Lakhan Chunder Sen, 33 Ind. Cas. 452; 30 M. L. J. 529 at p. 541; 20 C. W. N. 522; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10; 43 C. 660 (P. C.), relied on.

Per Wallace, J.—The dismissal of a suit on the ground of non-joinder of necessary parties is a dismissal for a cause of a like nature with defect of jurisdiction within the meaning of section 14 of the Limitation Act. [p. 141, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 392 of 1918, preferred against the decree of the Court of the District Munsif, Cannanore, in Original Suit No. 133 of 1916.

Mr. C. Madhavan Nair (Government Pleader), for the Appellants.

Dr. S. Swaminathan, Messrs. K. P. M. Menon, K. P. Abdulla Kutti and B. Poker, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This case raises a rather difficult point under the Limitation Act. The facts are these: The plaintiff was a manager of a mosque. The defendants are the trustees of that mosque. Some years ago, disputes arose among the trustees *inter se* and between some at any rate of the trustees and the plaintiff. Those disputes culminated in a suit, Original Suit No. 579 of 1910, before the District Munsif of Cannanore. The suit was by some of the

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trustees for the appointment of a Receiver to the property of the mosque and for the removal of the present plaintiff, who, they alleged, was indebted in a sum of Rs. 1,000 to them. The present plaintiff, then the first defendant in that suit, put in a written statement in which he disputed the right of the then plaintiffs to bring the action objected strongly to a Receiver being appointed and incidentally alleged that, so far from being indebted to the mosque, the mosque was heavily indebted to him. Issues were framed and one of the issues No. 3 was, "Is the first defendant indebted to the mosque or *vice versa*? In how much?" Another issue (No. 5) was, "If the mosque is found indebted to the first defendant, has the 1st defendant not to be paid the amount due to him before his removal? What arrangement may be made for his removal, if at all, in the case?" That issue, apparently put upon the record upon the invitation of the present appellants, though presumably assented to by the present first respondent (plaintiff), was very fully inquired into by the District Munsif and at his direction, Commissioners were appointed specially to investigate that matter with the result that it was found by the District Munsif that there was a sum of Rs. 3,302 due and owing by the mosque to the present plaintiff. He appointed a Receiver and removed the present plaintiff from his position although he held that he had not been guilty of any misconduct and that the trustees were not unanimous in desiring his removal, and he directed that the Receiver should take steps to have all claims of the present plaintiff settled as soon as may be possible. After that decree the Receiver took possession and in pursuance of the decree, paid to the present plaintiff a considerable part of the amount which had been found to be due to him. An appeal was taken from the District Munsif's decree to the Subordinate Judge and before him the points argued were; first, whether the suit by some of the trustees alone was maintainable and, secondly, whether on the finding that the mosque was the debtor to the present plaintiff for more than Rs. 2,500, the lower Court should have dismissed the plaintiff's suit for money, or have returned the plaint for presentation to the proper Court. He held that the suit

was in the proper Court as far as the money claimed was concerned but held that, in the circumstances, some only of the trustees were not competent to sue and, therefore, reversed the judgment and dismissed the whole suit. The present plaintiff, not getting the balance of the amount that had been found due to him, then brought this action and he is met by the defence that not having sued for three years his suit is barred by the Limitation Act. He answers that by saying that the time occupied in the previous suit should be deducted from the three years' period.

The principle to be applied turns upon the proper interpretation of section 14 of the Limitation Act, 1908, which runs thus, "In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." The interpretation to be put upon that section has been a matter of much discussion but this at least may be said that the interpretation must be a wide one and the principle applicable is stated in a few words by their Lordships of the Privy Council in *Nrityamoni Dass v. Lakhan Chunder Sen* (1): "Limitation would without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice." In that case the then plaintiffs had been defendants in the previous litigation and had got a decree for possession of certain property. The Privy Council said that it would have been better if in those proceedings they had been turned from defendants into plaintiffs, but they still held that although they remained defendants, they were *bona fide* litigating their rights in a Court of justice. I think the question for con-

(1) 33 Ind. Cas. 452; 30 M. L. J. 529; at p. 541; 20 C. W. N. 522; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 110; 43 C. 660. (P. C.).

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sideration by us is whether this plaintiff was in the previous litigation *bona fide* litigating his rights to be paid this money by the mosque represented by the present defendants. Once it is admitted that there was an issue, and it must be admitted in this case, before the Court as to whether he was entitled to that money or not and the results of that issue might be either an order that he should recover the amount or even a declaratory order that he would be entitled to the amount, such declaratory order being a step towards getting payment, for instance, by exercising a lien that he might have over property or by proving the amount in a claim against either an insolvent estate or estate in the possession of the Court through its Receiver, in my judgment, it is impossible to say that he was not *bona fide* litigating his rights. In this case the fact is that he actually got an order that an officer of the Court was to pay him the amount due and, in pursuit of that order, he had received a large sum on account from that officer of the Court, the person then in possession of the assets, out of which that payment should be made. Under these circumstances, in my judgment, during the whole period of that litigation, he was *bona fide* litigating his rights and that period must be excluded from the period of limitation prescribed for this suit.

This appeal must accordingly be dismissed with costs of the 1st respondent.

Wallace, J.—I agree. That the plaintiff was prosecuting his claim for money due to him by the mosque seems to be clear from the issues in Original Suit No. 579 of 1910 and from the fact that under the decree in that suit he was paid by the Receiver under the directions of the Court a part of the sums due to him, and he might legitimately expect in the same manner to be paid the rest. Had the decision of the District Munsif in Original Suit No. 579 of 1910 been what that of the Appellate Court upon his decision was, then, on the issues in that case, it could not have been held that the present claim was not being tried; and, on the other hand, had the Appellate Court upheld the original Court's decision and had the Receiver proceeded to carry out the orders of the Original Court, there would have been no cause of action left for the present plaintiff to sue.

It appears to me clear, therefore, that he was prosecuting his claim with due diligence and in good faith in another civil proceeding. Then, as to whether the proceeding was founded upon the same cause of action, I do not think there can be any doubt, although the form in which the plaintiff got his relief in the District Munsif's Court was framed in a declaratory form with a declaration that he had a charge for his money over the mosque property and with the direction already mentioned, to the Receiver appointed by the Court to pay the amount found due to him. The only other point is, whether he was prosecuting his claim in a Court which could not try it because of defect of jurisdiction, or other cause of a like nature. I think here it is clear from the final decision in Original Suit No. 579 of 1910 that the District Munsif's Court and the Appellate Court from it were prevented from deciding upon the lawfulness of the present plaintiff's claim, because the plaintiffs in Original Suit No. 579 of 1910 had not properly framed their action. That is a cause of a like nature with defect of jurisdiction. This is clearly a case in which the plaintiff has been honestly trying his best to get his case tried on the merits but has failed owing to the Court being unable to give him such a trial.

I, therefore, agree that section 14 of the Limitation Act applied.

V. N. V.

N. H.

Appeal dismissed.

MAKUNDRAM V. SHRIKRISHNA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 504 OF 1921.

November 3, 1922.

Present.—Mr. Batten, J. C.

MAKUNDRAM—DEFENDANT—APPELLANT
versus

SHRIKRISHNA—PLAINTIFF—

RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 188 (2) (c)—Village held in partnership—Management by lambardar—Suit for profits, maintainability of—General suit for accounts, whether necessary—Interest on village profits, when allowable.

A village was held by the members of a Hindu family who were joint at first but became separate in interest afterwards. But they continued to share profits of the village, of which they were tenants-in-common, by putting all the profits into a common chest and meeting their expenses from the same chest. This arrangement was subsequently discontinued and the village was managed by the member who was the *lambardar* in his capacity as such *lambardar*. Differences arose with regard to the distribution of profits and a suit was brought for profits for the period during which the village had been managed by the member as *lambardar*. It was urged that the various separated members of the family should be regarded as partners and that a general suit for accounts should be brought. *Held*, that the members could not be regarded as trading partners and that the suit as brought was tenable under section 188 (2) (c) of the Central Provinces Land Revenue Act.

No interest can be allowed in a suit for village profits where a co-sharer makes no demand for his share of profits.

Appeal against the decision of the District Judge, Saugor, in Civil Appeal No. 74 of 1921, dated 3rd September 1921.

Mr. M. Gupta, for the Appellant.

Mr. M. B. Niyogi, for the Respondent.

JUDGMENT.—The facts which are found and admitted in this case are that up to *Sambat* 1973 the village, the profits of which are in suit, was held by the members of a family which had once been joint but whose members were separated in interest since November 1879. Since that date, though the members of the family are no longer joint, they have been jointly sharing profits of the village, of which they are tenants-in-common, by putting all the profits into a common chest and by meeting their expenses from the same chest. The suit relates to the *Sambat* years 1974 and 1975, during which period

the defendant has admittedly been the *lambardar* and has been the actual manager of the village. It has been found and admitted that the previous amicable arrangements have no longer continued and that the defendant has been managing the village in the ordinary way as a village is managed by a *lambardar*. The suit is one that is *prima facie* tenable under clause (c), sub-section (2) of section 188 of the Land Revenue Act, II of 1917, which enacts that the *lambardar* shall collect the village profits and render an account of the same to the proprietors.

It is urged on behalf of the appellant, as it was urged in the lower Courts, that the various separated members of the family should be regarded as partners, as in a trading partnership, and that the plaintiff cannot bring a suit for accounts for the two years in suit without bringing a general suit for accounts for the period since November 1879. No precedent in support of this argument has been quoted. The fact is that up to the end of *Sambat* 1973 the parties agreed with reference to the distribution of the profits, but since that date they have not so agreed, and the defendant has been managing the affairs of the village and is responsible for the profits. No question of a trading partnership arises. No general principle of law applies to the case and paragraph 300 of Mayne's Hindu Law, which refers to a trading partnership which is the property in a Hindu family still joint, has no possible application to the case. I am of opinion that the lower Appellate Court has taken a right view as to the tenability of the suit.

The next ground of appeal raises the question of interest. The learned Advocate for the respondent does not press for interest as he admits that it is not proved that his client made a demand for the village profit. There is certainly no ground for granting interest where a co-sharer makes no demand for his share of the profits. It is just as much the business of a co-sharer to keep the *lambardar* up to the mark by periodical demands for accounts and profits as it is the duty of the *lambardar* to keep accounts and hand over the profits. That portion

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of the decretal amount which is made up of interest must be struck off the decree.

Costs in all Courts will be in proportion to the result.

N. H.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 620 OF 1919.
February 10, 1923.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Fforde.

THE FIRM DEVISAHAI-RAMJI DAS,
THROUGH DAL CHAND—PLAINTIFF—
APPELLANT

versus

TIRATH RAM AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 61, 83—Contract Act (IX of 1872), s. 222—Principal and agent—Suit by agent to recover amount of loss incurred—Limitation, commencement of.

Plaintiffs agreed to purchase a certain amount of grain, to hold it for the defendant, and to resell it under his instructions at such times and in such lots as he might think fit. The grain was purchased and sold in accordance with this agreement and there was a loss on the whole transaction. Plaintiffs sued to recover the amount of the loss from the defendant;

Held, (1) that the transaction between the parties amounted to a contract of agency carrying with it the right to indemnity conferred upon the agent by section 222 of the Contract Act;

(2) that, therefore, the suit was governed by Art. 83 and not by Art. 61 of Sch. I to the Limitation Act; [p. 144, col. 1.]

Manghi Ram v. Ram Saran Das—Maman Chand, 26 Ind. Cas. 415; 23 P. R. 1915; 100 P. L. R. 1915; 218 P. W. R. 1914, followed.

Kandaswami Pillai v. Avayambal, 7 Ind. Cas. 399; 34 M. 167; (1910) M. W. N. 316; 8 M. L. T. 194; 20 M. L. J. 989, dissented from.

(3) that limitation began to run from that date when plaintiffs paid for the grain and not from the date when the loss was ascertained after re-sale. [p. 144, col. 2.]

Kadari Pershad-Cheddi Lal v. Hari Bhagwan, 66 Ind. Cas. 900; 3 L. L. J. 65, followed.

Second appeal from the decree of the District Judge, Ferozepore, dated the 26th November 1918, reversing that of the Subordinate Judge, Second Class, Ferozepore, dated the 16th March 1918.

Mr. Manohar Lal, for the Appellant.

Mr. M. L. Puri and Lala Kanshi Ram, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the District Judge of Ferozepore, varying the judgment of the Court of first instance. The action, which was tried before the Subordinate Judge, was brought by a firm of commission agents, on the 24th of July 1914 to recover the sum of Rs. 4,000 alleged to be due to them on foot of certain purchases and sales of grain carried out by them upon the instructions of the defendant. The material facts appear to be as follows:—

A *kotla* of grain was bought by the plaintiff for the defendant on the 26th of July 1908 for Rs. 4,201-9-3, the plaintiffs paying the purchase price on that date. The grain remained in the possession of the plaintiffs who charged a rent for storage in addition to their brokerage commission. This grain was sold by the plaintiffs on defendant's instructions in different lots, the first lot being sold sometime in May or June 1912 and the last on the 30th September 1912. The total amount realized by these sales amounted to Rs. 2,729, showing a substantial loss on the whole transaction.

The Rs. 4,000 sued for is made up of the amount of this loss together with various sums on foot of commission, rent, interest and so forth. There is no dispute as to amount. The only question we have to determine is whether or not the suit is barred by time. This depends upon the particular Article of the Indian Limitation Act to be applied, which, again, depends upon the nature of the cause of action. The plaintiffs contend that Article 61 applies, which provides (in the Punjab) limitation period of six years for a suit to recover money payable to the plaintiff for money paid for the defendant. The defendant, on the other hand, argues that the suit is based upon the breach of a contract of indemnity, and that limitation is governed

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by Art. 83 of the Act which prescribes a period of three years.

If Art. 61 is applicable, the suit is within time. If Art. 83 is applied, it will depend upon whether time runs from the date of payment for the goods, or from the date when the contract of agency terminated and the actual loss on the whole transaction was ascertained; in the former case the suit is barred, and in the latter it is within time.

Now it appears from the uncontradicted evidence of witnesses that the contract was not simply for the purchase of grain by the plaintiffs for the defendant, but a contract to purchase the goods, hold them for the defendant, and re-sell them upon his instructions at such times and in such lots as he might think fit.

Upon this evidence the transaction may be properly regarded as a contract of agency, carrying with it the right to indemnity conferred upon the agent by section 222 of the Indian Contract Act. That being so, Art. 83 of the Limitation Act is applicable. We are supported in this view by the judgment of Rattigan and Le Rossignol, JJ., in the case of *Manghi Ram v. Ram Saran Das-Maman Chand* (1), where the facts were similar to those of the present case. It was there held that a suit for recouper of losses incurred by agents in a *badni* transaction was governed as to limitation by Art. 83. The Court in that case refused to follow the ruling of the Madras Court in *Handaswami Pillai v. Avayambal* (2), which has been relied upon by the appellants in support of the contention that Art. 61, and not 83, is applicable.

The only question remaining then to be considered is, when did time begin to run? The plaintiffs contend that the time must be computed from the date when the actual loss on the whole transaction was ascertained, i.e., on the 30th September 1912. We cannot accept this view. We are clearly of opinion that the plaintiffs were actually damaged at the moment they were out of pocket by the payment for the grain, namely,

on the 26th July 1908. As soon as they had paid the money they could have called upon the defendant to indemnify them. At that date their cause of action arose and from that date time began to run against them.

A similar view was taken by the Court in *Kadari Pershad-Chhedi Lal v. Har Bhagwan* (3), where the head-note is as follows:—

"Where a commission agent buys goods for a principal, but through the latter's default in paying for the same, they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses, must be brought within the period of limitation prescribed by Art. 83 of Sch. I to the Limitation Act.

"Limitation in such a case operates from the date of the payment made on behalf of the principal and not from the date of the sale."

As our own views are entirely in accord with those expressed by the learned Judges in the above cited judgments of this Court, we hold that the plaintiffs' suit is barred by time.

The appeal must, therefore, be dismissed with costs, and the order of the lower Appellate Court be affirmed.

Z. K.

Appeal dismissed.

(3) 66 Ind. Cas. 900; 3 L. L. J. 65.

(1) 26 Ind. Cas. 415; 23 P. R. 1915; 100 P. L. R. 1915; 218 P. W. R. 1914.

(2) 7 Ind. Cas. 399; 34 M. 167; (1910) M. W. N. 316; 8 M. L. T. 1941 20 M. L. J. 989.

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LOWER BURMA CHIEF COURT.

CRIMINAL REFERENCE NO. 32 OF 1922.

July 21, 1922.

Present:—Justice Sir Sydney Robinson,
Kt., Chief Judge, and Mr. Justice
Macgregor.

NGA SHAN—APPELLANT

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898),
s. 235—Penal Code (Act XLV of 1860), ss. 215,
420, offences under—Conviction for more serious
offence, whether permissible.*

When the facts proved in a case constitute two or more offences, the Court should convict of, and punish for, the most serious offence that is established, provided the accused has been charged with, and has had an opportunity of meeting the charge of that offence. [p. 147, col. 1.]

Where, therefore, a person takes a ransom for the restoration of stolen property, and fails to return that property to the person who paid him the ransom and the facts show an offence under section 420 of the Penal Code, though they also establish an offence under section 215, he can be convicted under section 420 provided he was duly charged with it. [p. 147, col. 1.]

Dputy Legal Remembrancer v. Ijjatullah Kazi,
10 C. W. N. 1005; 4 Cr. L. J. 154, referred to.

Reference made in criminal appeal against the judgment of the Special Power Magistrate, Thaton.

REFERRING ORDER.—The following reference was made by Mr. Justice Duckworth to a Bench under section 11 of the Lower Burma Courts Act, 1900:—

The facts of this case are very clear, and there are no reasons for holding, as stated by the appellant, that the prosecution case against him was a mere fabrication, due to a plot between complainant and his Chinese brother-in-law, Htan Na. In fact, the appeal was only admitted for consideration of the question whether the appellant, Nga Shan, was rightly convicted under section 420, Indian Penal Code, under which use could be made of his three previous convictions under section 380, Indian Penal Code, in order to impose upon him a heavy sentence, or whether, on the facts before the Court, he should merely have been convicted under section 215, Indian Penal Code, under which his sentence could not extend to more than two years' rigorous imprisonment.

As matters stand, appellant has been convicted under section 420, Indian Penal Code, for cheating and inducing the delivery of money, to wit, a sum of Rs. 14, and has been sentenced to five years' rigorous imprisonment including three months' solitary confinement. He was accused of inducing the complainant to pay him Rs. 14 as a ransom for the return of his two bullocks, which had undoubtedly been stolen, and, thereafter, in spite of several successive promises to return the said animals at Thindawgyi Kyaukkon, of failing upon each occasion to restore them. As a matter of fact, the said cattle have never been returned.

According to my view, the questions to be considered in order to determine the matter, are:—

(i) Does the record indicate that the appellant ever had the animals in his possession or control?

(ii) If so, does it show, or lead to the inference, that he had from the first, no intention of restoring them to the owner, after receipt of the ransom money? (Cheating).

(iii) Is it indicated that he may have at first intended to return the bullocks, and subsequently changed his mind, or otherwise been prevented from doing so? (No. Cheating).

(iv) Or, is it to be inferred that he never had control of the animals, and all along intended to swindle the owner out of his money? (Cheating).

Normally, where the facts show an offence under section 215, Indian Penal Code, it would be a Court's duty to convict under that section but I can see no reason, where the facts proved, or to be inferred, indicate the commission of a more serious offence (which may include an offence under section 215, Indian Penal Code), why a Court should be precluded from convicting an offender under the appropriate section, provided, of course, that he has been duly charged with it. It seems to me that section 235, Criminal Procedure Code, expressly provides for such a case.

The matter was decided by my learned brother, Pratt, J., in the unpublished case of *Nga Kyaw Zan v. King-Emperor*, Criminal Appeal No. 673 of 1912, where

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he came to the conclusion that, in cases where section 215, Indian Penal Code, fitted the crime, section 215, and not section 420, Indian Penal Code, should be utilized. However, it does not appear to me that the matter was thoroughly thrashed out in that instance, and I am aware that there are differences of opinion about the correctness of that decision.

I have already stated what my own view is, and what questions have to be decided in each separate case, for, in my opinion, the decision depends entirely on what are the proved facts in each instance, it being impossible to lay down any hard and fast rule.

What are the facts proved and to be inferred in the present case?

Complainant apparently met appellant casually, when searching for his bullocks, and told him of his loss, and asked him to attempt to procure information about them. The appellant told complainant that he would try to get news, and requested the complainant to meet him that evening. This was on the day following the actual theft of the animals.

At the meeting that night, in the *kwin*, appellant informed the complainant that he had received news of the lost cattle. On complainant mentioning a ransom, appellant said that he would go and consult another person, and warned the complainant to meet him next morning. The meeting took place in complainant's durian garden, and appellant told complainant that the ransom would be Rs. 30. On complainant suggesting that this was, perhaps, too much, it was arranged that they should meet again at complainant's brother-in-law, Htan Na's house that night at Tangale. At that meeting the appellant accepted a sum of Rs. 14 as a ransom for the return of the cattle and indicated the spot already referred to as the place where the bullocks would be released. On at least four occasions he failed to keep this promise, and the case was then sent up to Court.

I think it may be taken from these allegations, that the appellant, who knew complainant well, never had possession of, or control over, the cattle, and merely seized upon complainant's complaisance, in order to defraud him of what money he could. The cattle were worth at least

Rs. 120, and it is probable that a man, who had them securely in his control, would not have been contented with a paltry sum of Rs. 14 as a ransom.

If this be so, it seems to me that the offence could fall under section 420, Indian Penal Code.

If the appellant had possession, or control, of the animal while he might have been convicted under section 379 or section 411, Indian Penal Code, he could not well have been convicted under section 420, Indian Penal Code, unless it was shown, or was clearly to be inferred, that he never intended to restore them on payment of a ransom for, if he intended to return the bullocks at the time when the ransom was paid, but subsequently changed his mind, or was otherwise prevented from returning them, the offence of cheating would not have been complete. The case of the *Deputy Legal Remembrancer v. Ijjatullah Kazi* (1) might be referred to with reference to the last statement of law made by me.

In the present instance, my opinion is that an offence under section 420, Indian Penal Code, has been proved, and that the conviction was correct. In view, however, of the fact that Pratt, J., has come to a different decision in the case already referred to, which I am aware has since been followed in several Lower Burma Districts, I consider that the matter is of sufficient importance to be referred to a Bench or a Full Bench, of this Court, as the learned Chief Judge may decide.

The question referred will be:—When an accused person has taken a ransom for the restoration of stolen property, and fails to return that property to the person who has paid him the ransom, can he be convicted under section 420, Indian Penal Code, or must the conviction be confined to one under section 215, Indian Penal Code?

OPINION.

Robinson, C. J.—The question referred for the decision of this Bench is stated as follows:—“When an accused person has taken a ransom for the restoration of stolen property, and fails to return that

(1) 10 C. W. N. 1005; 4 Cr. L. J. 154.

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property to the person who has paid him the ransom, can he be convicted under section 420, Indian Penal Code, or must the conviction be confined to one under section 215, Indian Penal Code?"

The reference presumes that the facts established by the evidence would constitute the offence of cheating though they would also establish an offence under section 215, Indian Penal Code. In other words, the question is whether, the Legislature having enacted an offence to meet a particular form of crime, it is open to the Courts to convict of a more serious crime when the facts proved constitute that more serious offence.

This reference has been made because of an unpublished ruling of a Judge of this Court holding the view that it is not open to the Court to convict of the more serious offence. No reasons for that decision were given and no authority was cited, so that we do not know on what ground that *dictum* was laid down.

The Indian Penal Code defines many offences, some of the same character as others but differing in degree, others of an entirely different character. The general rule which, in our opinion, should guide the Courts is to convict of and punish for the most serious offence that is established provided, of course, that the accused has been charged with and has had an opportunity of meeting the charge of that offence.

Section 215, Indian Penal Code, was no doubt enacted to provide for a particular class of offence. Without it there might be cases in which as the facts constitute no other offence the guilty person would get off scot free. But we can find no ground for holding that the Legislature meant to confine the Court to that offence when the facts proved amount to another and more serious offence. If a man is guilty of the offence of rape and it is established that he was in committing that offence also guilty of murder it could surely never be held that because the Legislature had provided for the particular offence of rape he could not be convicted of murder.

We must, therefore, answer the reference by saying that he can be convicted of cheating.

Macgregor, J.—I concur in the answer to the reference proposed by the learned Chief Judge. The offences under sections 215 and 420 have the common ingredient that a person has been induced to part with money or money's worth. The addition to this of certain facts will result in an offence under section 215, against public justice. The addition to it of certain facts of a different kind will result in an offence under section 420, against property. Where the ingredients of an offence under section 420 are proved, I can find no provision of law forbidding a conviction under it merely because of the presence of other facts which, if looked at to the exclusion of some of the ingredients of the offence under section 420, disclose an offence under section 215.

W. C. A.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 390 OF 1922.
CRIMINAL REVISION PETITION No. 339 OF 1922.

November 15, 1922..

Present:—Mr. Justice Wallace.

GANAPATHI SARMA AND OTHERS—

ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 34, 149—
Riot—Common object—Liability of persons present
at different times.*

In cases of convictions of members of a riotous mob, for a specific act of violence, if persons found at particular points of time to be members of the mob but not shown to have taken part in the specific act, are to be held guilty of that act by force of sections 34 or 149 of the Penal Code, it must be clearly found that that act was done in furtherance of the common intention of the mob while the accused were in it or that the act was such as these accused knew to be likely to be committed in prosecution of their object. [p. 149, col. 1.]

Where the common object of a crowd innocent at first develops by degrees into something heinous

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and culpable and such developments are not inherent in its original common object but are merely ebullitions of spasmodic fury in a direction which none at first in the crowd could have contemplated, members originally present but absent at the time of the latter acts are not liable for these latter acts. A Court cannot presume that any and every person who is found to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end. In such cases the Court should consider, *first*, what was the original intention of the mob and which of its offences naturally were inherent or likely to have occurred in the prosecution of that intention and which were not; *secondly*, at what stage of the riot were the accused present and what was the temper, the intention, and the common object of the mob while they were present, what acts was it likely to go on to commit in furtherance of that common object; and *thirdly*, whether if they had left the mob at any stage, they could nevertheless be constructively held guilty of any of the acts committed by the mob after they had left. [p. 149, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Trichinopoly Division, in Criminal Appeal No. 2 of 1922, preferred against the judgment of the Court of the Sub-Divisional First Class Magistrate, Musiri, in C.C. No. 41 of 1921.

Dr. S. Swaminathan, for the Petitioners.

Mr. F. S. Vaz (for the Public Prosecutor), for the Crown.

ORDER.—Petitioners have been convicted of having taken part in a riot and committed various offences in the course of the riot. The riot took place at Karur on the night of 24th August 1921 and early morning of 25th August 1921, and was occasioned, as found by the lower Courts, by an attempt on the part of the Congress and Khilafat Committees there to compel the manager of a theatrical troupe performing at the theatre at Karur to hand over to the funds of these Committees his takings for one night's performance. Annoyed at his refusal, the crowd who had accompanied the Secretaries of these Committees attacked the theatre while the performance was going on, stampeded the audience and committed various acts of violence to the persons in the audience and the property of the troupe. The Trying Court has written a careful and discriminating judgment, in

which the main facts of the riot are very clearly set out.

The chief incidents of the night are detailed in order in paragraph 83, and following paragraphs of the Trying Court's judgment. The particular offences of which the crowd, generally, has been found guilty are endangering human life by throwing stones (section 336, Indian Penal Code), causing hurt by the same (section 337), causing hurt to Police Officers (section 332), wrongful restraint (section 341), mischief (section 426) and criminal trespass (section 447). The lower Courts have found the petitioners guilty of all these offences either directly or constructively by force of sections 34 and 149, Indian Penal Code.

The riot began at 8-30 P. M. and went on spasmodically till 9-30 the next morning. Between 11-30 P. M., when the Police fired and one of the mob was killed; until 6-30 A. M., there appears to have been a decided lull in the activities of the mob. Prior to 11-30 P. M., however, all the offences of which the mob as a whole were found guilty of had been perpetrated, although again at 6-30 A. M. there was a renewal of the offences under sections 426 and 447, and further offences under section 435 by isolated members of the crowd. That the actions of the mob between 8-30 and 11-30 P. M. were united and concerted and continuous admits of no doubt; and for whatever criminal offences it committed or was likely to commit in furtherance of its common object during that period, each member of the assembly would in law be responsible. As to the renewal of activities at 6-30 A. M. before individual members of the original mob could be held in law responsible for those acts, it would have to be clearly shown either that they were present during the second riot or that the second riot was a continuation of, and a likely result of the first.

It is also found that one of the petitioners, the 1st accused although present at the beginning of the riot at 8-30 P. M. left the place almost at once.

It is contended generally for petitioners, and cannot, I think, be denied, that both the lower Courts have used sections 34 and 149 of the Indian Penal Code in too loose and uncritical a manner, and have not

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clearly in all cases found as facts the ingredients necessary for convictions by force of these sections. In cases where there is no direct evidence of the actual participation of the accused in a specific act of violence, if persons proved at particular points of time to be members of the mob but not shown to have taken part in the specific act are to be found guilty of that act by force of section 34, it must be clearly found that that act was in furtherance of the common intention of the mob while these accused were in it, or if section 149 is used, it must be clearly found that that act was also in prosecution of the common object or such as these accused knew to be likely to be committed in prosecution of their object. The common object of the rioters for the purpose of section 149, which may be taken to be much the same as the common intention for the purpose of section 34, is set out in the charge, as taking vengeance on P. W. No. 2, the proprietor of the Dramatic Company, because of his refusal to give the collections of the night to the Congress and Khilafat Funds, and "later on" to take vengeance also on the Deputy Superintendent of Police and his Constables.

Now the Trial Court makes it clear, (paragraph 114) that the attempt to take vengeance on the Deputy Superintendent of Police only arose after one of the rioters had been shot dead, that is, about 11-30 P. M. and only materialised in any overt act in the attack in the early morning. In my view it cannot be held that persons who were in the mob at the first attack up to, say, 11-30 P. M., must necessarily be held, in the absence of evidence, to have been present in the second attack at 6-30 A.M. and conversely and much more obviously those only proved to be present at the second attack cannot possibly, in the absence of some evidence, be held to have been present at the first. Obviously, also, the common object of a crowd, comparatively innocent at first, may develop by degrees into something very much more heinous and culpable: and these developments may, on the one hand, be such as were naturally inherent in its original common object or may, on the other hand, be ebullitions of spasmodic fury in a direction which no one who was at first in the crowd could have contemplated.

In the latter case, I do not see how members originally present but absent at the time could be liable for these latter acts.

The lower Courts should have, therefore, considered, first, what was the *original* intention of the mob and which of its offences naturally were inherent or likely to have occurred in the prosecution of that intention and which were not: secondly, at what stage of the riot were these petitioners present, and what was the temper, the intention and the common object of the mob while they were present what acts was it likely to go on to commit in furtherance of that common object; and, thirdly, whether, if they had left the mob at any stage, they could nevertheless be held guilty of any of the acts committed by the mob after they had left. The lower Courts should have paid more attention to the provisions of section 148, Indian Penal Code, which lays down that no one is a member of an unlawful assembly unless he is aware of the facts that render that assembly an unlawful one and intentionally joins or continues in it. It may be difficult to decide these points clearly, but it has to be done. I am not, therefore, prepared to accede to the contention of Mr. Vaz, who appeared for the Public Prosecutor, and I am sure it is not the law that a Court is to presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member, of such a crowd must from the beginning have anticipated and contemplated resistance to the organised forces of order, that is, the Police, or have made up his mind before the riot began to oppose such resistance and overcome such force as stood in the way of the mob accomplishing its common object. That appears to me to be a fundamentally wrong view in law, though, of course, such a combination of common objects might be proved by evidence to have existed. It is entirely a question of fact on which findings, as I have indicated above, must be recorded by the Trying Court before it can apportion the legal responsibility of the various members of the unlawful assembly. In order to find what was the common object of the crowd at the beginning, it is not a

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legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object and must normally be based on more evidence than the mere acts themselves. I am not prepared, therefore, to infer as a matter of law that persons whose common object, say, from 8-30 to 11-30 P. M. was to wreak vengeance on P. W. No. 2 must necessarily have been those or joined with those whose common object between 6-30 and 9-30 P. M. was to wreak vengeance on the Deputy Superintendent of Police and *vice versa*. It is a matter for definite evidence and proof. This is a point to which neither of the lower Courts has paid any attention and it is a matter of great importance in the cases of several of those petitioners with whom I shall now deal.

The facts leading up to the riot as found are that about 5 P. M. the 1st accused, the local Secretary of the Congress Committee went to P. W. No. 2 at his house and demanded of P. W. No. 2 to give the collections of the night to the Congress and Khilafat Committee, and then threatened that there would be a disturbance and riot (P. W. No. 2 uses both words) if the money was not paid, and that, again, at 8-30 P. M. a crowd of about 200 people headed by the 1st accused and three or four others assembled outside the theatre to repeat and enforce the demand. This latter demand was in the nature of an ultimatum, P. W. No. 2 having already several times refused previous requests of this nature. Some throwing of stones by the crowd on the theatre was going on. Then the 1st accused and three or four others went inside the compound, evidently as leaders and representatives of the crowd, and the 1st accused renewed their demands for the collections from P. W. No. 2. P. W. No. 2 put him off, promising to pay something in the morning. The 1st accused and his companions went after ten minutes purely in an angry mood, the 1st accused saying definitely that P. W. No. 2's promise was unsatisfactory and that it was impossible to prevent a disturbance, as the crowd would not listen to him. When the 1st accused

reached the crowd and went into it, stones began to fall and the riot definitely began, the crowd being "furious," as P. W. No. 2 puts it, because he would not give any money. The evidence is that the 1st accused raised his hand to the crowd. P. W. No. 3 thought he was trying to pacify it, P. W. No. 4 that he was encouraging it to riot. D. W. No. 22, the only defence witness of any use on this part of the case, says that the 1st accused was trying to disperse the crowd, but he did not go near the crowd and evidently cannot say at what stage of the proceedings he saw the 1st accused do so. It is clear that the 1st accused cleared off the scene at an early stage of the riot and was not seen after about 8-30 P. M.

Now, no witness speaks to the first accused having committed any of the specific acts of violence by the mob. His conviction is based purely on the application of sections 34 and 149, Indian Penal Code, to his case, on the ground, as both Courts have held, that he, as leader and spokesman of the mob, was legally responsible for all that the mob substantially did in furtherance of its common object although he himself left it at the beginning. The findings of fact in his case, so far as they are relevant, appear to be as follows:—that at 5 P. M. he threatened P. W. No. 2 with a riot if his demands were not complied with; that at 8-30 P. M. he was at the head of a mob of two hundred people to support his demands and acted as spokesman, but when his demand was refused, he again hinted at a riot, and that when he again reached the crowd, stone-throwing began. There is no evidence of any cries of the mob which would go to show what its intention then was: but it appears to me to have been simply to bring further intimidation to bear on P. W. No. 2 to grant its demands. Its action was confined to stone-throwing until about 10-25 P. M. when the Police arrived with arms, and the play was not stopped until twenty minutes later when the attack of the mob appeared imminent and the Police outposts, who were on the road, were withdrawn inside the compound. Thus, for at least two hours after the first accused left nothing more than stone-throwing went on although the crowd was in numbers easily sufficient

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to force its way in and break down any resistance. In these circumstances, I am not prepared to find that the crowd at 8-30 P. M. had any common intention of breaking into the theatre, stampeding the audience, wrecking the performance and damaging the properties. Nor am I prepared to find that at that time it was obvious to the members of it that such results were likely to happen. A person leaving the crowd then would be justified in inferring that its temper was such that it would, as it did, do nothing more serious than throwing stones indefinitely, until something unforeseen and which could not be reasonably anticipated roused them to more criminal actions. Any member, therefore, who left it at 8-30 can at the most only be held guilty by force of sections 34 and 149 of offences under sections 336 and 337 of the Indian Penal Code.

It is urged on behalf of the first accused that the evidence does not show that he was a member of the unlawful assembly at all, and that, on the contrary, he was trying to prevent the assembly using violence, but in this contention I cannot concur. His whole conduct indicates to my mind that he intended to use show of force and intimidation to P. W. No. 2 to get his illegal demand enforced and that he headed the crowd for that purpose: and I agree with the lower Courts in holding that the stone-throwing was inherent in his plan, if not actively directed by him. It was going on when he left the crowd to confer with P. W. No. 2, and began again when he returned from the conference. But I must disagree with the Trying Court when it seeks to fasten on him the responsibility for the further actions of the crowd, merely because he "did not use his power of control over the crowd" to prevent further offences, or because he did not beforehand communicate the intention of the mob to the authorities (see paragraph 117 of the lower Court's judgment) and with the lower Appellate Court's even more unsatisfactory inference that, because he was an "important personage among the rioters," therefore, he must be held responsible for all that his comrades did in the course of the riot. (See paragraph 4 of the Sessions Court's judgment). I, therefore, hold that the first accused's conviction under section 147 and sections 336

and 337 by force of sections 34 and 149 is legal and that his conviction under other sections is not legal and must be set aside.

The next set of petitioners with whom I have to deal are those proved to have been in the assembly between 8-30 P. M. and midnight, accused Nos. 9, 12, 13, 15, 21, 29, 31 and 33. I would here remark that I accept only the evidence believed by the Trying Court. The question whether, in any particular case, a witness who has retracted in cross-examination what he stated in chief examination should be believed has to be decided on the facts of the case, and I would demur to attempting to lay down, as the lower Appellate Court has done, any general principle in such cases. In the present case I consider that the Trying Court has probably appreciated better than the lower Appellate Court the extent of credibility to be attached to such witnesses and prefer with the Trial Court to reject such witnesses altogether. The common intention of the mob between 8-30 and 11-30, has been found to be and obviously was to stone the premises, the patrons to the show and the Police, break open the compound gates, trespass into the compound, commit mischief there, drive off the audience, and close the performance, so much. The 9th accused is only identified as having in the beginning dissuaded people from buying tickets, and having thrown stones. His case is similar to that of the 1st accused and his conviction has to be similarly modified.

So far as the 12th accused is concerned the evidence is that he threw stones during the riot and assaulted Constables at about midnight. No one says that he was present after that. He was, therefore, in my opinion, guilty of the acts of the mob up to midnight as he was still taking part in the attacks at midnight, and his conviction by force of sections 34 and 149, Indian Penal Code, for the acts committed up to that time by the mob, *i.e.*, under sections 147, 336, 337 426 and 447 appears to me correct, but his conviction under section 341 as I shall indicate later, cannot be upheld.

As to the 13th accused there is evidence against him similar to that against the 12th accused and his case must be similarly dealt with.

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As to the 15th accused he is proved to have held P. W. No. 9, one of the spectators, as he was running away from the shed. He is said to have recognised P. W. No. 9 and let him go. There is nothing to show that his action was in concert with the mob or that his action was not wholly innocent, and it is not said that any crowd was with him at the time. I do not see how it can be inferred from that act alone that the 15th accused was one of the mob who took part in its common object. There is no other evidence that an offence under section 341 was part of the common intention of the mob at any time. I find, therefore, no evidence on which the 15th accused can be convicted and his conviction must be set aside. It also follows that section 341 must be struck out in the case of all accused since this act of the 15th accused is the only evidence that any wrongful restraint of ordinary spectators by the mob occurred.

As to accused No. 21 there is the strong evidence of his taking part in the initial stone-throwing and that he was present also when the mob burst open the gate at 11-30 P. M. His case is, therefore, the same as accused No. 12.

As to accused No. 29 there is evidence that he took part in the throwing of stones before the advance into the compound was made.

As to accused No. 31, there is evidence that he was inside the compound after the first entry by the mob, burning Policemen's clothes about 11 P. M. or midnight and that later on he took part at 8-30 A. M. in burning the doors. That evidence was sufficient for the Trying Court to conclude that he was present throughout, and his conviction directly or constructively for all acts of the mob, except the offence under section 341 is, therefore, correct.

As to accused No. 33, his case appears to me to be the same as that of accused No. 9.

The next batch of accused is Nos. 3, 27 and 48. All three appear only in the later attack in the early morning. Accused No. 3 is identified as a member of the mob by P. W. No. 15. I am asked to interfere in his case as he is an old man and was shot during the riot. He was evidently the man at whom P. W. No. 1 fired because he

saw him aiming a stone at him although P. W. No. 1 was not able to identify him. (P. W. No. 1 in the list in paragraph 113 of the Trying Court's judgment is a mistake for P. W. No. 15). The evidence shows clearly that he was inside the compound and, therefore, there was enough evidence for the lower Courts to find that he was guilty of being a member of an unlawful assembly.

As to accused Nos. 27 and 48 they were seen by many witnesses committing mischief by fire to the property in the compound. The acts committed by the mob in this second attack were obviously criminal trespass, mischief and mischief by fire, and the mob's intention then was not only to get at P. W. No. 2 but also at P. W. No. 1, the Deputy Superintendent of Police. I think that the evidence as to the acts of the later mob is, in the absence of other evidence, sufficient to clearly identify it with the original mob and its actions. It is found that the mob had remained all night at the spot between 11-30 P. M. to 6-30 A. M. and that at 6-30 it continued the efforts to break down the resistance and was still as is evident from the case of accused No. 3, throwing stones. I hold that these three accused were, in the absence of reliable evidence to the contrary, fairly proved to have been members of the mob and in the riot throughout and were, therefore, guilty in law of all the acts of the mob, from which I exclude the offence under section 341, Indian Penal Code.

The net result is that all the accused are acquitted of the offence under section 341, Indian Penal Code, and that the convictions of accused Nos. 3, 12, 13, 21, 27, 31 and 48 are otherwise confirmed: that the convictions of accused Nos. 1, 9, 29, 33, under sections 426 and 447 are set aside and otherwise confirmed: and that the 15th accused is acquitted altogether. In the case of accused Nos. 12, 13, 21, 27, 31 and 48, I reduce the sentence of imprisonment by two weeks, and in the case of the 3rd accused who has already been two weeks in jail, I think that is sufficient and reduce the sentence of imprisonment to the period already undergone.

In the case of the 1st accused I reduce the fine to Rs. 200, and in default to undergo

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rigorous imprisonment for 6 weeks, and in the case of the 9th accused the period of imprisonment not undergone will be remitted but the fine of Rs. 500 will stand. In the case of accused Nos. 29 and 33 I cancel the fine and the sentence will otherwise stand. Accused Nos. 12, 13, 21, 27, 31, 29, 33 and 48 will go back to Jail to serve out their sentence.

V. N. Y.

Order accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 38 OF 1922.

May 19, 1922.

Present.—Mr. Ashworth, J. C.

Raja SURENDRA BIKRAM SINGH

—ACCUSED—APPLICANT

*versus*EMPEROR—COMPLAINANT AND
Thakur BHAGWAN BAKSH SINGH

—ACCUSED.

U. P. Land Revenue Act (III of 1901), s. 40—Possession, determination of—Revenue Court, jurisdiction of—Criminal Procedure Code (Act V of 1898), ss. 146, 435 (3)—Property attached under s. 146—Release after determination of possession by Revenue Court—Revision.

Under section 40 of the U. P. Land Revenue Act, the Revenue Court is competent to decide as to which of the parties is entitled to the possession of the property in dispute although it has no jurisdiction to determine finally the question of the title to that property. [p. 154, cols. 1 & 2.]

Where a Magistrate releases property attached under section 146 of the Criminal Procedure Code consequent upon possession being awarded to a party under section 40 of the U. P. Land Revenue Act, the order of release cannot be questioned in revision by virtue of section 435 (3) of the Code. [p. 154, col. 2.]

Appeal against an order of the Sessions Judge, Lucknow, dated the 18th April 1922, confirming an order of the Magistrate of the First Class, Lucknow, dated the 8th March 1922.

Messrs. *Durga Charan Banerjee, Bisheshwar Nath Srivastava, D. K. Seth, Har Govind Dayal and A. P. Sen*, for the Applicant.

Mr. *Ali Mohammad*, holding the brief of the Government Pleader, for the Crown.

Messrs. *Chhail Behari Lal, Niamat Ullah and Satyanand Roy*, for the Opposite Party.

JUDGMENT.—This is an application, under section 438 of the Code of Criminal Procedure for revision of an order of the Sessions Judge of Lucknow, dated 18th April 1922, confirming an order of the Sub-Divisional Magistrate of Lucknow, dated the 8th March 1922.

The *Talukdar* of Itaurja died in January 1921. Two claimants came forward—the present applicant and the opposite party. The Magistrate took action under sections 145 and 146 of the Code of Criminal Procedure as he apprehended a breach of the peace between the two claimants and, finally, on the 27th January 1921, after deciding that neither party was then in possession, made an order under section 146 of the Code of Criminal Procedure attaching the *taluka*. A Receiver was appointed.

Subsequently, proceedings at the instance of one or other of the parties were taken in the Revenue Court for mutation of names. An Assistant Collector, under section 40 of the Land Revenue Act, likewise found that neither party was in possession but after ascertaining by summary enquiry which of them was best entitled to the property in question, that is to say, both the *taluka* and the non-*talukdari* property, made an order in favour of the applicant for possession in respect of the non-*talukdari* property and of the opposite party in respect of the *taluka*. This decision was appealed against to the Collector and the appeal was transferred to the Deputy Commissioner of Rae Bareilly who upheld the decision of the Assistant Collector.

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A copy of this decision was sent to the District Magistrate of Lucknow, who had attached the property under section 146 of the Code of Criminal Procedure and he removed the Receiver and delivered the *taluka* to the non-applicant. There was an application in revision to the Sessions Judge on the ground that the District Magistrate had no power to release the property from attachment until a competent Court had determined the rights of the parties thereto, and that the Assistant Collector acting under section 40 of the Land Revenue Act, was not a competent Court to determine such rights. This application was rejected by the Sessions Judge (he has wrongly signed himself as District Judge) on the ground that under section 435 (3) an order passed under section 146 (being an order under Chapter XII) of the Code of Criminal Procedure could not be called in question in revision.

The questions for me to decide in this application are :—

(1) Was the District Magistrate of Lucknow justified in releasing the property from attachment on the ground that the decision of the mutation case in favour of the non-applicant amounted to a determination by a competent Court of the rights of the parties?

(2) If not, is this Court debarred by section 435 (3) of the Code of Criminal Procedure from interfering with this order?

(3) Should this Court interfere?

As to question (1) it has been argued that the Assistant Collector, acting under section 40 of the Land Revenue Act, had only jurisdiction to "ascertain by summary enquiry who was the best person entitled to the property" and that this could not mean that he had jurisdiction as a competent Court to determine the rights of the parties to the property. The expression quoted, no doubt, merely means that the Revenue Court shall decide by a summary enquiry who appears to have the best *prima facie* title. This is not the same thing as determining the rights of the parties. But the argument advanced omits the fact that section 146 adds to the expression "until a competent Court has determined the rights of the parties thereto" the words "or the person entitled to possession thereof." I am of opinion that the Assistant

Collector, although he was not competent to decide the rights of the parties to the property was entitled to decide the person entitled to possession thereof. Section 40 requires that, after the summary enquiry as to the person who has the best *prima facie* title, the Court "shall put such person in possession." It is impossible to hold that this provision does not give the Court power to decide the person entitled to possession. The questions of title to possession and of an absolute title are quite different and the fact that the decision as to title to possession is based merely on a summary enquiry as to the person best entitled to the property cannot be used as an argument that the Court is not competent to decide the question of title to possession when the section requires a Court to put the person into possession.

As to question (2), under section 146 of the Code of Criminal Procedure the Criminal Court after attaching the property is *functus officio* unless the subsequent event occurs of a competent Court determining the rights of the parties to the property or the person entitled to possession thereof. If, therefore, I had held that a competent Court had not determined either of these questions, I should have been prepared to hold that the action of the District Magistrate in releasing the property was without jurisdiction and as such could not be said to be an order under section 146 of the Code of Criminal Procedure. Consequently, the bar against revision created by section 435 (3) of the Code of Criminal Procedure would not operate. Question (3) does not arise.

Consequently I dismiss this application.

N. H.

Application dismissed.

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MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 1160 OF 1922.

CRIMINAL REVISION PETITION NO. 653
OF 1922.

November 15, 1922.

Present.—Mr. Justice Oldfield and Mr.
Justice Ramesam.

In re MANDAYAPURATH

ERESAKUTTY MOOPAN AND ANOTHER
—ACCUSED NOS. 1 AND 2—PETITIONERS—
APPELLANTS.

*Criminal Procedure Code (Act V of 1898), ss.
196, 537—Order under s. 196 sanctioning prosecution
—Omission to address Magistrate concerned—
Irregularity.*

An order of the Government sanctioning, under section 196 of the Criminal Procedure Code, the prosecution of a person for a political offence did not say in its body to whom the order was given but the District Magistrate, the Special Magistrate and the Public Prosecutor concerned were designated below it. It was objected that the order was open to objection on the ground that it was not given to any determinate person:

Held, (1) that the order must be taken as addressed to the persons designated below who were the persons concerned in the holding of the trial;

(2) that even if the objection was valid, the omission was a mere irregularity covered by section 537 of the Criminal Procedure Code.

In Cr. A. No. 1160 of 1922.

Appeal against the sentences of the Court of the Special Judge, Malabar, Calicut, in Case No. 118 of 1922.

In Cr. R. P. No. 653 of 1922.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to admit and receive in evidence in the said Criminal Application No. 1160 of 1922, the depositions of two Police Officers, Head Constable No. 328, and Police Constable No. 591, P.Ws. Nos. 10 and 11 respectively in Case No. 7 of 1921 on the file of the Court of the Special Tribunal, Calicut.

Messrs. K. P. M. Menon, R. Govinda Menon, and Abdulla Kutti, for the Appellants.

The Public Prosecutor, Mr. J. C. Adam the Crown.

JUDGMENT.—Preliminary objection has been taken to the trial in the lower Court

in this appeal and a similar objection on an identical ground has been taken to the trial in Criminal Appeal No. 847 of 1922. We have accordingly heard the learned Counsel in both these cases before giving judgment. Our decision on the objections in this case will apply also to the objection in Criminal Appeal No. 847 of 1922.

The objection is that, the case being instituted under an order of the Local Government based on section 196 of the Code of Criminal Procedure, the order, Exhibit A, in the present case being similar to the order in the other already referred to, is not as contemplated by law, and a condition precedent to the validity of the proceedings is, therefore, wanting; or more definitely that the order of authorization by Government is not given to any determinate person as (it is said) section 196 impliedly requires. This objection was not taken in either case in the grounds of appeal in any specific way, but the learned Public Prosecutor has not demurred to our proceeding at once. It is further material that in neither case was any such objection taken at the trial. This might be important if we proposed to deal with the matter under the explanation to section 537 of the Criminal Procedure Code or the last portion of section 16 of the Ordinance No. 1 of 1922. For we have not been shown how the accused were prejudiced in any way in the disposal of the case on the merits. Nothing of that sort is in fact alleged; and, when the question is only of the machinery for the institution and prosecution of the proceedings and not of the mischief, which section 196 is designed to prevent, the institution of proceedings in respect of grave political offences without the approval of the Government at all, we should be prepared to hold that we are concerned only with an irregularity covered by section 537 or section 16 of the Ordinance, not with an illegality by which the proceedings would be vitiated.

But in fact there is, in our opinion, neither illegality nor irregularity. The order in question, no doubt, runs simply: "His Excellency the Governor in Council in exercise of the powers conferred on him by section 196 of the Code of Criminal Procedure, hereby sanctions the prosecution

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of the said persons before Special Judge for offences punishable under section 121 of the Indian Penal Code." But this order was communicated and is and must be taken as addressed to the three persons, designated below it; the District Magistrate, Malabar, the Public Prosecutor, Malabar and the Senior Special Judge as the person concerned in the holding of trials. There is some difficulty about the Public Prosecutor, Malabar. But we are informed that appointments of Public Prosecutors, who are, no, doubt called Additional Public Prosecutors, have been made for the whole of the Malabar District, and not, as the appointment of the ordinary Public Prosecutors attached to the existing Sessions Court is made, for North and South Malabar. The important point, however, is the communication of the order to the District Magistrate, because he is the officer who in Malabar, as elsewhere, is entrusted with the duty of initiating prosecutions generally for offences punishable under the Indian Penal Code. There is no suggestion that the District Magistrate is not directly or indirectly responsible for the prosecution. The complaint was presented and the prosecution was carried on by Mr. Rama Pattar, who signs and describes himself as Additional Public Prosecutor, South Malabar; we must then apply to what he did, section 114 of the Indian Evidence Act and particularly illustration (e) thereto; and it must be presumed that Mr. Rama Pattar was a person duly empowered to initiate and carry on the proceedings. No objection was taken at the trial to that presumption and there is nothing on the record to support any objection to it. In these circumstances, we do not think that any objection to the order of the Government, as insufficient in itself or as insufficient to justify the initiation and carrying out of the proceedings by Mr. Rama Pattar has been established.

We turn then to the contentions peculiar to Appeal No. 1160 of 1922; and we have first to deal with an application, Criminal Miscellaneous Petition No. 653 of 1922, for the admission in evidence of the depositions of two Police Officers in another case or for their examination now as witnesses. The circumstances are that these two Police Officers gave evidence in Case

No. 7 of 1921 on the 7th October 1921 and succeeding days; that is to say, over six months before the trial in the present case was held. The petition is argued on the ground that the accused could not, in the exercise of reasonable diligence, have known of or adduced this evidence, which is said to be material. We cannot see how there was anything in the circumstances to prevent their knowing of and adducing this evidence, when what these witnesses spoke to had been public property for over six months before the trial. We have, moreover, had the evidence read; and we do not see how it can be regarded as material. Criminal Miscellaneous Petition No. 653 of 1922, therefore, fails and is dismissed.

On the merits of the present case, as disclosed by the evidence, there are the statements of the 3rd, 4th, 5th, 6th and 7th prosecution witnesses, eye-witnesses. There is no doubt, that, if those statements are believed, the charge against the accused is amply made out. Against the 3rd, 5th, 6th and 7th prosecution witnesses there is nothing, either in the shape of enmity or against their credit. The credit of the 4th prosecution witness may be doubtful since he is a dismissed village servant. Of these witnesses, 7th prosecution witness says that he gave information to the authorities a few days after the occurrence; and that is not contradicted. Sixth prosecution witness was a Head Constable who might very naturally note or remember the names of these two accused, since they were both prominent persons, having been Secretary and President of the Local Khilafat Association. The witnesses deposed consistently, no successful attack being made on their evidence in cross-examination. The main objection to the prosecution case is based on the delay after which it was instituted: and there is also the allegation of the accused that they were living in their usual homes and that they surrendered at once, when a warrant for them was issued. That they were living in their usual homes is not, however, supported by any evidence on their side and no questions were put to the prosecution witnesses on the point. It is possible that more important occurrences, in which loss of life or direct responsibility for destruction

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of property, engaged the attention of the authorities in the first instance. In any case this delay is quite inconsistent with the suggestion, which has also been made that the accused have been prosecuted because of their prominence in the Khilafat movement. There is further *alibi* evidence; and we concur in the lower Court's estimate of it adding only that the evidence of the second defence witness, relating to the first accused is not; even if believed, necessarily conclusive.

Taking this view of the evidence we think that reasonable doubt as to the convictions is excluded. We, therefore, confirm them and also the sentence dismissing the appeal.

Appeal & Petition dismissed.

V. N. V.

N. H.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 76-B OF 1922.

February 9, 1922.

Present.—Mr. Justice Duckworth.

EMPEROR—APPELLANT

versus

NGA KALA—RESPONDENT.

Burma Habitual Offenders Restriction Act (II of 1912), ss. 6, 7, 10—Restricted offender—Surety bond, whether can be taken—Restriction of person to village other than his own—Double report, legality of.

A person restricted under the Burma Habitual Offenders Act, should not be made to report himself to the Police in addition to reporting himself to the village headman.

A person who is proceeded against under the Burma Habitual Offenders Restriction Act cannot be required to execute a surety bond.

In order to justify the restriction of a person to a village other than his own, there must be proof that he is able to support himself at that village.

Criminal reference by the Sessions Judge, Bassien, in Criminal Revision No. 18 of 1920.

FACTS appear from the following Referring Order:—

In his Criminal Miscellaneous Case No. 131 of 1921, the Sub-Divisional Magistrate of Henzada has passed a restriction order under section 7 of the Burma Habitual Offenders Restriction Act against the respondent Nga Kala. In my opinion the order cannot stand. He speaks of the respondent entering into a bond. The word "bond" is not to be found anywhere in the Habitual Offenders Restriction Act, an order is passed against the respondent for disobedience of which he can be prosecuted under section 18 of the Act. There is no such thing as a bond. In the second place, the respondent has been made to move his residence to another village tract, apparently the special reason required by r. 3 of the Rules under the Act Police Department Notification No. 280, dated 17th November 1919) is that he has a well-to-do relative in the village tract who can support him. But there is nothing on the record to show that she is willing to support him, and section 10 of the Act certainly contemplates that he should earn his own livelihood. There is on the record no evidence to prove and no finding that the respondent can earn his livelihood within the area of restriction. Again, the respondent has been ordered to make a double report, once a day to the Village Headman and twice a week to the Officer in charge of the Neikban Police Station. Such a double report is clearly illegal, (*vide* r. 6 of the Rules under the Act). Moreover, r. 6 says that report of a Police Officer shall only be ordered in exceptional cases for reasons to be recorded in writing; there is nothing to show that the present case is an exceptional one, and no such reasons

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have been recorded. For the above reasons, I am of opinion that the order of restriction against the respondent, Nga Kala, must be set aside. Submitted to the Chief Court.

ORDER.—I have read the reference of the learned Sessions Judge of Bassien and also the proceedings of the Magistrate.

I will deal with the learned Sessions Judge's criticisms seriatim.

The Magistrate, in the circumstances stated, clearly had the option of proceeding against Nga Kala under section 110, Criminal Procedure Code, or under the Burma Habitual Offenders Restrictions Act. In the former case a bond was necessary. In the latter it was not. The Magistrate, from what he endorsed on the Form Criminal 57, appears to me to have recognised this and to have made no error. Moreover, when he decided to take action under the Burma Habitual Offenders Restriction Act, he never mentioned that any bond was required. He went astray in having a bond executed. As regards his restriction to another village tract than his own, the Magistrate was probably, in the circumstances stated by the learned Sessions Judge, in error. There is no enquiry whether and no proof that the respondent is able to support himself at that village.

As regards the double report, that to the Police was clearly not called for. The reasons stated by the learned Sessions Judge show this adequately. At the same time, after reading the evidence in the case and the reported case of *Emperor v. Po Mya* (1) these appear to me good grounds for a restriction order against Nga Kala.

The order will not, therefore, be set aside, but will be modified in respondent's favour as follows:—Nga Kala, son of Maung Shwe Ba, will restrict his movements within the village tract of Thayetoh during the day, will remain at his residence during the night and will report himself to his Headman at 8 P.M., every night for one year or till the 30th November 1922. If he has occasion to leave the village tract he shall obtain the necessary pass from

(1) 61 Ind. Cas. 1005; 13 Bur. L. T. 155; 10 L. B. R. 274; 22 Cr. L. J. 477.

the Headman. The bond which he executed, will be cancelled. This order must be explained to Nga Kala and the Headman concerned.

W. C. A. & N. H.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION No. 65 OF 1923.

March 22, 1923,

Present:—Mr. Justice Kulwant Sahay.

TANAK CHAUDHRY—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XL V of 1860), ss. 147, 426
—*Damage to property of another—Mischief—*
Rioting.

In a Collectorate partition a certain building which was in the possession of the complainant fell to the share of one A. Subsequently, there was a compromise between A and the complainant whereby the former agreed to give up the building to the latter in exchange of a plot of land. This compromise was filed before the Collector who gave effect to it in the Collectorate partition. Complainant continued in possession of the building. Accused, a servant of A, along with others, demolished the building and ploughed up the site asserting that the building belonged to his master A and that the compromise was ineffective as no deed of exchange has been drawn up in accordance therewith:

Held, (1) that the compromise having been given effect to by the Collector in the partition the title in the building had passed to the complainant;

(2) that the accused was, therefore, guilty of mischief, and consequently of rioting.

Ram Krishna Singh v. Emperor, 66 Ind. Cas. 817; 3 P. L. T. 335; (1922) A. I. R. (Pat.) 197; 23 Cr. L. J. 321, distinguished.

Criminal revision against the order of the Sessions Judge, Madhubani, upholding the conviction and sentence passed by the Sub-Divisional Magistrate, Madhubani.

TANAK CHAUDHRY v. EMPEROR.

Messrs. Manohar Lal and A. P. Upadhyaya, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The petitioner has been convicted by the Sub-Divisional Magistrate of Madhubani for rioting under section 147, Indian Penal Code, and has been sentenced to six months' rigorous imprisonment. The conviction and sentence has been upheld on appeal by the Sessions Judge.

The facts, shortly stated, are that in village Mukhiapati one Ramchunder Babu and Sunder Babu had each 8-annas share and each had a *kutchery* house situated therein, the *kutchery* of Ramchunder Babu being to the North of that of Sunder Babu. The two *kutcheries* were surveyed in plots Nos. 2432, 2433 and 2437 in the Cadastral Survey. The entire sixteen-annas of the village were sold to Babu Mahanti Lal and others in the following shares:—Babu Mahanti Lal and others 8-annas, Babu Anrudh Singh and others 4-annas, and Babu Paryag Singh and others 4-annas. There was a Collectorate partition of the village and in that partition all the three plots whereupon the two *kutcheries* were built fell to the share of Babu Anrudh Singh. An objection was filed by Babu Mahanti Lal who was in possession of one of the *kutcheries*, and subsequently there was a compromise between the parties whereby it was agreed that one of the *kutcheries* with the lands and trees standing thereon be allotted to Mahanti Lal and in exchange thereof, Mahanti Lal should make over certain *Zirait* land to Anrudh Babu. This compromise was filed before the Collector and on the 16th of July 1919 the Collector gave effect to this compromise and made the final order in the partition case. Delivery of possession was given on the 27th April 1921 and since then disputes have been going on between Mahanti Lal's party and Anrudh Singh's party as regards the possession of the *kutchery*. In 1921 there was a case under section 447-147, Indian Penal Code, about dismantling the cook-shed attached to the *kutchery*. In 1922 there was a proceeding under section 144, Criminal Procedure Code, relating to the *kutchery*. The occurrence giving rise to the present case took place on the 19th June 1922. On that date at 9 A. M. the complainant, who is a servant

of Babu Mahanti Lal, lodged a *Sanha* before the Police to the effect that on the morning of that date while he was alone in the *kutchery* Anrudh Babu's men came and threatened him and that there was a likelihood of the breach of the peace. The Sub-Inspector deputed a Constable to see that no breach of the peace occurred and the complainant with the Constable returned to the village at about 2 P. M. when he found that the *kutchery* was no longer existing and the land had been ploughed up. The Sub-Inspector arrived in the village at about 5 P. M. and then the complainant lodged his First Information in which the present petitioner was named for the first time. The information was to the effect that in the absence of the complainant the petitioner came there with a mob, dismantled the *kutchery* and ploughed up the land. An investigation was made by the Sub-Inspector with the result that the petitioner and others were placed on their trial and convicted as stated above.

The defence story was that the exchange was never given effect to and that the delivery of possession on the 27th April 1920 was in accordance with the original allotment whereby the three plots of land upon which the two *kutcheries* stood were allotted to the petitioner's master and that the petitioner's master continued in possession throughout.

It has been found by both the Courts below that the petitioner's master was not in possession of the *kutchery* which was given to Babu Mahanti Lal under the compromise. That the compromise was given effect to by the Collector and although in the petition of compromise it was stated that a regular deed of exchange would be executed between the parties, yet title passed to Mahanti Lal under the Collectorate partition which gave effect to the compromise.

Having regard to the finding of both the Courts below that Mahanti Lal never parted with the possession of the *kutchery* and, that Anrudh was not given actual possession of that *kutchery* house, the argument of the learned Vakil for the petitioner that in dismantling the *kutchery* house, the petitioner was not guilty of any criminal offence inasmuch as the *kutchery* house belonged to

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his master cannot be accepted. The learned Vakīl relies on the case of *Ram Krishna Singh v. Emperor* (1) and argues that the petitioner by destroying the property belonging to his master did not cause any mischief, and, therefore, he could not be convicted of any offence of rioting the common object of which is stated to be "to commit mischief to Mahanti Lal and his co-sharers by dismantling their *kutchery* house and by means of criminal force or show of criminal force to obtain possession of its site and thus to enforce any right or supposed right of Anrudh Singh." The facts of that case are quite distinguishable from those of the present case. In that case there was a delivery of possession under O. XXI, r. 95 of the Civil Procedure Code and the complainant who was the judgment-debtor still asserted his possession after delivery of possession by the Civil Court. It was held that the delivery of possession by the Civil Court had the effect of making the possession of the judgment-debtor that of a trespasser and the accused in that case was justified in taking possession of the property by ousting the judgment-debtor, and the property being his own it could not be held that he committed mischief by causing damage to that property. In the present case the findings of both the Courts below are clear that the *kutchery* house in question was the property of Mahanti Lal and he was in possession and, therefore, there was no justification for the petitioner to dismantle the house which amounted to a mischief under section 425 of the Indian Penal Code.

The second point taken by the learned Vakīl for the petitioner is, that there is no finding as regards the common object stated in the charge. His argument is that the Court cannot infer the common object but it must find it upon the evidence adduced in the case. He says that it must be found that the mob was actuated by the common object alleged in the charge, and reliance is placed on the case of *Jadubar Singh v. Emperor* (2). On reading the two judgments of

the Courts below it is quite clear that the finding as regards the common object stated in the charge is based upon the evidence on the record and is not a mere surmise. There is no substance in this contention also.

The third point taken is that the accused *bona fide* believed the *kutchery* to be the property of his master and, therefore, he committed no offence. Having regard to the circumstances proved by the evidence there can be no reasonable ground for the petitioner to entertain a *bona fide* belief that the property belonged to his master. There had been previous cases in which the possession of Mahanti Lal was declared. This contention almost must, therefore, be disallowed.

As regards the sentence it is said that no bodily injury was caused to any person, there was no assault or beating, and all that the accused did was to dismantle the *kutchery* house and to plough up the land and the sentence of six months' rigorous imprisonment is unduly severe. Having regard to the circumstances of the case, I am of opinion that three months' rigorous imprisonment would meet the ends of justice. The conviction is accordingly upheld but the sentence is reduced to three months' rigorous imprisonment.

Z. K.

Conviction upheld;
Sentence reduced.

(1) 66 Ind. Cas. 817; 3 P. L. T. 335; (1922) A. L. R. (Pat.) 197; 23 Cr. L. J. 321.

(2) 52 Ind. Cas. 494; 20 Cr. L. J. 670.

BANSIDHAR MARWARI v. INDAR NARAIN SINGH.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 144 OF 1923.

April 6, 1923.

Present:—Justice Sir John Bucknill, KT.
BANSIDHAR MARWARI—PETITIONER
versus

INDAR NARAIN SINGH AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Proceedings under s. 107—District Magistrate, power of, to interfere—Direction to Subordinate Magistrate, to initiate proceedings under s. 145—District Magistrate, jurisdiction of.

A District Magistrate has no power to set aside an order made under section 107 of the Criminal Procedure Code by a Magistrate subordinate to him. If he finds that an improper order has been made, all he can do is to submit the case to the High Court for the exercise of its revisional powers. [p. 162, col. 2.]

A District Magistrate has no jurisdiction to direct a Magistrate subordinate to him to take proceedings under section 145 of the Criminal Procedure Code. [p. 162, col. 2.]

Revision from an order of the District Magistrate, Bhagalpore, dated the 23rd February 1923.

Messrs. G. C. Pal and S. C. Majumdar, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application in criminal revisional jurisdiction. The matter is a very simple one. The Sub-Divisional Officer of Bhagalpore, on the 25th January 1923, as a result of the perusal of a Police report and under the belief that there was an imminent danger of a breach of the peace, made an order restraining both parties from going upon certain lands about which there was a dispute between them; this he did under the provisions of section 144 of the Criminal Procedure Code. He ordered that notices should be issued on the parties accordingly and that they should show cause before him on the 7th February last. On the 7th February the matter came before him. His order-sheet reads: "Cause shown by both parties. Draw proceedings under section 107, Criminal Procedure Code, against second party. Fix 26th February 1923 for showing cause by the second party why they should not be ordered to execute a bond of Rs. 200 each to keep the peace for the period of one year with a surety of like amount." Now, I think that it is common ground here that

the Sub-Divisional Officer seems to have made a mistake. He does not clearly round off or finish the proceedings under section 144 of the Criminal Procedure Code which were actually before him. Presumably, he intended to conclude the proceedings under section 144, and after having closed them down, to initiate proceedings under section 107, but at any rate he passed no order under the provisions of section 144. I think that I should mention that, in coming to the conclusion to which he did, the Sub-Divisional Officer had the advantage of seeing the written statements which had been filed in response to his notice of the 25th January by both parties. Now, on the 23rd February, it would appear that the second party, (that is the respondent here) applied, it is said, *ex parte*, to the District Magistrate of Bhagalpore to set aside the Sub-Divisional Officer's order. The District Magistrate on that date and, it is alleged, without any notice having been given to the first party, made an order which is the principal subject-matter of the application now before this Court. In this order, after reciting that he had read the records and the Police report and after commenting upon the fact that the Sub-Divisional Officer did not appear to have made any order absolute under the provisions of section 144 and assuming that it had been intended that those proceedings under section 144 had been in some fashion or other dropped, the District Magistrate writes: "The petitioner has questioned the propriety of a proceeding under section 107, Criminal Procedure Code. The dispute, he says, is a dispute concerning land and this is admitted by the Police report on which the Magistrate relies." He then expresses the view that, on the materials which were available before him, it could hardly be said that the claim which was put forward by the second party could be regarded off hand as not *bona fide*, and, then, makes the following order: "This is, therefore, a case in which section 145 should be applied. Therefore, under section 435 of the Criminal Procedure Code I set aside the preliminary order under section 107, Criminal Procedure Code, and direct that proceedings be taken up under section 145, Criminal Procedure Code." Now it is admitted here that each part of this order is bad. In the first place,

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had the District Magistrate desired to deal in any way with the order which had been made by the Sub-Divisional Officer under the provisions of section 107 of the Criminal Procedure Code, he might possibly have referred the matter to this Court; but he certainly had no power to set aside the order which had been made by the Sub-Divisional Officer. In the second place, it is also similarly admitted that the District Magistrate had no jurisdiction to direct the Sub-Divisional Officer to take proceedings under section 145 of the Criminal Procedure Code. Now, when the District Magistrate's order was sent down to the Sub-Divisional Officer, he, obeying the directions which had been given to him by the District Magistrate, made the following order on the 16th February: "Perused District Magistrate's order. Draw proceedings under section 145, Criminal Procedure Code, and fix the 16th March 1923. In the meantime the land is attached under section 145, clause (4), Criminal Procedure Code. Send copy of this order to Police for attachment." This series of errors was brought to the attention of this Court on the 5th March and a Rule was obtained from Mullick and Adami, JJ., all further proceedings being stayed pending the hearing of the application. The matter has now come before me.

What has actually taken place is not defended or excused by the learned Assistant Government Advocate who appears for the opposite party. Indeed, the District Magistrate himself in his reply to the communication from this Court asking him whether he had any cause to show why his order should not be set aside, does not, so far as I understand in his explanation, seem now to contemplate that he can justify his having made an order of this character. What, however, is urged, very sensibly, by the learned Assistant Government Advocate is that in many cases where in orders there has been irregularity of form but where it would seem, on such investigation as is possible in this Court, that no harm would be done to the parties and that although by a wrong method a right result may perhaps have been reached, it is undesirable that this Court should exercise its discretionary jurisdiction in revision. Whilst I am in full accord with that proposition I must say that in this case I think it can

hardly be said that it is one in which it is not more important to draw attention to the series of errors which has taken place than to take up the attitude that formalities have not been observed which should be condoned. It was, I think, quite obvious that the Sub-Divisional Officer ought to have concluded his investigation under the provisions of section 144 and, at any rate, to have made some order which would indicate what had happened to those proceedings which seem to have been left by him in the air. It is also equally clear that the District Magistrate had neither power to quash the proceedings which had been initiated by the Sub-Divisional Officer under the provisions of section 107, nor to order the Sub-Divisional Officer to initiate proceedings under section 145. Lastly, as a corollary it was doubtless irregular for the Sub-Divisional Officer to have drawn up proceedings under the provisions of section 145 simply on the ground that he was told so to do by the District Magistrate. I fear that, if such a series of errors were passed over without comment and the orders which have been wrongly made were allowed to stand, simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders, those who have to administer the Criminal Law in subordinate capacities might perhaps feel that any close adherence to the formalities prescribed by the Criminal Procedure Code is unnecessary. In this case, therefore, I feel that a sense of the irregularity of what has taken place would be marked by setting aside these orders. I direct, therefore, that the order of the District Magistrate of the 23rd February last and the order of the Sub-Divisional Officer of the 26th January last be set aside. The result will be that the Sub-Divisional Officer will be left with the proceedings which were commenced by him on the 7th February under the provisions of section 107 of the Code of Criminal Procedure. In order to place his order-sheet upon a proper footing, he ought, strictly speaking, to pass some order indicating what has happened to the proceedings under section 144 which he initiated so long ago as the 25th January. I wish, however, specifically to mention that it does not necessarily follow that other proceedings in addition to or in lieu of those taking

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place under section 107 may not also be desirable or even necessary. With that, however, I have here nothing whatever to do. Whether such steps are desirable or necessary must depend upon circumstances as they arise:

N. K.

Rule made absolute.

MADRAS HIGH COURT. SPECIAL BENCH.

CRIMINAL REVISION CASE NO. 384 OF 1922
CRIMINAL REVISION PETITION NO. 333 OF 1922.

December 22, 1922.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, Mr. Justice Phillips, Mr.
Justice Devadoss, Mr. Justice Venkata-
subba Rao and Mr. Justice Wallace.

In re VARISAI ROWTHER AND ANOTHER
—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 254, 256, 342, 537—Examination of accused—Cross-examination of prosecution witnesses under s. 256—Fresh examination of accused, whether obligatory.

Section 342 of the Criminal Procedure Code which requires that the accused shall be examined generally in the case after the examination of the prosecution witnesses and before the accused is called on for his defence, is mandatory and not discretionary and failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can be cured under section 537 of the Code. [p. 164, col. 2.]

Per Curiam (Venkatasubba Rao, J. dissenting):—The mere fact that in a warrant-case after the framing of a charge under section 254 of the Criminal Procedure Code, the prosecution witnesses are recalled and cross-examined under section 256 of the Code, does not render a fresh examination of the accused obligatory and the omission to question the accused again at this stage does not amount to a non-compliance with the provisions of section 342 of the Code and does not vitiate the trial.

In re, Marudath Mathu Vannian, 71 Ind. Cas. 252; 43 M. L. J. 402; 16 L. W. 420, (1922) M. W. N. 601; 44 M. 820; (1922) A. J. R. (M) 512; 24 Cr. L. J. 124, overruled.

The expression "after the prosecution witnesses has been examined" in section 342, Criminal Procedure Code, means when the prosecution has finished calling evidence. Cross-examination of the prosecution witnesses

under section 256 is not part of the examination of the prosecution witnesses within the meaning of section 342, nor does such re-examination generally amount to giving fresh evidence for the prosecution, but is merely explanatory of the cross-examination. If new and material matter in support of the prosecution is elicited in cross-examination or re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and if fresh evidence on material matters in support of the prosecution case is elicited in re-examination it would be obligatory on the Court to question the accused on that. [p. 164, col. 2.; p. 165, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Ramnad, in Criminal Appeals Nos. 10 and 15 of 1922, confirming the conviction and sentence of the Court of the Second Class Magistrate, Paramakudi, in C. C. No. 163 of 1921.

This case coming on for hearing on 17th November 1922, upon pursuing the petition and the orders of the lower Courts and the records in the case, and upon hearing the arguments of Dr. S. Swaminadhan, for the Petitioners, and of the Public Prosecutor on behalf of the Crown, the Court (Krishnan, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The point taken here is based on *In re Marudath Mathu Vannian* (1). This point is being taken in a good many cases and it is argued that the trial in the lower Courts is vitiated entirely by the omission to question the accused after the taking of the prosecution evidence is completed. I am inclined to think this requires further consideration. The case is referred to a Bench.

This case coming on for hearing on the 27th and 28th November 1922, in pursuance of the Order of Reference to a Full Bench, dated the 17th November 1922, upon perusing the petition and the records in the case and the said Order of Reference to a Full Bench, and upon hearing the arguments of Dr. S. Swaminadhan, for the Petitioners, and of the Public Prosecutor on behalf of the Crown the Court made the following:

(1) 71 Ind. Cas 252; 43 M. L. J. 402; 16 L. W. 420; (1922) M. W. N. 601; 44 M. 820; (1922) A. J. R. (M) 512; 24 Cr. L. J. 124.

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ORDER.—This petition will be dismissed. We propose now only to say that the Court are of opinion that the recent decision of Oldfield and Ramesam, JJ. in *In re Maruda Muthu Vannian* (I) is wrongly decided and cannot be relied on on a future occasion. What our reasons are for that judgment will be stated later on. *In re Maruda Muthu Vannian* (I) is wrong and as there are many cases pending it is right that the view of the Court should be stated as soon as possible though there must be some slight delay in formulating our reasons.

Dr. S. Swaminadhan, for the Accused.
The Public Prosecutor, for the Crown.

This case having been posted this day for formulating the reasons the Court made the following

ORDER.

Schwabe, C. J.—This criminal revision petition has been ordered to be referred to a Full Bench by reason of a large number of similar cases pending in which decisions of Magistrates throughout the Presidency would be vitiated if the recent decision of this Court in *In re Maruda Muthu Vannian* (I) was correctly decided.

The facts are that the accused were charged by the Police in a warrant-case for receiving stolen property before the Second Class Magistrate of Paramakudi. The procedure adopted by him was the following. Witnesses for the prosecution were examined. The accused being given the opportunity to cross-examine the witnesses when their examination was completed did not avail themselves of that opportunity. The accused were then questioned generally on the case for the purpose of enabling them to explain the circumstances appearing from the evidence against them, and they stated that they would put in a written statement. The Magistrate then, under section 254 of the Criminal Procedure Code, being of opinion that there was ground for presuming that the accused had committed an offence which was triable as a warrant-case and which he was competent to try, framed in writing a charge against the accused under section 411 of the Indian Penal

Code. The accused pleaded not guilty and the case was adjourned. At a later date, at their request, and in exercise of their rights under section 256, Criminal Procedure Code, the prosecution witnesses were re-called for cross-examination by the accused, and, where necessary, were re-examined. Evidence was then called for the defence and, the accused through their Counsel addressed the Court. The accused were not further questioned generally on the case after the cross-examination and re-examination of the prosecution witnesses. It is contended that the omission to question the accused again at this stage was an illegality, being a failure to comply with section 342 and vitiated the whole trial. The point was not taken before the Magistrate who heard the case or an appeal before the Sub-Divisional Magistrate of Ramnad who affirmed the conviction, but comes before us in revision.

Section 342, Criminal Procedure Code, requires in all cases that the accused shall be questioned generally on the case in order to enable him to explain any circumstance appearing in the evidence against him, and this has to be done, in the words of the section, "after the witnesses for the prosecution have been examined and before he (the accused) is called on for his defence." That this is mandatory and not discretionary has been held in many cases and I think by all the High Courts in India, and this must be taken as established. That failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can in a proper case be excused under section 537 of the Criminal Procedure Code has also been held in many cases, though that has not been with such unanimity. In my judgment, failure to comply with the provisions of section 342 is an illegality and that must be considered as established in this Presidency.

The question remains as to the point of time at the trial when this questioning of the accused has to take place. Under the section it must be *after* the prosecution witnesses have been examined and *before* the accused is called on for his defence. In my judgment, "after the prosecution witnesses have been examined" means

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when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include the cross-examination and re-examination of the prosecution witnesses, if there is any. In Sessions cases this will always be the case as the witness remains in the witness-box until the re-examination is complete. But the position is different in proceedings before Magistrates. In a warrant-case, which is all we are concerned with here, the procedure authorized by the Code is that the prosecution witnesses are called and can then be cross-examined on behalf of the accused and, if necessary, re-examined. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution is closed. The Magistrate then, either dismisses the case on the ground that no case is made out, or, after questioning the accused generally to enable him to explain any circumstance appearing against him from the evidence, formulates a charge under section 254, Criminal Procedure Code. The charge is then read over and explained to the accused under section 255 and he is asked whether he is guilty or has any defence to make. This procedure is directly in accordance with the Code, and it is difficult to see how any other is possible. It may be that the accused is not going to ask that the witnesses for the prosecution be re-called for cross-examination under section 256, but proposes at once to call his evidence; or it may be that he is not going to call any evidence, but to rely only on his address to the Court. In either event he will have been called on for his defence and by the words of the Statute, the questioning has to be after the termination of the prosecution evidence and before he is called on for his defence. It is true that, under section 256, although he has not availed himself of the first opportunity of cross-examining prosecution witnesses, he can ask for them to be re-called for that purpose. That does not, in my judgment, make that cross-examination part of the examination of the prosecution witnesses within the meaning of section 342. Nor does re-examination generally amount to giving fresh evidence for the prosecution, but is merely explanatory of the cross-examination. If new and ma-

terial matter in support of the prosecution case is elicited in cross-examination or in the re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and, indeed, if fresh evidence on material matters in support of the prosecution case were elicited in re-examination, it would probably be obligatory on the Court to question the accused on that. It is open to the prosecution to call fresh evidence after the formulation of the charge, and if this is done, on the termination of that evidence, the accused must be questioned generally under section 342 after this further examination of the prosecution witnesses. This procedure provides a reasonable method of carrying out the obligation of the Statute in the interest of the accused, the object being that he should have an opportunity of explaining the prosecution evidence after it is completed. That this is the proper interpretation and, in fact, the only workable one seems clear from an examination of section 257, because that section provides that, after the accused has entered upon his defence, the Magistrate may on the application of the accused have the prosecution witnesses re-called for examination. The questioning of the accused under section 342 has to take place before the accused is called on for his defence, and it follows that if this cross-examination of re-called prosecution witnesses is examination of prosecution witnesses within the meaning of section 342, it would be impossible to comply with the Statute, because the questioning would then be taking place after the accused had been called on for his defence and not before as the section requires. It was probably for this reason that the word "examination" is used in section 342, so that in warrant-cases, in which under the earlier section the cross-examination of prosecution witnesses might take place after the accused had been called on for his defence, the time occupied in this cross-examination should not be included in the time before which questioning was to take place. Nor is there anything unreasonable in this, because the accused has already had an opportunity of cross-examining and knows the whole force of the prosecution case, and if he

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chooses to exercise his right of cross-examination at a later stage, this cross-examination can be fairly treated for the purpose of this section as being rather evidence for the defence than evidence for the prosecution.

Direct authorities against this view are *Mitarjit Singh v. Emperor* (2), in which it was held that examination under section 342 means examination-in-chief, cross-examination and re-examination, and *In re Maruda Mathu Vannian* (1) to the same effect but with neither of these, for the reasons given above, do I agree.

In the result, this petition will be dismissed.

Phillips, J.—I agree.

Wallace, J.—I agree.

Devadoss, J.—The question referred to the Full Bench is whether a trial is "vitiating entirely by the omission to question the accused after the taking of the prosecution evidence is completed." The objection that the trial is vitiated by such an omission is based upon a recent decision of a Bench of the High Court reported as *In re Maruda Mathu Vannian* (1), which, in the opinion of Krishnan, J., required further consideration.

The facts necessary to appreciate the objection are: the accused were charged by the Police with an offence under section 411, Indian Penal Code. After the prosecutor examined his witnesses, the accused were questioned evidently under section 253, Criminal Procedure Code. The accused said that they would put in a written statement but did not file any; and a charge was framed against the accused under section 411, Indian Penal Code, on 3rd September 1921. The accused pleaded "not guilty", and their plea was recorded on the same day. They cross-examined the prosecution witnesses on 3rd October 1921 and on 21st October 1921. On 21st October 1921 they entered upon their defence and adduced their evidence. The accused were not questioned generally on the case to explain the circumstances appearing in evidence against them after the cross-examination of the prosecution witnesses was over and before they entered upon their defence. The con-

tention is that the accused should have been questioned generally on the case as required by the latter part of section 342, Criminal Procedure Code, and the omission to do so vitiated the whole trial. In *In re Maruda Mathu Vannian* (1) it was held that the omission by the Magistrate to examine the accused generally on the case after the cross-examination of the prosecution witnesses was over vitiated the trial, and the conviction was on that ground illegal.

It may be taken as settled law that the omission to examine the accused under section 342, Criminal Procedure Code, generally on the case after the prosecution witnesses have been examined is an illegality and not an irregularity, which vitiates the whole trial. Two questions have to be settled in this case. The first is, when should the examination of the accused take place in order to comply with the mandatory provisions of section 342, and the second, whether the examination prior to the close of prosecution case will fulfil the requirements of section 342. The first clause of section 342 consists of two portions. The first is optional with the Court and the second is obligatory on the Court. The first portion runs as follows:—"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary," and the second, "(The Court) shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The non-compliance with the first portion does not render a trial illegal or the proceedings irregular; and under the second portion it is the duty of the Court to question the accused, and that after the witnesses for the prosecution have been examined and before he is called on for his defence. Chapter XX of the Criminal Procedure Code relates to the trial of summons-cases by Magistrates, Chapter XXI relates to the trial of warrant-cases by Magistrates, Chapter XXII relates to summary trials, and Chapter XXIII relates to trials by High Courts and Courts of Session. Under

(2) 63 Ind. Cas. 825; 6 P. L. J. 644; 2 P. L. T. 550; (1922) Pat. 7; (1922) A. I. R. (Pat) 158; 22 Cr. L. J. 697.

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section 245, the Magistrate may, if he thinks fit, examine the accused, but he is not bound to do so. Under section 253, the Magistrate may examine the accused if he thinks necessary. Section 342 is in chapter containing general provisions as to inquiries and trials. Under section 209, which is in the chapter relating to inquiry preliminary to commitment, the Magistrate may, if he thinks necessary, "examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him." Section 342 makes the examination of the accused obligatory only in cases where the accused is called on for his defence. A Magistrate may discharge an accused without framing a charge, in which case his non-examination would not vitiate the proceedings. But where a Magistrate, or Judge in a Sessions trial, finds that the prosecution has made out a case which the accused has to meet then it is incumbent upon the Magistrate or Judge to question the accused generally on the case for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. It may be taken that the stage at which the examination is to be held is before the accused is called on for his defence. In the chapter relating to the trial of warrant-cases, provision is made in section 254 for the framing of a charge against the accused before the whole of the prosecution evidence is completed, if there is ground for presuming that the accused has committed an offence triable under the chapter. The difficulty in interpreting section 342 is caused by the amendment to sections 254 and 256, which were made in the Criminal Procedure Code of 1898. Under the Code of 1882, under section 252 the Magistrate was required to "take all such evidence as may be produced in support of the prosecution," and under section 254, "If, when this evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, he should frame a charge in writing against the accused." Under the Code of 1882, therefore, the Magistrate could not frame a charge against the accused till the evidence for the prosecution was completed. Under the Code of 1898 the Magistrate

could frame a charge before the prosecution evidence is completed, if he thinks there is ground for presuming the accused has committed an offence. Under section 256 of the old Code after the charge was framed the accused had the right to cross-examine any of the witnesses for the prosecution present in Court or its precincts. But under section 256 of the Code of 1898 the duty was cast upon the Court to ask the accused whether any of the prosecution witnesses should be re-called for cross-examination. He has, therefore, an undoubted right to have all or any of the prosecution witnesses re-called for cross-examination after the charge is framed and after he exercises such right the evidence of any of the remaining witnesses for prosecution should be taken and after cross-examination and re-examination they should be discharged. So then, if a Magistrate frames a charge against the accused before the examination of all the prosecution witnesses is over, he shall ask the accused whether he wishes to re-call any or all the prosecution witnesses for cross-examination, and after such cross-examination he shall take the evidence of the remaining prosecution witnesses. It is only after that, that the accused shall be called upon to enter upon adduced evidence and he can be said to enter upon his defence only when he begins to adduce evidence on his behalf. The contention that, if an accused person cross-examines any of the prosecution witnesses under section 256; the Magistrate is bound once more to examine the accused generally on the case seems untenable. Section 342 says: "The Court shall question the accused after the witnesses for the prosecution have been examined and before he is called on for his defence." That can only mean that the examination of the accused should take place after the prosecution has placed its whole case before the Court. If the accused chooses not to cross-examine or reserves his rights to cross-examine the prosecution witness after a charge is framed, I do not think the Magistrate is bound to question him after cross-examination of the prosecution witnesses is over, provided he questions him after the prosecution has placed its whole case before him. If the Magistrate frames a charge before the whole

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of the prosecution evidence is placed before him, he should examine the accused under section 342 after the remaining witnesses for the prosecution have been examined and cross-examined. The accused in a warrant-case has three opportunities of cross-examining the prosecution witnesses; once, before the charge is framed, secondly, under section 256, and, thirdly, after he has entered on his defence. He can apply to the Magistrate under section 257 to issue process for compelling the attendance of one or more prosecution witnesses for cross-examination. It cannot be the intention of the Legislature to make it obligatory on the Magistrate to question the accused if he chooses to cross-examine any of the prosecution witnesses after all the defence evidence has been taken. Such cross-examination could only be to help him in his defence, and, therefore, it must be taken that such cross-examination is part of his defence. The words in section 342 are, "after the witnesses for the prosecution have been examined," and the expression cannot reasonably be interpreted to mean "after the accused has chosen to exercise his right of cross-examination at the very end of his defence." If the prosecution applies to the Court to allow it to adduce fresh evidence after the charge is framed and if such evidence is adduced, then it is the duty of the Court, under section 342, to question the accused generally, for, it cannot be said that the witnesses for the prosecution have been examined till the whole of the prosecution case is before it. But where the prosecution has let in all the evidence it wishes to rely on, and if the Magistrate questions the accused after taking all such evidence before framing a charge, whether the accused has cross-examined the witnesses or not, I think the mandatory provisions of section 342 must be held to be substantially complied with. It, therefore, follows that any examination of the accused which is made before all the evidence for the prosecution has been let in cannot satisfy the mandatory provisions of section 342.

I shall briefly deal with the cases quoted in argument before us. The cases quoted fall under three heads:

I. Cases in which the Sessions Judge did not question the accused generally

on the case after the close of the prosecution. In those cases the High Court held that the whole trial was vitiated by the failure to question the accused to explain the circumstances appearing in evidence against him even though his statement before the Magistrate was read as part of the prosecution evidence. They are reported as *Fatu Santal v. Emperor* (3), *Raghu Bhumij v. Emperor* (4), *Emperor v. Savalya* (5), *In re Nainamalai Konan* (6), and *In re Raja Padaiyachi* (7).

2. The following are the cases in which a Magistrate did not question the accused generally, and the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of section 342. *Suraj Pandey v. Emperor* (8), *Gulam Rasul v. Emperor* (9), *Emperor v. Harishchandra* (10), *Gulabjap v. Emperor* (11), *Basapaningapa v. Emperor* (12) and *Mahomed Hossein v. Emperor* (13).

3. In the following cases the Magistrate examined the accused before framing the charge, but did not question the accused generally on the case under section 342 after cross-examination under section 256 was over, and the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of section 342: *Mitarjit Singh v. Emperor* (2), *Tilak Gope v. Bhaya Ram* (14), *Ramnath*

(3) 61 Ind. Cas. 705; 6 P. L. J. 147; 2 P. L. T. 288; 22 Cr. L. J. 417.

(4) 58 Ind. Cas. 49; 5 P. L. J. 450; 21 Cr. L. J. 705; 1 P. L. T. 241.

(5) 9 Bom. L. R. 356; 5 Cr. L. J. 332.

(6) 69 Ind. Cas. 377; 14 L. W. 418; 23 Cr. L. J. 697.

(7) 2 Weir 405.

(8) 58 Ind. Cas. 521; 21 Cr. L. J. 793; (1920) Pat. 281; 1 P. L. T. 641.

(9) 61 Ind. Cas. 715; 6 P. L. J. 174; 22 Cr. L. J. 427; 2 P. L. T. 390.

(10) 10 Bom. L. R. 201; 7 Cr. L. J. 194.

(11) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290.

(12) 31 Ind. Cas. 365; 17 Bom. L. R. 892; 16 Cr. L. J. 765.

(13) 22 Ind. Cas. 766; 41 C. 743; 18 C. W. N. 1247; 15 Cr. L. J. 190.

(14) 62 Ind. Cas. 870; 22 Cr. L. J. 598.

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Rai v. Emperor (15), *Emperor v. Nga Po Mya* (16), *Abbas Ali v. Emperor* (17) and *Fernandez v. Emperor* (18).

In *Raghu Bhumi v. Emperor* (4) Mr. Justice Jwala Prasad of the Patna High Court observed: "The accused adhered to the retraction of their confessions. They were not examined as to the circumstances disclosed in the prosecution evidence which the learned Sessions Judge has used against the accused and this, to my mind, amounts to an omission to examine the accused under section 342, and to prepare a proper record thereof under section 364. So much is essential in a Sessions trial where an accused is entitled to have his statement considered by assessors and the Appellate Court." This omission was held by the learned Judge to vitiate the whole trial. In *Tilak Gope v. Bhaya Ram* (14) Mr. Justice Bucknill held that "this omission to examine the accused after the case for the prosecution has been closed, or, rather after all the witnesses for the prosecution have been examined, is a vital defect and cannot be cured by trying to bring into operation the provisions of section 537, Criminal Procedure Code." In that case, after the accused had been examined by the Magistrate, one witness at any rate for the prosecution was subsequently examined. The learned Judge qualified his first statement, "after the case for the prosecution has been closed" by adding the words, "or, rather, after all the prosecution witnesses have been examined." Section 342 makes it obligatory on the Magistrate to examine the accused after the witnesses for the prosecution have been examined, and does not require the Magistrate to wait till the accused has exercised his right of cross-examination of the prosecution witnesses after the charge is framed. As I said above, the amendments to sections 254 and 256 were made in 1898 without in any way altering the wording of section 342, and a reasonable construction must be put upon the words

without attributing to the Legislature the fault of enacting inconsistent provisions. It is a well-known canon of construction that where a reasonable construction would reconcile the provisions of an enactment, that construction ought to be adopted.

In *Mitarjit Singh v. Emperor* (2) a Bench of the Patna High Court held that, "until the witnesses have been cross-examined and re-examined it cannot be said what the exact case that the accused will have to meet is, and, if he is forced to disclose his defence before cross-examination, it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination to a great extent destroyed. Considering... both the wording of the section and its intention it appears to me clear that the Court must question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses." No doubt, this is a direct authority for the contention of the petitioner, but, with great respect to the learned Judges, it is not easy to conceive how an accused person would be prejudiced by disclosing his defence after the whole of the prosecution evidence has been taken and before he exercises the right to re-cross-examine them. No doubt if, before the whole of the prosecution evidence is taken, he is asked to disclose his defence the prosecution witnesses who remain to be examined may change their version in order to meet the defence of the accused. But where the prosecution has definitely put forward the whole of its case the mere fact that the prosecution witnesses are not subjected to a second cross-examination would not in any way prejudice the accused, if he discloses his defence before such cross-examination. It is open to the accused not to make any statement. The law does not cast upon him the duty of making a statement. If he feels that by disclosing his defence before the whole of the cross-examination is over his case will not suffer, he need not answer the Court questions. We are only concerned with the duty of the Court under section 342, and not with the option of the accused. It may be said that his answers to the questions put to him by the Court, even after the whole of the cross-examination is over, might

(15) 61 Ind. Cas. 844; 2 P. L. T. 549; 22 Cr. L. J. 460.

(16) 42 Ind. Cas. 176; 3 U. B. R. (1917) 18; 11 Bur. L. T. 134; 18 Cr. L. J. 944.

(17) 4 Cr. L. J. 471; 3 L. B. R. 208 (P. B.).

(18) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

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prejudice him. But that is left to the discretion of the accused and his legal advisers. The Court is not asked to cross-examine the accused but its duty is only to ask the accused to explain the circumstances appearing in evidence against him. I, therefore, consider, with all respect, that the reasoning of the learned Judges does not militate against the view that I take that the duty of the Magistrate under section 342 is discharged if he questions the accused generally after the prosecution has placed its whole case before the Court.

In *Shamlal Kalwar v. Emperor* (19), after the examination and cross-examination of the prosecution witnesses a charge was framed against the accused. The accused were asked if they would cross-examine any of the prosecution witnesses, but they declined and then they were called on to enter upon their defence. On a subsequent date, at the instance of the Public Prosecutor, a charge under section 325, Indian Penal Code, was added to one of the accused and the charge under section 147, Indian Penal Code, was verbally altered. The prosecution witnesses were then re-called and cross-examined. It was not disputed that the prosecution evidence was closed when the accused were called on to enter upon their defence. It was contended that after the alteration of the charge under section 147, Indian Penal Code, and the addition of a charge under section 325, Indian Penal Code the accused should have been examined and the omission to do so contravened the mandatory provisions of section 342. Mr. Justice Jwala Prasad and Mr. Justice Adami held: "The trial does not commence *de novo* so that if the accused had already been called on to enter upon his defence there is no further obligation upon the Magistrate to examine the accused under section 342 of the Code." They also observe: "The authorities of which we are so well cognisant do not all apply to the present case."

In *In re Maruda Mathu Vannian* (1) the Magistrate in trying a warrant-case examined the accused before framing the charge, but did not examine the accused generally on the case after cross-examination.

(19) 65 Ind. Cas. 610; 3 P. L. T. 91; 23 Cr. L. J. 146; (1916) A. I. R. (Pat.) 393; 1 Pat. 54.

The learned Judges held that the omission of the Magistrate vitiated the whole trial. If the whole of the prosecution case had been before the Magistrate before he framed the charge and if he questioned the accused generally on the case before framing the charge, I think he satisfies the mandatory provisions of section 342. It is not necessary that the accused should make a statement by word of mouth. No doubt, section 364 requires the Magistrate and a Court other than the High Court to record the whole of the examination "including every question put to him (accused) and every answer given by him in the language in which he is examined, or, if that is not practicable in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or to add to his answers." Section 256, clause (2), makes provision for the accused putting in a written statement and the Magistrate filing it with the record. When the Magistrate questions the accused if he says, "I will put in a written statement," I think it is the duty of the Magistrate to take the written statement as an answer to his questions. In other words, in such a case the accused does not wish to answer by word of mouth questions put to him, but prefers to put in a written answer.

In the present case, after the examination of the witnesses for the prosecution, a charge was framed against the accused on 3rd September 1921. The accused were examined by the Magistrate on the same date. They cross-examined the prosecution witnesses on 3rd October 1921 and 21st October 1921. The examination of the accused by the Magistrate, after the prosecution had let in all their evidence, satisfied the provisions of section 342, and, therefore, the trial is not vitiated by any omission to examine the accused after the cross-examination of the prosecution witnesses was over. The accused did not answer the questions put by the Magistrate Court but said they would put in a written statement, and the default, if any, is on their part. The Magistrate did what was required of him under section 342, and if the accused

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did not choose to put in any written statement, they could not contend that the proceedings before the Magistrate were vitiated by an illegal omission.

The petition, therefore, ought to be dismissed.

My answer to the question referred to the Full Bench is, that a trial is not vitiated by the omission to question the accused generally on the case after re-cross-examination of all the prosecution witnesses is completed, provided the Magistrate examines the accused after the whole of the prosecution case has been placed before him.

Venkatasubba Rao, J.—I regret I am not of the same opinion, and as I venture to take a different view I shall very briefly state my grounds.

The Magistrate says in his judgment:—"Accused Nos. 1 and 2 who were questioned after the prosecution evidence was heard, preferred to put in a written statement, but no such statement was filed. * * * There were grounds for presuming that accused had committed an offence under section 411, Indian Penal Code; a charge was accordingly framed. * * * This happened on 3rd September 1921. There was further cross-examination of the prosecution witnesses on 3rd October 1921 and 21st October 1921. The accused was not further examined and he commenced to produce evidence in his defence on the latter date.

Section 342 consists of two parts. The first part leaves it to the option of the Magistrate to put such questions to the accused as he considers necessary. The accused may be similarly examined under sections 209, 210, 245, 253 and 254. Whereas the latter sections indicate the stage when the examination may at the discretion of the Magistrate be made, the first part of section 342 gives the Magistrate a wider discretion, as it permits him to put questions to the accused at any stage of the enquiry or trial.

Then, we come to the second part of section 342. The provision here is mandatory. It is agreed on all hands that it is the duty of the Court to make the examination of the accused at some stage of the case. The more difficult question remains:—At what stage is this examination to be made? The point of time is indicated by the words "after the witnesses for the prosecution

have been examined and before he (the accused) is called on for his defence."

Comparing these words with the words used in the last portion of section 256 which runs thus:—"The evidence of any remaining witnesses for the prosecution shall next be taken and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence," the conclusion seems irresistible that the point of time indicated is between the close of the prosecution case and the entering by the accused upon his evidence.

It is said that an examination of the accused immediately upon the taking under section 252 of the evidence in support of the prosecution, complies with the mandatory provision contained in section 342. I am unable to accept this view. *In the first place*, at that stage, it cannot be said that all the witnesses for the prosecution have been examined, because section 256 contemplates further evidence likely to be forthcoming on behalf of the prosecution. *In the second place*, the accused is not called upon to enter upon his defence upon the taking of the evidence referred to in section 252. Far from the accused entering on his defence at that stage, if the Magistrate is of the opinion, that there is ground for presuming that the accused has committed an offence, the Magistrate is required to frame a charge against the accused. It cannot be said that the stage preceding the framing of the charge is the point of time conveyed by the words "before the accused is called on for his defence."

The words used in section 342 are "called on for his defence." I may notice in this connection two other sets of words. Section 255 (1) runs thus:—The charge shall then be read and explained to the accused and asked whether he has "any defence to make." Section 256 contains the following sentence:—"Accused shall then be called upon to enter upon his defence and produce evidence." In my opinion, the words in section 342 "called on for his defence" are used in the same sense as the words "to enter upon his defence" in section 256. I must point out that neither side has attempted to argue that the stage when the accused should be examined under

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section 342, is after the charge has been framed, read and explained and before the accused is asked under section 255 whether he has "any defence to make." The rival contentions before us were (1) on behalf of the Crown—the examination indicated in section 342 should be made after the taking of the evidence in support of the prosecution mentioned in section 252 and before the framing of the charge under section 254; (2) on behalf of the accused—the said examination should be made after the entire evidence for the prosecution mentioned in section 256 is given and before the accused is called upon to enter upon his defence. I am clearly of the opinion that the right construction is that contended for on behalf of the accused. If the other construction were right, it would follow that the accused would be "called on for his defence" before a charge against him is framed, that is, at a point of time which is anterior to his being asked whether he "has any defence to make." I see no warrant for this position in the sections to which I have referred.

I have so far given my reasons for construing the section in the manner I have done. The learned Public Prosecutor has argued that this interpretation should be avoided, as it would lead to consequences inconvenient and unjust. I think, on the contrary, this construction alone carries out the object underlying the enactment of section 342.

Under section 342 it is only one examination that is made imperative. The other view will lead in certain events to the result that the Court will be bound to have a double examination of the accused; once when the evidence referred to in section 252 has been taken and again when further witnesses for the Crown, if any, have been examined under section 256. Moreover, the object of section 342 can be most effectually carried out only if the accused is examined at the very close of the case for the Crown and previous to his entering upon his defence. Not only may very material evidence be given in examination-in-chief of any further witnesses examined under section 256 but matters unfavourable to the accused may be elicited in the cross-examination and re-examination of the witnesses already examined under section 252.

It is intended that the accused should have an opportunity, in answer to a general question "What have you to say" to explain any circumstances appearing in the evidence against him.

This seems to me a very useful provision.

It must also be noted that the accused cannot give evidence on oath. Whether this is a privilege which he enjoys or a disability under which he labours, the statement, if any, that the accused makes under this section corresponds, as nearly as possible, to his evidence or oath and it is distinctly provided by clause 3 of section 342 that the answers given by the accused may be taken into consideration by the Court. A mere statement of the accused at this stage may conceivably lead to his acquittal without any production of evidence on his behalf.

It seems to me that this view alone makes section 342 consistent with section 253. Otherwise, the words in the latter section *vesting a discretion* in the Magistrate,—"*Of making such examination (if any) of the accused as the Magistrate thinks necessary*" will be not only redundant but positively misleading because, at that point, the Magistrate, according to the other view, is under an obligation to examine the accused.

It has been said on behalf of the Crown that section 257 lends some support to the view contrary to what I have taken. I am unable to agree. It is, no doubt, true that section 257 gives a further opportunity to the accused to cross-examine any prosecution witnesses even after he has entered upon his defence. But this circumstance can have no bearing upon the right interpretation of the terms of section 342. The latter section fixes a point of time not only with reference to the examination of the witnesses for the prosecution but also with reference to the accused being "called on for his defence." The mere fact that some prosecution witnesses may be cross-examined at the instance of the accused even after he has entered upon his defence cannot alter the interpretation which the plain words in section 342 should receive.

Then, turning to section 537, I am of the opinion that the infringement of the rule enacted in section 342 is not a mere error,

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omission or irregularity. Assuming for a moment that the disregard of the rule amounts only to an error, omission or irregularity, how can it ever be ascertained that such an error, etc., has in fact or has not occasioned a failure of justice? We shall be left to speculate what the statement of the accused would have been or in what manner it would have influenced the mind of the Trying Judge. I would for that reason assume in every instance that the non-observance has in fact occasioned a failure of justice.

The result is that, in my view, the decision in *In re Maruda Mathu Vannian* (1) on both the questions is correct. I would, therefore, set aside the conviction of the accused and order a re-trial.

V. N. V.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 103 OF 1923.

March 22, 1923.

Present.—Mr. Justice Kulwant Sahay.

Musammât RAMJHARIA AND

ANOTHER—SECOND PARTY—PETITIONERS

versus

PIAR KOERI—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Written statement, failure of one party to file, effect of—Jurisdiction of Magistrate—Transfer of case to another Magistrate, when can be made.

The basis of a proceeding under section 145 of the Criminal Procedure Code is not the written statement of the parties but the Police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace. [p. 174, col. 2.]

When a Magistrate is so satisfied he should make a note stating the grounds of his being so satisfied, and require the parties to attend and put in written statements of their respective claims. [p. 174, col. 2.]

If a party fails to put in a written statement that would not take away the jurisdiction of the Magistrate to proceed with the case. The proceeding having been properly initiated it is incumbent on the Magistrate to make the enquiry and to take such evidence as the parties offer irrespec-

tive of the fact that one or other of them has failed to put in a written statement. [p. 174, col. 2.]

In re Goluck Chunder Mytee, 11 W. R. 9 Cr., relied on.

Section 145 of the Criminal Procedure Code requires the Magistrate who draws up a proceeding under the section to call upon the parties concerned to attend his Court and to file written statements of their respective claims. He cannot direct them to appear before another Magistrate. But after the parties have attended and are ready to proceed with the case, it may be validly transferred to another Magistrate competent to try it. [p. 175, col. 1.]

Misri Chaudhury v. Narsingh Prasad Tewari, 62 Ind. Cas. 139; 2 P. L. T. 186; 22 C. L. J. 483, distinguished.

Application against an order of the Honorary Magistrate, Arrah, dated the 5th of February 1923.

Mr. S. P. Varma, for the Petitioners.

JUDGMENT.—The petitioners were the second party in a proceeding under section 145 of the Criminal Procedure Code. The dispute relates to the possession of three plots of land bearing Survey Nos. 1100, 1106, and 1153 in village Parbatpur. These plots formed the *raiya* holding of two brothers Singar Koeri and Piar Koeri. Singar Koeri died about four years ago and Musammât Ramjharia, of the second party, is his widow. The surviving brother Piar Koeri is the first party in these proceedings and his case is that the two brothers were joint and since the death of Singar Koeri he has been in exclusive possession of the three plots by right of survivorship. Musammât Ramjharia of the second party claims that her husband was separate from the first party and that she has been in exclusive possession of half of the three plots in dispute as the heir of her husband. Mukhan Ahir, the other member of the second party, claims actual possession of a part of the land in dispute as a mortgagee from Musammât Ramjharia.

On the 13th October 1922, the first party filed a petition before the Sub-Divisional Officer of Arrah setting out the above facts and stating that, on the 10th October 1922, he was obstructed by the second party when he went to sow Khesari crops in the lands; that there was a likelihood of a breach of the peace and he prayed for proceedings under section 107 of the Criminal Procedure Code. The Magistrate thereupon made an

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order upon the Police to enquire and report by the 7th November 1922, and to see that no breach of the peace takes place. The Police submitted a report and on the 7th of November 1922 the Magistrate ordered the proceedings under section 145 of the Criminal Procedure Code to be drawn up, fixing 23rd November 1922 as the date for filing written statement and adducing evidence. After some adjournments the second party filed a written statement on the 21st December 1922. The first party prayed for time and the case was adjourned to the 16th January 1923. On the 16th of January, it appears that no written statement was filed by the first party, but he was present in Court with his witnesses and was ready to go on with the case. The Magistrate thereupon made the following order on the 16th January 1923: "Case ready; transferred to Moulvi Abdul Gafoor for favour of disposal." On the same date the case was taken up by Moulvi Abdul Gafoor; some witnesses were examined on behalf of the first party, and on the petition of the first party the case was adjourned to the 29th of January in order to enable the first party to produce more witnesses. On the 29th of January three more witnesses were examined for the first party and three witnesses were examined for the second party, and on the 5th of January 1923, the Magistrate made his final order declaring the first party to be in possession and forbidding disturbance of such possession. The second party now applies for revision of this order.

The first point taken by the learned Counsel on behalf of the second party is, that as no written statement was filed by the first party, the learned Magistrate had no jurisdiction to make an order in favour of the first party. Sub-section (1) of section 145 provides that, "whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of First Class is satisfied from a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and require the parties concerned in such dispute to attend his Court in person or by Pleader, within a

time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute." In order to give jurisdiction to a Magistrate to proceed under section 145, Criminal Procedure Code, all that is necessary is that he should be satisfied of there being a likelihood of a breach of the peace and he should make a note stating his grounds of his being so satisfied and require the parties to attend and to put in written statements of their claims. This was done in the present case. The Magistrate was satisfied upon the Police report and he made an order requiring the parties to put in written statements. Now, if a party fails to put in a written statement that would not take away the jurisdiction of the Magistrate to proceed with the case. The proceeding being properly instituted it was incumbent on the Magistrate to make the enquiry and to take such evidence as the parties offered irrespective of the fact that one or other of the party failed to put in a written statement. The Magistrate would not be justified in refusing to proceed with the case because the parties neglected to file a written statement on the date fixed; he has to take evidence, if offered by any of the parties, and to decide the case upon such evidence. Reference in this connection may be made to the case of *In re Goluck Chunder Mytee* (1). This case was undoubtedly decided under the Act of 1861, but the principle enunciated therein is applicable to proceedings under the present Code. The learned Counsel for the petitioner argues that the written statement is the basis upon which a case under section 145 proceeds and it is upon the allegations contained in the written statement that the parties know what the case of their opponent is, and have to adduce evidence accordingly, but, in my opinion, the basis of a proceeding under section 145 is not the written statement but the Police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace. In the present case we find that the case sought to be made by the first party was clearly set out in his petition of the 13th of October 1922, and when he appeared

(1) 11 W. R. 9 Cr.

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on the date fixed for hearing and adduced evidence the Magistrate was bound to receive such evidence and to decide the case. The learned Counsel relies on sub-section (4) of section 145 which provides that the Magistrate shall, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, and receive the evidence produced by them, and contends that if no written statement is filed, the Magistrate cannot proceed further, or, in any event, cannot make any order in favour of the party failing to file a written statement; but this sub-section does not say that if no written statement is filed the Magistrate cannot make the order. If no written statement is put in he certainly cannot peruse it, but all the same he is bound to hear the parties and to take the evidence produced by them. I am, therefore, of opinion that the not filing of the written statement by the first party did not take away the jurisdiction of the Magistrate to make an order in his favour.

The second point taken is that as no written statement had been filed on the 16th of January 1923 the learned Sub-Divisional Officer had no jurisdiction to transfer the case to any other Magistrate for disposal, and reliance is placed upon the case of *Misri Chaudhury v. Narsingh Prasad Tewari* (2). In that case the proceeding was drawn up by the Sub-Divisional Magistrate and in the order initiating the proceeding the learned Magistrate directed the parties to appear before another Magistrate on the 28th of August 1920 and to file their written statements there. This Court held that it was illegal for the Sub-Divisional Magistrate to direct the parties to appear before another Magistrate and to file their written statement there, inasmuch as section 145 requires the Magistrate to draw up proceeding calling upon the parties concerned to attend his Court and to file written statements. In the present case the case was not transferred until the parties were ready and one of the parties had filed his written statement. This objection, therefore, also must be disallowed.

(2) 62 Ind. Cas. 179; 2 P. L. T. 186; 22 Cr. L. J. 483.

The third objection taken is, that the second party claims possession of the plots in dispute jointly with the first party, and, where the dispute is between two parties, one of whom claims joint possession, proceedings under section 145 cannot be maintained and reliance is placed on the case of *Sham Lal Mahton v. Rajendra Lal* (3). That was a case of admitted joint proprietors. In the present case each party claims exclusive possession of one half of the plots in dispute. This objection is without any foundation and cannot be allowed.

The result is, that this application is dismissed.

Z. K.

Application dismissed.

(8) 58 Ind. Cas. 518; 1 P. L. T. 594; 21 Cr. L. J. 790.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 362-B OF 1922.

June 10, 1922.

Present:—Mr. Justice Duckworth.

NGA BA SEIN—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Burma Habitual Offenders Restriction Act (I I of 1919), ss. 2, 10—Area of restriction—Magistrate, duty of.

An order under the Burma Habitual Offenders Restriction Act confining a person to the four corners of his house is improper. The narrowest limits of restriction should be the village of the person concerned, or the limits of the village to which he is restricted.

Before making an order of restriction under the above Act the Magistrate should satisfy himself that the accused is able to earn his livelihood within the area of restriction.

Reference made under section 438, Criminal Procedure Code, by the Sessions Judge, Toungoo, to amend the restriction order passed on the accused by the Sub-Divisional Magistrate, Pegu.

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JUDGMENT.—The accused, Nga Ba Sen, had an order of restriction passed against him under the Burma Habitual Offenders Restriction Act, by which he had to report his presence to the headman every day before 6 P. M., was not permitted to leave his village tract without the leave of the Police Station Officer at Kawa, and not depart from his house between the hours of 10 P. M. and 5 A. M. without making a report to the headman.

The case has been referred to this Court by the learned Sessions Judge, Toungoo, more especially with reference to the last portion of this Court's order, as reported in the case of *Emperor v. Nga Kala* (1). The Sessions Judge has rightly raised the point as to whether an order confining a man to the four corners of his own house at night is a proper order under the provisions of the Act. I am aware that this is a common form of order under the Act in the districts, and it is necessary that a definite ruling be pronounced in regard to it, especially in view of the last paragraph of the decision quoted. I have fully considered the point, and am of the opinion that it was never intended that a man should be confined to the four corners of his house at night in such cases as this, and that the narrowest limits of restriction should be the village of the man concerned, or the limits of the village to which he is restricted, as the case may be.

The Act itself does not define the limits of restriction, further than laying down that a person may be restricted to any area prescribed in the order of restriction. This is in section 2. Section 10 would perhaps lead to an inference that the area must be the whole area of a village, inasmuch as it speaks of the person being able to earn his livelihood within the area of restriction. Further, rule 3 of the Police Department Notification No. 280, dated November 17th, 1919, Published at page 918 of the *Burma Gazette* of November 22nd, 1919, seems to make it clear that the area shall ordinarily be the village-tract or town where the person resides, or to which he is restricted by the order. It is going too far to restrict the person to his house within such an area. It

is clear, however, that, in the case quoted from the Burma Law Journal, the point was never considered either in this Court, or by the referring Sessions Judge, and the fact that in that case the man was restricted to his house at night was, due to the causes suspected by the learned Sessions Judge, Toungoo, in his present Order of Reference. In other words, it was due to oversight, and must be read as in the nature of an *obiter dictum*. The rest of that decision is correct but that portion of it, by which the person in question was restricted to the four corners of his house at night, is erroneous and is overruled.

The first portion of the Magistrate's order is unobjectionable. With regard to the second part it appears that the accused's village is four miles away from the Police Station. In order to obtain leave from the Police Station Officer, he would have to leave his village-tract, and thereby offend against the order. This is contrary to the spirit of rule 5 of the Notification already referred to. Under rule 6 his headman can grant him leave for three days, which would enable him to apply to the Police Station Officer, in case he required longer leave of absence.

There is another defect in the present proceedings. The Magistrate never, as provided by section 10 of the Act, satisfied himself that the accused was able to earn his livelihood within the area of restriction. I find that this error is almost universal, and shows that the Act is never carefully or intelligently read.

Accordingly, the order is amended as follows:—"That the accused do report his presence every day before 6 P. M. to his headman, and that he do be restricted to his village-tract."

W. C. A.

Order accordingly.

SHANTI SARUP v. JAHANGIR MAL, BANSI MAL.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1875 OF 1922.

February 10, 1923.

Present:—Mr. Justice Martineau.

SHANTI SARUP, MINOR, THROUGH KHA-

RAK SINGH—PLAINTIFF—APPELLANT

versus

THE FIRM JAHANGIR MAL-BANSI
MAL, THROUGH TILAK RAM-ANANT

RAM AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XLIII, r. 1 (m)—Order holding that no compromise has been proved—Appeal, whether lies.

R. 3 of O. XXIII of the Civil Procedure Code applies only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise or satisfaction.

Therefore, an order holding that there has been no compromise is not an order under r. 3 of O. XXIII of the Civil Procedure Code and is not appealable under r. 1 (m) of O. XLIII of the Code which pre-supposes the existence of an agreement, compromise or satisfaction.

Mahamad Idris Meah v. Mahamad Esahak, 42 Ind. Cas. 192, distinguished.

Miscellaneous first appeal from the order of the Subordinate Judge, First Class, Ludhiana, dated the 7th June, 1922.

Mr. Dev Raj Sawhny, for the Appellant.

Lala Balwant Rai and Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—In this case the plaintiff's next friend alleged, and the defendants denied, that the dispute had been compromised. The lower Court has found on inquiry that there was no compromise. The plaintiff appeals, contending that he has a right of appeal under O. XLIII, r. 1 (m), Civil Procedure Code, whilst it is contended for the respondents that the right of appeal given by that rule from an order refusing to record a compromise applies only where a compromise has been found to have been made and the Court has for some reason refused to record it, and does not apply to a case in which it has been found that no compromise took place.

No authority on the point has been cited. Counsel for the appellant has referred to *Mahamad Idris Meah v. Mahamad*

Esahak (1), but it does not appear that in that case the existence of the compromise was disputed.

It appears to me that the contention of the respondent's Counsel is correct. In the first place, I think that the words used in O. XLIII, r. 1 (m), "an order under r. 3 of O. XXIII recording or refusing to record an agreement, compromise or satisfaction" pre-suppose the existence of an agreement, compromise, or satisfaction. In the second place r. 3 of O. XXIII applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise, or satisfaction. Consequently, the order passed by the lower Court in the present case finding that there has been no compromise is not an order under r. 3 of O. XXIII and is not appealable.

The appeal is accordingly dismissed with costs.

Z. K.

Appeal dismissed.

(1) 42 Ind. Cas. 192.

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BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 21 OF 1922.

December 8, 1922.

Present.—Mr. Justice Marten and Mr. Justice Fawcett.

NILKANTH DEVRAO NADKARNI
AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MURARI GOVIND MHALE—

DEFENDANT—RESPONDENT.

*Committee — Temple Committee — Meeting—
Quorum, want of—Adjournment—Notice.*

Where a duly notified meeting of the members of a Temple Committee cannot be held owing to there being no *quorum*, such meeting cannot be adjourned to, and held at, a later hour, without notice of such adjournment having been previously given to all the members of the Committee; an adjourned meeting held without such notice, and all business transacted thereat are invalid.

Second appeal from a decision of the District Judge, Kanara, in Appeal No. 146 of 1918, reversing the decree passed by the First Class, Subordinate Judge at Karwar, in Civil Suit No. 189 of 1917.

Messrs. S. V. Palekar and D. R. Ugrankar, for the Appellants.

Mr. G. P. Murdeshwar, for Respondent No. 3.

JUDGMENT.

Marten, J.—The question on this appeal is whether defendants Nos. 1 to 4 have been properly appointed trustees of the suit temple. That in its turn depends on whether they were validly appointed trustees on November 15, 1913, by the Temple Committee. This Temple Committee is one appointed under the Religious Endowments Act, 1863, and at the date in question it consisted of some ten or eleven members. A notice, Exhibit 39, is alleged to have been given for this Committee to meet at 8 o'clock in the morning on November 15, 1913. At that hour only two members of the Committee were present, and, according to the minutes, Exhibit 34, as there was not present a sufficient number of members to form a quorum for the commencement of the business of the Committee, it was decided that the work of the Committee be deferred and that the Committee should meet at 3 P. M. that day. Then at 3 o'clock that day, three members were present. They then proceeded to transact certain business, and incidentally to elect the defendants I have mentioned.

Now, the real point of the dispute is this, that away back in 1884 or thereabouts the Collector had settled a dispute between the Vaishnavs and the other branch of the Smarth sect as to the proportions in which their respective sects should be appointed Muktesars of various temples. As set out in paragraph 3 of the plaint, it was decided that the Muktesars of the first three temples there mentioned should be in the hands of the Smarths only, and that of the other three temples should be in the hands of the Vaishnavs. The plaintiffs allege that by means of the 1913 election the Vaishnavs have got their nominees elected Muktesars of the suit temple, which, under the 1884 agreement, was to be in the hands of the Smarths. That is what is at the bottom of this dispute.

It will be seen, therefore, that the question of the appointment is no mere technical matter. In the first place, the appointment of trustees is, generally speaking, a matter in which the terms of the appointment have to be properly complied with. In the second place, particularly when religious feelings are aroused, it is to my mind important that any election should be properly conducted. The learned Trial Judge found that the elections were invalid. On appeal the lower Appellate Court set aside this judgment and dismissed the suit holding that the whole suit was bad, because it was within section 92 of the Civil Procedure Code, and the requisite consent of the Collector had not been obtained. That decision was reversed by the High Court and the case remanded.

On remand, the learned Appellate Judge's judgment really comes to this: that the meeting was continuous from 8 A.M. to 3 P.M.; and that there was really no adjournment or postponement. What he says is: "In strictness of speech, it should be said that there was no postponement; there was a waiting for the third member to come. The meeting was convoked at 8. The members were late. Business did not begin till 3. This is easy going. But there are many Committees which must go easily if they are to go at all." On the facts here, I do not think the Judge could fairly inter that the members waited at the place of meeting from 8 to 3. The minutes do not

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say so, and the evidence of the recorder Santaya does not say so. What he says is: "The time fixed for the meeting was 8 A.M. Defendants Nos. 8 and 10 were present at that time. So we waited for the arrival of the other members. But as nobody turned up, the meeting was adjourned till the afternoon of that day."

So that brings one to this point. Admittedly, there was no quorum, for the quorum is three. Could then the two members adjourn the meeting either to a later hour that day or to some subsequent day, and in any event would such an adjournment be valid unless notice of the adjournment was given to all the members? Now there are no special rules of this Committee which have been framed, or at any rate which have been brought to our attention, and we must, therefore, decide the case on general principles. There being no quorum, I fail to see what power the two members had to adjourn the meeting to 3 o'clock that day or to 3 o'clock say two days afterwards, unless at any rate notice of the adjournment was given to all the members. *Ex hypothesi* no such notice of the adjournment was given, and it seems to me, therefore, that the adjourned meeting at 3 o'clock was invalid.

This seems to me to be no mere technicality. If, for instance, some member had come at 9 o'clock and found no body present, he would naturally assume that either the meeting had been held and was over: or that it had failed for want of a quorum, and that in any event he had come too late, and might go away. He would not necessarily know without some express notice that the meeting was to be held at 3 o'clock. I do not say that that happened in the present case. But one has to consider the matter on general principles.

It seems to me, therefore, with all deference to the learned Appellate Judge, that the view he took cannot be sustained. One argument was addressed to us to the effect, that in India and in particular in the districts the various Committees are easy-going people, especially as regards time, and that accordingly it would be a hardship to lay down any hard and fast rules about time. I am not laying down any such hard and fast rules. It is open to the Committee to frame any special rules they like within

reason for the conduct of their own business. But it seems to me on the whole that the evils of allowing an indefinite delay in business are likely to outweigh the alleged hardships of reasonable punctuality, and to lead possibly to irregularities of a kind which it is very desirable to avoid.

There is one other point, and that is, that the notice convening the meeting did not specifically state that the meeting was called for the election of new trustees, nor was the notice given to all the members. The notice, Exhibit 39, does say that one member of the Committee had died. So possibly one might infer that his place on the Committee was to be filled up. But that is different from the trusteeship of the suit temple. And the mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustees of the suit temple were to be made. It would also seem from the judgment of the lower Appellate Court that notice was not served on one member of the Committee, Dewan Bahadur Yennemadi, and that the notice on one other man was doubtful, for only word was left at his house, he being away from home.

Having regard to the view I take on the other part of the case, I do not think it necessary to decide this point about the sufficiency of the notice, nor as to whether it was properly served. But as the point has been raised, I may refer to *Young v. Ladies' Imperial Club* (1) where Lord Sterndale, M. R., lays down some general principles governing meetings for special purposes. He says: "I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting." Then he refers to a case of *Smyth v. Darley* (2)

(1) (1920) 2 K. B. 523 at pp. 527, 528; 89 L. J. K. B. 563; 123 L. T. 191; 64 S. J. 374; 36 T. L. R. 392.

(2) (1849) 2 H. L. C. 789 at p. 803; 9 E. R. 1293; 81 R. R. 392.

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which was the case of an election and not as in *Young v. Ladies' Imperial Club* (1) of an expulsion from a club, and quotes Lord Campbell as saying: "The election being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as, for instance, abroad—there could not be a good electoral assembly." Then he cites another case of *In re Portuguese Consolidated Copper Mines, Limited* (3) and quotes Lord Esher as saying: "All the Directors should have had notice of the meeting of the 24th." Then Lord Sterndale proceeds.

"That was on general principles I think, and not any special provision in the articles that notice should be sent to every member." Next, he again quotes Lord Esher—"If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th." Then Lord Sterndale continues, "therefore, as to the general principle, I think, there can be no question," and he points out that there are or may be exceptions where it is physically impossible for a member to attend, he being abroad, or possibly dangerously ill, but that he does not know of any other exception.

As I have said, I do not propose to decide whether in this particular case the notice sent was sufficient, or whether it ought to have stated expressly that new trustees were to be appointed. I have no doubt that the latter course is far preferable, but whether its omission would invalidate the appointment is a question that I leave open.

There is one further point. It is said that even if the election of 1913 was invalid, it was ratified by a subsequent resolution in 1916. It appears that the custom was for the persons who had been elected Mukteshis to be entered in a particular book belonging, I gather, to the Collector. Some hitch arose about this, and consequently the Collector suggested that the matter

should be reconsidered by the Temple Committee. Accordingly, they purported to meet again and to re-elect these particular persons.

This point is not dealt with by the lower Appellate Court. But the learned Trial Judge points out that the persons who purported to make these new elections were only three, of whom one was defendant No. 11 who quite clearly had not been validly appointed a member of the Committee. He had only been co-opted by the members of the Temple Committee, which is clearly invalid under the Act regulating the appointments of new members of the Committee.

It, however, appears that this point was not relied on in the written statement of the defendants, nor did they make it a ground of their appeal to the lower Appellate Court. That no doubt is a reason why the lower Appellate Court did not deal with the point. One can understand that in any event there would be the greatest difficulty in upholding this alleged confirmation, having regard to the illegality of the appointment of defendant No. 11. Under the circumstances, I do not think it is open now to the respondents to rely on the validity of that confirmation.

In the result, therefore, I would allow this appeal, and restore the judgment of the learned Subordinate Judge.

As regards costs, the appellants had to amend their memo. of appeal by specifically raising the points on which they eventually succeeded, and an adjournment of the appeal became necessary for their opponents to meet these points.

On the whole, we think the justice of the case will be met by letting the judgment of the Trial Judge as to the costs of the trial stand. As regards the costs of the proceedings before the District Court both on the first occasion and on remand, we will direct that each party should bear his own costs. As regards the costs of this appeal, we direct they be paid by defendants Nos. 1 to 4 including the costs of the remand Appeal No. 269 of 1920 decided by this Appellate Court on June 7, 1921.

(1) (1889) 42 Ch. D. 160 at p. 167; 58 L. J. Ch. 491; 60 L. T. 857.

Fawcett, J.—I agree. I am certainly

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indisposed to be too technical in dealing with meetings in the *Mofussil* of bodies like this Temple Committee, whose appointment of defendants Nos. 1 to 4 is in question. I quite agree with the learned District Judge that practice must to a large extent be considered as sufficient authority for the mode of transacting business. But, at the same time, I think it is clear that the view he has taken in treating the adjourned meeting as merely a continuation of the first meeting is one that contravenes a very necessary and reasonable principle of justice and equity, *viz.*, that every member of a Committee or other body should have due notice of the time when he may attend the meeting, if he wants to. This is a principle which has been laid down very strongly by the Courts in England, as is shown by the cases to which my learned brother has referred. It is also, I think, recognised very plainly by the Legislature both in England and in India, for the Companies Acts of both countries contain provisions in the model articles enacted in a Schedule, under which due notice of a general meeting is to be given to all persons concerned. [8 Edw. VII. c. 69, Schedule I., section 49, and Indian Companies Act, 1913, Schedule I, Art. 49.]

It is obvious, as my learned brother has pointed out, that even in this particular instance, it might have happened that some member attended late, and not knowing of the time to which it had been adjourned, did not take part in the proceedings at the adjourned meeting. No doubt it is true that that is not alleged in this case, and that it probably did not happen. But that does not, in my opinion, affect the principles of law, on which, in dealing with a case of this kind, we must act, especially as the business which was transacted is of a very important kind, *viz.* the appointment of trustees, a matter concerning which the Courts are scrupulous to see that ordinary principles regulating the validity of election, &c., have been properly complied with.

The assumption of the District Judge that the second meeting was a mere continuation of the first is opposed to the actual fact and I do not think that it can be prop-

erly justified by a reference to dilatory habits and easy-going ways. If we are to accept that as a sufficient excuse for a departure from the ordinary principles regarding meetings of Committees, then it would be very difficult to draw the line; and I think that, as my learned brother has pointed out, it would lead to far greater confusion and injustice than the opposite view.

The learned Judge has cited an instance which he considers is in favour of his view, *viz.*, that at the first session of a newly constituted House of Commons, two University Members (no one else appearing) adjourned the House until His Majesty's pleasure be further known. But in my opinion that does not really support the view of the matter that he has taken. In that case there would necessarily be notice to all the Members of the House as to the time when they were to meet again; for His Majesty's pleasure would be signified in a form that would reach all members concerned in due time. Then, again, there is an arrangement in the House of Lords in England, by which if there is not a quorum of members at the proper time, there is automatically an adjournment to a definite hour later on. (See *Encyclopædia of the Laws of England*, Volume I, page 129) See also in the case of companies, there is usually a provision under which "if within half an hour from the time appointed for the meeting a quorum is not present, the meeting... shall stand adjourned to the same day in the next week at the same time and place." [8 Edw. VII. c. 69, Schedule I, section 52, and Indian Companies Act, 1913, Schedule I, section 52.] But that is quite a different case, for there is a definite time fixed for the adjourned meeting, which is known to all the members, so that they have an opportunity of attending at the proper time. In the present case no evidence was adduced that there was any similar practice in this case, and it is too late now to ask us to consider that point. In any case the time fixed, *viz.*, 3 P. M., is not alleged to have been a time fixed according to such a practice, but it happened to be the particular time selected by the two members.

Therefore, I agree with my learned brother

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that the appeal should be allowed and the order of the Subordinate Judge restored.

W. C. A.

Appeal allowed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 183 OF 1922.

February 26, 1923.

Present:—Mr. Pison, J. C.

Musammat BIBI AIMNA—

DEFENDANT—PETITIONER

versus

MOHAMMAD RUKAN ALAM—

PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 72, 76, 77—Refusal to register, refusal to admit for registration, and refusal to accept for registration, distinction between—Refusal to register—Appeal to Registrar—Suit to enforce registration, when maintainable.

For a suit to lie under section 77 of the Registration Act the following requisites are necessary:—

- (1) The presentation of the document required to be registered by a person authorised to present it to the Sub-Registrar;
- (2) A refusal to register by the Sub-Registrar;
- (3) An appeal within time to the Registrar;
- (4) A refusal to register by the Registrar; and
- (5) The institution of the suit within time.

[p. 186, col. 2.]
The expression "refusal to admit a document for registration" in section 72 of the Registration Act refers to cases where registration has been refused rather than to cases where a Sub-Registrar has declined to accept a document at all at the first stage of his proceedings. In other words, refusal to admit to registration and refusal to register are the same thing. There is, however, a distinction between the expressions "refusal to accept for registration" and "refusal to register." [p. 184, cols. 1 & 2.]

Gangaya v. Sayana, 21 B. 699; 11 Ind. Dec. (N. S.) 470; *Udit Upadhyaya v. Imam Bandi Bibi*, 24 A. 402; A. W. N. (1902) 99; *Yellambal Achi v. Goundasami Odayar*, 15 Ind. Cas. 370; (1912) M. W. N. 412 and *Shama Charan Das v. Joyenoolah*, 11 C. 750; 5 Ind. Dec. (N. S.) 1259, referred to.

Gangadara Mudali v. Sambasiva Mudali 34 Ind. 769; 19 M. L. T. 397; (1916) 2 M. W. N. 38, distinguished.

Therefore, in order to validate a suit under

section 77 of the Registration Act there must be a refusal to register and not merely a refusal to accept for registration. [p. 184, col. 2.]

Section 72 of the Registration Act must, however, be read widely as giving a general power of appeal in all cases where registration is refused and where refusal is not on the ground of non-execution. [p. 185, col. 2.]

Shama Charan Das v. Joyenoolah, 11 C. 750; 5 Ind. Dec. (N. S.) 1259, relied on.

There is no authority for the proposition, that where the Sub-Registrar refuses registration on a number of different grounds, there is no appeal to the Registrar under section 72 of the Registration Act, merely by reason of the fact that one of those grounds refers to a question of limitation. [p. 185, col. 2.]

Petition for revision of the order of the Divisional Judge, Derajat, dated 12th June 1922, reversing the order of the Munsif 1st Class, Kohat, dated 22nd December 1921.

Mr. Saaduddin Khan, K. S., for the Petitioner.

Mr. S. Abdul Ali Khan, for the Respondent.

JUDGMENT.—The plaintiff in this case instituted a suit under section 77 of the Registration Act for a decree directing the registration of a document executed on the 23rd of January 1921 between Rukan Alam and his wife Musammat Aimna. Musammat Aimna denied execution of the document and the question of the execution was alone put in issue. The first Court held that execution was not proved and dismissed the suit. The Divisional Judge on appeal by the plaintiff held that execution was proved and passed a decree directing registration. In the first Court the plaintiff's Counsel claimed the framing of an issue on the question whether a suit under section 77 of the Registration Act would lie. The Munsif on the same day declined to deal with the question in a short order which simply states that there is no need to alter or add to the issue. I regard this refusal as a material irregularity. The jurisdiction of the Court was challenged on grounds which clearly deserved consideration, and an issue should have been framed and adjudicated upon. The question was naturally not raised in the grounds of appeal in the Divisional Court as the plaintiff was the appellant and, as the judgment of the Divisional Court is silent on the subject, it may also be assumed that it was not there argued. The question, however,

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appears to me of considerable importance and I have, therefore, at the instance of the defendant, taken up this question on the revisional side. The finding of fact by the Divisional Court that the document was duly executed by the defendant will not be re-opened. The present proceedings deal solely with the question of law involved. The history of the case before the registering authorities is as follows:—The document, as already stated, was executed on the 23rd of January 1921. On the 22nd of June 1921 or nearly five months after execution the plaintiff made an application to the Registrar which is headed as an application under section 36 of the Act. The application states that registration is allowable as the 4 months prescribed for registration has expired and fifth month is beginning and that registration can be permitted on payment of penalty fees within an additional four months. The application recites that the defendant is intentionally keeping out of way and a request is made that she be summoned. The Registrar on receiving this application simply endorsed upon it on the same day: "To go to the Sub-Registrar." The application was received by the Sub-Registrar on the 29th of June and on that day the plaintiff was present. The Sub-Registrar gave orders that the defendant was to be served with a notice for the 8th of July. On that day the parties duly appeared. The Sub-Registrar then passed the following order:—*Musammat Aimna* denies completion and execution of the document. The document was written on the 23rd of January 1921 and was presented to the Registrar on the 22nd of June 1921, which is also time barred. This agreement is vague (*mohmal*). It is written jointly on behalf of *Musammat Aimna* and *Rukan Alam*. There should have been a separate agreement by *Rukan Alam* and a separate agreement on behalf of *Musammat Aimna*. Therefore, in these circumstances, registration is refused." The plaintiff then put in an appeal to the Registrar under section 72 of the Act. The Registrar rejected the appeal *in limine* by an order stating that as registration was refused on the ground of denial of execution, the appellant should have applied under section 74 of the Registration Act and not under section 72. The plaintiff

then instituted the present suit within 30 days of the order of the Registrar rejecting his appeal.

It is argued for the petitioner that compliance with all the provisions of the law of Registration must be established to allow the institution of a suit under section 77 of the Registration Act. It is contended that, in this case, there has been no "refusal to register," but merely a "refusal to accept for registration." The document was not presented for registration within 4 months of its execution as prescribed by section 23 of the Act. No application was made to the Registrar under section 25 of the Act for extension of the time allowed for presentation and no such extension was granted. There is no adjudication by the Registrar on an appeal under section 72, or on an application made under section 75 and consequently no refusal to register under section 72 or 76, a refusal to register under one or other of these sections being an indispensable requisite to create the right to sue under section 77. It is urged that in this case the Sub-Registrar rightly declined to accept the document for registration as presented after time, and that there is preponderance of authority for the view that such "refusal to accept" is distinguishable from refusal "to register." The argument may be viewed from two standpoints. One is the legal effect of refusal to accept as opposed to refusal to register. The other is, whether, even assuming that there has been a refusal to register, the provisions of the Law of Registration have been sufficiently complied with in this case to enable the plaintiff as against this refusal, to sue under section 77 for a direction that the document be registered. It is not easy to treat these two aspects of the case entirely independently. The distinction, if it exists, between refusal to accept for registration and refusal to register itself depends upon what view is taken of the requirements of the law of registration.

There are three different expressions used in the Act: Refusal to register, refusal to admit for registration and refusal to accept for registration. It is tolerably clear that section 72, where it says that "An appeal shall lie against an order of the Sub-Registrar refusing to admit a document for registration," refers to cases when registration

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tration has been refused rather than to cases where a Sub-Registrar has declined to accept a document at all at the first stage of his proceedings; in other words, refusal to admit to registration and refusal to register are the same thing. The Act, however, evidently intended some distinction between refusal to accept for registration and refusal to register. Section 19 of the Act lays down that the registering officer shall refuse to register a document which is in a language which he does not understand. The immediately succeeding section, section 20, lays down that a registering officer may in his discretion refuse to accept for registration any document in which an interlineation, erasure, etc., etc., occurs. Section 21 again uses the expression "accept for registration" in prescribing the conditions necessary for the proper description of property to which a document relates. Clearly, the Legislature must, in framing these sections, have had some object in view in using two different expressions. This further is the view generally taken by High Courts in India. *Gangava v. Sayava* (1) is very definite in this respect. Another authority is *Udit Upadhia v. Imam Bandi Bibi* (2). As against this there is a well-known ruling of the Madras High Court *Gangadara Mudali v. Sambasiva Mudali* (3) in which the view is taken that no distinction exists between refusal to register and refusal to accept for registration so far as regards the provisions of section 77, and that both can equally validate a suit under that section. The ruling in question dealt with a case in which the circumstances were most peculiar and in which the plaintiff had been prejudiced by advice given to him by the Sub-Registrar which had had the effect of an unexpected order passed by the Collector under section 25 of the Act refusing to extend the time. That ruling, if it were followed, would have an important bearing upon the present case inasmuch as it is an authority for the view not only that refusal to accept and refusal to register are the same thing but that when the refusal is based upon non-presentation within time, a Court is nevertheless entitled

to hear a suit brought under section 77. The force of the ruling, however, is considerably weakened by the fact that the two Judges who composed the Bench were not unanimous and also the fact that the circumstances of the case were so peculiar that the law may almost be said to have been to some extent twisted to avoid an inequitable result. We find, indeed, that the Madras High Court itself has not followed that precedent to its logical conclusion. In a case reported as *Yeliambal Achi v. Govindasami Odayar* (4) it was held that no appeal would lie to a Registrar under section 72 when the Sub-Registrar had merely refused to take up a document for registration under section 20. It is not quite clear why the term "take up" is used instead of the term "accept." Possibly, this was to avoid conflict with the previous case in which it was laid down that no distinction between refusal to accept and refusal to register could be maintained. There is, however, another important authority *Shama Charan Das v. Joyenoolah* (5) for the view that when a Registrar has refused to extend time such refusal may create the right to sue under section 77. That case related not to refusal to extend the time for presentation under section 25 but to a refusal to extend the time for the admission of execution under section 34. It is a little difficult to reconcile that judgment with the view generally taken by the same High Court that refusal to accept for registration and refusal to register are to be distinguished. If a Registrar declines to extend time under section 34 the obvious presumption would seem to be that there has been a refusal to accept for registration. There can be little doubt that the distinction between refusal to accept for registration and refusal to register must be preserved, and that to validate a suit under section 77 there must have been a refusal to register. It appears to me, however, that too much stress has been laid upon the ground of refusal as opposed to the stage of the proceedings at which the refusal was made. The refusal to accept for registration implies a refusal to take up the

(1) 21 B. 699; 11 Ind. Dec. (N. S.) 470.

(2) 24 A. 402; A. W. N. (1902) 99.

(3) 34 Ind. Cas. 779; 19 M. L. T. 397; (1916) 2 M. W. N. 38.

(4) 15 Ind. Cas. 370; (1912) M. W. N. 412.

(5) 11 C. 750; 5 Ind. Dec. (N. S.) 1259.

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case *in limine*, whereas a refusal to register postulates something more than a mere security of the date and outward form of the document. Now what we clearly have to consider in the present case is whether there was a refusal to register which cannot be explained alone on the ground that the document was not presented within time. The Act may, I think, be considered exhaustive as regards the case in which refusal to accept for registration is warranted and in each case there is a remedy. If acceptance is refused under section 20 it is tolerably simple for correction to be made by the executants and for the document to be presented again. Under section 21 the defects in the document may be cured by attaching the necessary descriptions of the property. If acceptance of the document is refused under section 23 because it has not been presented within time, the person presenting can apply to Registrar under section 25 for time to be extended. It is clearly not the intention of the Act to give the Sub-Registrar a final voice in a decision in cases where any contentious question is involved. Under section 68 (1) of the Act he is under the superintendence and control of the Registrar. Now, when we come to the question of refusal to register as opposed to refusal to accept *in limine* it is quite clear that the Act is not exhaustive. In fact, the only sections which directly refer in so many words to refusals to register by a Registrar are section 19 and section 35. There may be numerous other grounds on which registration is actually refused. Section 35 deals with refusal to register on the ground of non-execution and a special remedy against such refusal is provided for by section 73. Unless, therefore, it is assumed that the Act is not exhaustive, the only other ground of refusal would be that given in section 19 which relates solely to the rare case in which a document is in a language which the Registrar does not understand. Now, section 72 provides for an appeal to the Registrar in all cases of refusal to register other than those in which the refusal is on the ground of non-execution. It is inconceivable that section 72 applies only to cases where registration is refused under section 19. The ruling already quoted *Shama Charan Das v. Joyenoolah*

(5) is a good authority for the view that section 72 must be read widely as giving a general power of appeal in all cases where registration is refused and where refusal is not on the ground of non-execution. The learned Judges may, perhaps, have gone too far in including among the orders appealable under section 72 an order of refusal based upon the ground that extension of time was not allowed under section 34. But if they are held to have gone too far it must be solely for reason of the fact that a refusal on the ground of non-appearance within time is a refusal to accept for registration and not a refusal to register. In all case where actually registration has been refused on grounds other than the denial of execution section 72 applies. I can see no authority for the proposition, that, when a sub-Registrar refuses registration, as in the present case, on a number of different grounds, there is no appeal to the Registrar under section 72 merely by reason of the fact that one of those grounds referred to a question of limitation. Further, in the present case it is to my mind clear from the order of the Sub-Registrar dated the 8th of July 1921 that the question of limitation was not the main ground for refusal. The remark that the presentation is also time-barred seems to be rather in the nature of an *obiter dictum*. The Sub-Registrar was refusing to register mainly on the ground that the document was vague, that it was not executed in counter-part, and that execution was denied. There was, therefore, in the present case, in my opinion, a clear and unmistakeable refusal to register and one which was made not at the preliminary hearing but after a regular proceeding to which both parties had been summoned. The concluding words of the order corroborate this view. The contention that there was nothing more than a refusal to accept for registration cannot be sustained.

The finding, however, that there has been a refusal to register and not a mere refusal to accept for registration does not finally dispose of the petitioner's contention that in the present case the requirements of the Law of Registration have not been complied with. It is argued that the presentation of the document after

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the period allowed by section 23 and the omission of the plaintiff to apply for and obtain an order extending the time under section 25 are fatal to his power to sue. I am not prepared to accept this contention in the present case. The application made to the Registrar on the 22nd of June 1921 is, no doubt, described as one under section 36, to compel the attendance of the other party, but it also most clearly implies a demand that time for presentation be extended. It seems to assume that this demand will be granted. The Registrar made no inquiry into this question and merely forwarded the application to the Sub-Registrar. This may be regarded either as an acceptance of the application that time should be extended or it may be regarded as a direction to Sub-Registrar to report upon the question; it can at least not be interpreted in any way as a refusal to extend time. If such a refusal was implied there would have been no meaning in the transmission of the document to the Sub-Registrar. It may be argued, however, that, once the Sub-Registrar had said that the presentation was time-barred, the plaintiff could and should have moved the Registrar under section 25 to allow an extension of time. It appears to me that it was extremely difficult for the plaintiff to know how to act. Registration had been refused by the Registrar on a number of grounds. Some of these grounds would have warranted an appeal under section 72 and another an application under section 73. There was the difficulty that the procedure is not the same in these two sections. Section 72 relates to an appeal which is heard, without fresh evidence as an appeal, and section 73 refers to an application on which the Registrar acts in an original capacity. In view of the nature of the order passed by the Sub-Registrar I hardly think that the plaintiff could be blamed for making his application in the form of an appeal under section 72. He undoubtedly had the right to appeal under that section and there was no doubt that he was intending *bona fide* to move the Registrar to exercise his powers under the Act to give him redress against an order refusing registration. The case became still further complicated when the Registrar refused even to take up the appeal under section 72

on the ground that there was denial of execution and that, therefore, an application should have been made under section 73. It seems to me that the plaintiff was at least entitled to assume that the Registrar had refused to order the document to be registered under section 72 and that, therefore, his proper remaining remedy was to come to the Civil Court under section 77. There is a consensus of rulings to the effect that, for a suit to lie under section 77, the following requisites are necessary:—

1. The presentation by a person authorised to present the document to the Sub-Registrar.

(2) A refusal to register by the Sub-Registrar.

3. An appeal within time to the Registrar.

4. A refusal by the Registrar; and

5. The institution of the suit within time.

I am unable to see in the present case that any of these requisites have been omitted. There has been presentation to a Sub-Registrar by a person authorized to present. There has been a refusal by the Sub-Registrar and, as I have already shown, not a mere refusal to accept for registration. There has been an appeal within time to the Registrar. There has been a refusal by the Registrar to direct registration and there has been the institution of a suit within 30 days from that refusal. In Holmwood's Law and Practice of Registration in India the broad proposition is laid down that when a Registrar has refused to order the document to be registered under section 72 or section 76 there is nothing in section 77 to oust the jurisdiction of a Civil Court. There has been a refusal to register under section 72 and it cannot be said that, because there has not also been a refusal under section 76, the jurisdiction of the Civil Court is ousted. Whether or not the plaintiff could and should under the Registrar's order of the 22nd of June 1921 have lodged a further application under section 73 (out of which section 76 arises) seems to me immaterial. He was undoubtedly entitled to appeal under section 72 and he did so. The rejection of the appeal *in limine* appears to me to amount to exactly the same thing as its dismissal on the merits. I must hold, therefore, in the present case

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that no defect in procedure has been shown which would oust the jurisdiction of the Civil Court under section 77 of the Act and that the present suit was, therefore, legally brought. In view of this finding there is no reason for me to interfere in the order of the Appellate Court and I dismiss this application for revision with costs.

Z. K.

*Application dismissed.***BOMBAY HIGH COURT.**

APPEAL FROM APPELLATE DECREE No.
461 OF 1922.

March 15, 1923.

Present—Sir Norman Macleod, Kt., Chief
Justice, and Mr. Justice Crump.

HARJIVAN DEVRAJ AND ANOTHER—
DECREE-HOLDERS—APPELLANTS

versus

GAJANAN KASHINATH NAIK—

JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182
—*Civil Procedure Code (Act V of 1908), O.*
XXXIV, r. 4—Mortgage suit—Preliminary decree
—*Application to make decree final—Limitation,*
operation of.

A preliminary decree in a mortgage suit must be made final before it can be executed, and an application to make such a decree final must be made within three years and six months from its date. Such an application cannot be looked upon as a proceeding in execution, and the fact that a previous application, made within the period prescribed, is dismissed for want of prosecution will not avail to save limitation for a subsequent application made after the expiry of that period.

Second appeal against the decision of the District Judge, Thana, in Appeal No. 14 of 1921.

Mr. P. B. Shingne for the Appellants.

JUDGMENT.—On the 29th June 1911 the plaintiffs obtained a decree in the Court of the First Class Subordinate Judge at Thana on a simple mortgage. The decree directed as follows:—"The defendant do pay to the plaintiffs Rs. 598 and costs within 6 months from this date or do pay the same into Court. In default,

the plaintiffs do get the mortgaged property or a sufficient portion thereof sold and do recover their amount." That was a decree under O. XXXIV, r. 4, Civil Procedure Code, which corresponded to section 88 of the Transfer of Property Act as it stood prior to the passing of the Civil Procedure Code. Sections 85 to 90, 92, to 94, 96, 97, 99 and part of 100 of the Transfer of Property Act, IV of 1882, were repealed and re-enacted in the Civil Procedure Code in O. XXXIV with certain variations, decrees passed in accordance with the provisions of sections 86 and 88 of Act IV of 1882 were regarded by some Courts as final decrees and by some Courts as preliminary decrees, with the result that there was a conflict of decisions on the question whether any further proceedings should be treated as in execution or as applications to make the decree final. That conflict was set at rest by the alteration made in section 89 when it became O. XXXIV, r. 5, whereby it was directed that the Courts should pass a final decree, the terms of which would depend upon whether the mortgage amount had been paid or whether there had been default. Unfortunately, sections 86, 88 and 92 were not materially amended when inserted in the Civil Procedure Code as O. XXXIV, rr. 2, 4 and 7, with the result that not only those rules but also the forms 3, 4 and 5 of preliminary decrees appearing in Appendix D are misleading. An ordinary layman and even a lawyer might well think that all that is necessary after a decree has been obtained under one of those rules and drawn up in accordance with the relative forms is to apply to the Court in execution to get the mortgaged property sold, purchased or redeemed. In this case the plaintiff on the 7th December 1913 took out a *darkhast* to make the decree final which was not prosecuted. We do not think, although it was called *darkhast*, that the Court would be entitled to look upon it on that account as a proceeding in execution considering that the application really was to make the decree final. A similar *darkhast* was issued on the 24th April 1915 which was also dismissed for want of prosecution.

Now, the time allowed for applying to the

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Court for making a decree final is three years from the time when the right to apply accrues under Art. 181, First Schedule of the Limitation Act. So that after three years and 6 months from the 29th June 1911 the plaintiffs were time-barred from asking the Court to make the decree final.

On the 25th April 1918 an application was made to make the decree final and that was rejected as being out of time. The plaintiffs have appealed from the rejection of their application. Since it is clear under the provisions of the Code that there has been only a preliminary decree which must be made final before it can be executed, all the previous applications were futile to prevent the present application being time-barred. The decision of the learned Judge in the Court below dismissing the application was right, and the appeal, therefore, must be dismissed.

It might be desirable, until the rules in O. XXXIV and the corresponding forms are re-cast, that the Courts when drawing up preliminary decrees under rules 2, 4 and 7 should add the following heading, "Preliminary decree which requires to be made final within the prescribed period of limitation before it can be executed."

W. C. A.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2078 OF 1920.

November 29, 1922.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

DRONAMRAJU RAMA RAO AND OTHERS
—DEFENDANTS—APPELLANTS

versus

KISSAPRAGADA VEDAYYA
AND OTHERS—PLAINTIFF AND
DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 28, 29—Place of registration—Mortgage-deed—Property not mortgaged included to give jurisdiction to particular Registrar—Registration, validity of—Personal covenant, suit on, whether maintainable—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 116.

Where certain property which is not intended to be mortgaged is included in a mortgage-deed merely to give jurisdiction to a particular Sub-Registrar to register the deed, the properties really intended to be mortgaged being situate outside the jurisdiction of the Sub-Registrar, the registration of the deed as a mortgage-deed is invalid as being in fraud of the Registration Law. [p. 189, col. 1.]

Harendra Lal Roy Chowdhuri v. Hari Dasi Debti, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.), *Biswanath Prasad v. Chandra Narayan Chowdhury*, 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.) relied on.

Notwithstanding the invalidity of the deed as a mortgage, however, a personal covenant to pay contained in such deed, is valid and enforceable inasmuch as under section 29 of the Registration Act a deed containing such a covenant can be validly registered at any place where the parties to it desire and a claim based on such a covenant is governed by Art. 116 of Schedule I to the Limitation Act. [p. 189, cols. 1 & 2.]

Joginee Mohun Chatterjee v. Bhoot Nath Ghosal, 29 C. 654; 6 C. W. N. 856, *Biswanath Prasad v. Chandra Narayan Chowdhury*, 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.), followed.

Amba v. Shrinivasa Kamath, 68 Ind. Cas. 754; 26 C. W. N. 369; 14 L. W. 575; (1922) A. I. R. (P. C.) 135 (P. C.), *Ram Narayan Singh v. Adhindra Nath Mukerji*, 38 Ind. Cas. 932; 44 C. 388; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 32 M. L. J. 39; 25 C. L. J. 121; 21 C. W. N. 383; 19 Bom. L. R. 194; 44 I. A. 87 (P. C.), *Sham Lal v. Tehariya Lakhmi Chand*, 58 Ind. Cas. 278; 18 A. L. J. 476; 2 U. P. L. R. (A) 102, referred to.

Per Devadoss, J.—Where a document consists of two or more parts or where there are two or more covenants in a document, the mere fact that one part or one covenant becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act, does not necessarily make the other parts or covenants of the document invalid or inoperative. [p. 192, col. 1.]

Kalka v. Mathura Das, 50 Ind. Cas. 220; 21 O. C. 341, dissented from.

Second appeal against a decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 89 of 1919, preferred against the decree of the Court of the District Munsif, Amalapuram, in Original Suit No. 239 of 1913.

Messrs. Narayanamurthi and K. Ramamurthi, for the Appellants.

Messrs. G. Lakshmananna and Somasundaram, for the Respondents.

JUDGMENT.

Phillips, J.—In this suit it has been found that one square yard of house site was included in the mortgage-deed merely

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to give jurisdiction to the Peddapur Sub-Registrar, who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. Following the decision in *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1) and *Biswanath Prasad v. Chandra Narayan Chowdhury* (2) it has been held that the mortgage-deed is invalid as being "in fraud of the Registration Law." The learned Subordinate Judge has, however, found that the general personal covenant to re-pay is not invalid and has given a decree for the part of the claim that is not barred by limitation, holding that Art. 116 of the Limitation Act is applicable in accordance with the ruling of Ameer Ali, J., in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* (3). In appeal it is contended that that ruling is wrong, and that as the registration of the mortgage-deed is invalid, the document as a whole must be treated as unregistered, and consequently the covenant to re-pay must also be treated as an unregistered covenant.

What was held by the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1) and upheld in *Biswanath Prasad v. Chandra Narayan Chowdhury* (2), was that "an entry intentionally made use of by the parties for the purpose of obtaining registration in a District where no part of the property actually charged and intended to be charged in fact exists is a fraud on the Registration Law and no registration obtained by means thereof is valid." The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the present case, the object attained by the fraud was the registration of the mortgage-deed as such, for had the document been merely a covenant to re-pay, the Peddapur Sub-Registrar would have had jurisdiction under section 29 of the Registration Act (Act XVI of 1908), for under that section parties are at liberty to choose

their own place of registration. In so far then as the document evidenced a mere covenant to re-pay there was no fraud upon the Registration Law, and to hold that such registration was invalid would be to extend the principle above-mentioned so as to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud. To do this appears to me to extend the principle to inequitable length and I am supported in this view not only by the direct ruling of Ameer Ali, J., in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* (3) but also by the action of the Privy Council in the case reported as *Biswanath Prasad v. Chandra Narayan Chowdhury* (2), for that case was remitted to the Calcutta High Court for a decision as to whether the plaintiff had a valid alternative claim for a personal judgment for the mortgage-debt. No doubt, there was no finding that the claim for a personal decree was based upon a contract in writing registered but it would appear from a perusal of the argument in the case reported as *Mathura Prasad v. Chandra Narayan* (4) that a period of limitation of 6 years was contemplated, the argument being that a payment of interest in 1903 would save limitation for the suit brought in 1908. Unless it was the opinion of the Court that the debt was secured by a registered instrument the argument would have been of no avail, for such a payment was not within three years of institution of the suit, and the suit would have been barred if based upon the personal covenant. Had that been the case, it appears to me improbable that the case would have been remitted for a consideration of the claim. I am, therefore, of opinion that the decision in *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* (3) is right and that the registration of the personal covenant to re-pay is not procured by fraud and is consequently valid. The other cases cited in *Amba v. Shrinivasa Kamathi* (5) and *Ram Narayan Singh v. Adhindra Nath*

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(2) 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.).

(3) 29 C. 654; 6 C. W. N. 856.

(4) 60 Ind. Cas. 833; 25 C. W. N. 985; 40 M. L. J. 489; 19 A. L. J. 385; 33 C. L. J. 440; 23 Bom. L. R. 629 (1921) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413; 2 P. L. T. 397 (P. C.).

(5) 68 Ind. Cas. 754; 26 C. W. N. 369; 14 L. W. 575; 1922 A. I. R. (P. C.) 135 (P. C.).

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Mukerji (6) do not appear to have any bearing on the present case and the facts reported in *Sham Lal v. Tehariya Lakhmi Chand* (7) are too vague to give that case any value here.

The second appeal is accordingly dismissed with costs.

The Memo of Objections must also be dismissed with costs as the lower Court exercised its discretion in awarding a personal remedy and was entitled in so doing to reduce the rate of interest contracted for in the mortgage-deed.

Devadoss, J.—The plaintiff brought the suit as transferee of an hypothecation bond executed by the first defendant in favour of one Seshayya impleading defendants Nos. 5 to 7, the undivided sons of Seshayya and the alienees of some portions of the hypothecation. Various contentions were raised by the defendants. The District Munsif of Amalapuram dismissed the suit on the ground that the registration of the document was invalid as a parcel of land not belonging to the defendants Nos. 1 to 4 was included in the document only for the purpose of giving jurisdiction to the Sub-Registrar who registered the document and that the claim was barred by limitation. On appeal the Subordinate Judge of Rajahmundry held that the document was invalid as a mortgage-deed and that the suit was not barred by limitation and gave a money-decree to the plaintiff. The defendants Nos. 1, 2, 4 and 11 have preferred this second appeal.

It is contended by Mr. Narayanamurthi for the appellants that the registration of the document was in fraud of the Registration Law, and that the document cannot be treated as a registered document for any purpose and, therefore, Art. 116 of Limitation Act did not apply to the case; he relied upon *Harendra Lal Roy Chowdhury v. Hari Dasi Debi* (1), *Biswanath Prasad v. Chandra Narayan Chowdhury* (2), *Amba v. Shrinivasa Kamath* (5) and *Kalka v. Mathura Das* (8). In *Harendra Lal Roy*

(6) 38 Ind. Cas. 932; 44 C. 388; 21 M. L. T. 12; 15 A. L. J. 107; (1917) M. W. N. 94; 32 M. L. J. 39; 25 C. L. J. 121; 21 C. W. N. 383; 19 Bom. L. R. 194; 44 I. A. 87 (P. C.).

(7) 58 Ind. Cas. 278; 18 A. L. J. 476; 2 U. P. L. R. (A.) 102.

(8) 50 Ind. Cas. 220; 12 O.C. 341.

Chowdhury v. Hari Dasi Debi (1), the plaintiff brought the suit upon mortgage-deed registered in Calcutta. The defendant contended among other things that the deed had not been legally registered because no portion of the property mortgaged was situate in Calcutta. It was found that the only portion of the property alleged to be in Calcutta was described as "25, Guru Das Street." But the property so described was found to be non-existent. Their Lordships of the Privy Council held "that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry, intentionally made use of by the parties for the purpose of obtaining registration in a District where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item." In *Biswanath Prasad v. Chandra Narayan Chowdhury* (2) "a mortgage-bond for Rs. 8,000 which purported to mortgage a 7-anna share in a village in the Darbhanga District and a one *kauri* share in the Muzaffurpur District was registered only in the Muzaffurpur District. The mortgagor had purchased the one *kauri* share shortly before the execution of the mortgage and in order that he might register in Muzaffurpur. He paid Rs. 50 for the one *kauri* share, but there was no registered instrument or delivery of possession as required by section 54 of the Transfer of Property Act, 1882. Their Lordships found that none of the parties intended that the one *kauri* share should vest in the mortgagor or pass under the mortgage." Viscount Finlay in delivering the judgment of their Lordships: "In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one *kauri* share in *Mouza Kolhua*

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should vest in Udit (Narayan) or should pass by the mortgage from him to the mortgagee. This case differs *toto celo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument and which both parties had intended should form part of the security." With regard to the contention that a personal decree should be passed in favour of the plaintiff the noble Viscount observed: "As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time, their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made; and, further, whether, under all the circumstances, the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs. The appeal, so far as it relates to the enforcement of the mortgage on the land, must, in their Lordships' opinion, be dismissed." In that case the mortgage-bond was dated 27th February 1902; the amount of the bond was payable on the 7th September 1902. The suit was instituted on 14th September 1908. It may be safely assumed that the plaintiff could not have expected to get a personal decree against the mortgagor unless Art. 116 was held applicable to the case. No doubt, the respondents were not represented before the Privy Council. But it is quite clear from the order of their Lordships remanding the case to the High Court to enable the plaintiff to amend his plaint and claim a personal decree that they thought that the personal remedy was not barred. Though their Lordships did not say so in so many words in their judgment, it is quite apparent what their

view was from the observation of their Lordships in the course of the argument.

With reference to the contention of the appellants' Counsel that "in any case there is no reason why we should not have a personal decree for money."

Sir John Edge observed: "if this was merely a suit to recover money, would not limitation have run" and Counsel for the appellant answered "no, payment of interest saves it." Then Lord Shaw said: "That payment of interest was in 1903."

The contention that the registration which is ineffectual to validate a document required by law to be registered cannot avail for any other purpose seems untenable.

Under section 17 of the Registration Act, certain classes of documents

- (1) gifts of immovable property;
- (2) non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish any title or interest in immovable property of over Rs. 100 in value;
- (3) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right or interest;
- (4) leases of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent; are required to be registered in order to be valid and if they are not registered under section 49 of the Act, they cannot affect the immovable property comprised therein or shall be received as evidence of any transaction affecting such property.

Other documents are registrable at the option of the parties. Under section 28 of the Act the class of documents mentioned in section 17, sub-section (1), clauses (a), (b), (c) and (d) and section 18 clauses (a), (b) and (c) shall be presented for registration in the office of a Sub-Registrar within whose Sub-District the whole or some portion of the property to which such document relates is situate. By section 29 every document other than those referred to in section 28 may be presented for registration either in the office of the Sub-Registrar in whose Sub-District the document is executed, or in the office of any other Sub-Registrar at which all the persons executing the same

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desire to. There is nothing in the Registration Act, therefore, to prevent the registration of a simple money-bond in the office of any Sub-Registrar at which the parties desire to have the document registered.

A simple mortgage usually contains a personal covenant to pay. In fact in almost all the mortgage transactions in this Presidency there is a personal covenant by the mortgagor to re-pay the mortgage amount personally. The portion of the document in which there is a transfer of specific immoveable property as security for money is severable from the portion in which the mortgagor undertakes to re-pay personally the money advanced or to be advanced to him. Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts of the document invalid or inoperative. Though that portion of the document which by law is required to be registered would be invalid unless registered in accordance with the rules governing registration of documents yet the portion of the document optionally registrable would be valid as the parties have consented to present it in the office of the Sub-Registrar by whom it is registered. It is clear from the observation at page 517 in 48, Calcutta 509 "[*Biswanath Prasad v. Chandra Narayan Chowdhury* (2)] the appeal, so far as it relates to the enforcement of the mortgage on the land, must, in their Lordships' opinion, be dismissed" that their Lordships did consider the document to be a valid one so far as the claim for a money-decree was concerned.

The case in *Amba v. Shrinivasa Kamathi* (5) has no application to this case. Their Lordships observe: "It was not and is not disputed that these two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian and had never been appointed her legal guardian, and was not, therefore, her assignee or representative within the meaning of section 3 of the Registration

Act, 1877. He was not an executant of the said deeds or either of them; neither was he, within the meaning of the section 34 of that Act, the representative, assign or agent duly authorised on behalf of Krishna Kamathi, deceased, the only executant. The presentation by him of these two deeds for registration was in direct conflict with the express provisions of this 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity; and, if that be so, as in their Lordships' opinion it must be held to be, it is not disputed that the deeds would be void and unenforceable." In that case there was no valid presentation of the document and not as in the present, all the parties to the document wanted to get round the provisions of the Registration Act by recitals intended to mislead the Sub-Registrar to do what he would not otherwise have done. The registration of a document by false personation would be no registration at all, and the document being a fraudulent document becomes unenforceable against the party sought to be bound by it as he never consented to the registration being effected by a person falsely personating the executant. That class of cases differs from the present where both parties with their eyes open get a document registered with the intention of treating the document as a validly registered document, but for purposes of convenience or other reasons they violate the specific provisions of section 28 which requires that documents of a certain class should be registered by a Sub-Registrar within whose Sub-District the whole or any portion of the property comprised in the document is situate. The case in *Kalka v. Mathura Das* (8) is of the Judicial Commissioner's Court of Oudh. No doubt, the Judicial Commissioner held that where registration is invalid for one purpose it is invalid for all purposes. This view is evidently on the assumption that all the covenants in a document and all the parts of the document form one indivisible whole. A mortgage-deed, as I have said above, contains more than one part and more than one covenant. A mortgagee can give up his security and sue on the personal covenant alone. He may choose to sue for all or any of the remedies

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in respect of it. To read an ordinary mortgage document as one indivisible whole is opposed to the recitals therein and the intention of the parties to the document.

Mr. Lakhshman for the respondent relied upon *Ram Narayan Singh v. Adhindra Nath Mukerji* (6). It was a case in which a mortgage document which by law is required to be attested by two or more witnesses was not so attested. Their Lordships of the Privy Council held that the document could not be treated as a mortgage document as it contravened the provisions of law which laid down the essentials for a valid mortgage-deed and the absence of the necessary requisite prevented the document taking effect as a mortgage. But it was treated as a simple money-bond. The case which is directly in point is the decision of Mr. Justice Ameer Ali (now a member of the Judicial Committee of the Privy Council) reported as *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal* (3). The learned Judge observed: "I am not satisfied that there was any such property as No. 251-2 belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah so as to give him, under section 28 of the Registration Act, jurisdiction to register the document. If I am right in that conclusion, it follows that the document cannot take effect as a mortgage-deed; but, as it is registered, although the suit has been brought more than three years after the date of execution the claim is not barred as was contended for by the defendant's Counsel." This decision was long before the ruling of the Privy Council reported as *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1) which settled the law on this point. Though the learned Judge did not give reasons for holding that the document which was invalid as a mortgage on account of want of jurisdiction of the Sub-Registrar who registered the document was a valid document for purposes of limitation, yet his opinion is entitled to great weight, and it is in consonance with reason. The Registration Act does not prohibit the use of a document as a registered one if the provisions of section 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one. I, therefore, hold that the plaintiff document is a registered

document so far as the personal covenant contained in it is concerned and, therefore, Art. 116, Limitation Act, applies to the case. The Subordinate Judge has rightly held that the suit is not barred by limitation. The second appeal fails and is dismissed with costs.

The plaintiff did not sue in the first instance on the personal covenant alone. He based his suit on the footing of a valid mortgage and prayed for a mortgage decree. In the circumstances, the rate of interest allowed to him by the lower Appellate Court is fair, and there is no reason to interfere with the discretion of the lower Appellate Court. The Memorandum of Objections is dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 19, 1923.

Present:—Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

SURAPATI ROY AND OTHERS—

APPELLANTS

versus

RAM NARAYAN MUKERJI AND OTHERS

—RESPONDENTS.

Bengal Tenancy Act (VIII. of 1885), s. 12—Permanent tenure, transfer of, when complete.

Under section 12 of the Bengal Tenancy Act, a transfer of a permanent tenure by a registered document is complete as soon as the document is registered. [p. 195, col. 2.]

Hamendra Nath Mukerji v. Kumar Nath Roy, 12 C. W. N. 478 and *Kristo Bullun Ghose v. Kristo Lal Singh*, 16 C. 642; 8 Ind. Dec. (N. S.) 424, followed.

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Appeals against the decrees of the Calcutta High Court, dated May 26, 1919, modifying those of the Subordinate Judge, Hoogly, dated February 28, 1917, which had affirmed the decrees of the Munsif, dated September 30, 1915.

Mr. *Beyram*, for the Appellant.

Mr. *Wallach*, for the Respondent.

JUDGMENT.—These consolidated appeals arise out of two suits brought by the plaintiff, a *putnidar* under the Burdwan Estate, to recover rent from the defendants in respect of three *dar-putni taluks* they held under him. The Burdwan Raj contains a large number of *putni* tenures, and subinfeudation is recognised and largely given effect to in that Estate. Not only are *putnidars* entitled to grant sub-tenures called *dar-putnis*, but the *dar-putnidar* on his side can grant subordinate-tenures under himself which bears a designation of *se-putni*. The plaintiff's case is that the fifteen defendants whom he sued for the *dar-putni* rents of the three *dar-putni taluks* were all jointly interested in the under-tenures. The defendants, other than defendants Nos. 3, 14 and 15, contended that although, originally, they held a share in the *dar-putni* tenure, they had, on the 25th August 1906, conveyed their 12-annas interest to one Ramtarak Bhattacharjee as the *benamidar* of the defendants Nos. 3, 14 and 15 and that two years later, *viz.*, in June 1908, Ramtarak had, by a registered document, renounced all interest in the *dar-putni* in favour of the defendants Nos. 3, 14 and 15 acknowledging that they were the real purchasers and that he was only their *furzidar*. The defendants, other than Nos. 3, 14 and 15, accordingly urged that they were not liable for the rent of the under-tenure and were wrongly sued.

It appears that after the execution of the deed of sale in 1906, the plaintiffs have instituted against these several defendants, including defendants Nos. 3, 14 and 15, suits for rent in which the defendants, other than defendants Nos. 3, 14 and 15, denied their liability on the ground that they had parted with their interest in favour of their co-defendants Nos. 3, 14 and 15, and that in those suits the Court before whom the question came for trial had held that the contending defen-

dants had failed to establish that the transaction was *bona fide* and not a mere sham; and had declared that, notwithstanding the transaction of 1906, the plaintiff was entitled to rent from all the defendants, and had decreed his claim accordingly. There were further suits between the parties; the same contentions were raised by the defendants, other than defendants Nos. 3, 14 and 15; but the defence was disallowed on the ground that the question relating to their liability was *res judicata*. The defendants, other than the defendants Nos. 3, 14 and 15; thereupon, on the 6th July 1914, executed a fresh document in favour of their co-defendants Nos. 3, 14 and 15, by which they purported to confirm the transaction of 1906 and release in the latter's favour whatever right and title they possessed in their 12-annas share of the *dar-putni*.

The present suits are brought for rents partly due for a period prior to July 1914; and partly for a period thereafter. The Munsif before whom the cases came for trial held that the rent for the period anterior to the execution of the last document, *viz.*, the release of 1914, came within the terms of the previous decisions and that, consequently, the matter was *res judicata*; but with regard to the period after the execution of the document of the 6th July 1914 he held that the transfer by the contending defendants to their co-defendants Nos. 3, 14 and 15 was valid, and that, therefore, they were entitled to be absolved from liability for all subsequent rent. He accordingly decreed the plaintiff's claim for the rent of this later period against defendants Nos. 3, 14 and 15 alone.

From this part of the Munsif's decree, the plaintiff appealed to the Subordinate Judge of Hoogly, who, on the 28th February 1917, dismissed the appeal and affirmed the decree of the Munsif.

He held that the point in controversy was concluded by the decision in the case of *Hamenādra Nath Mukerji v. Kumar Nath Roy* (1) that the deed which the contending defendants had executed ratifying the previous transaction of sale was not only a "disclaimer of any subsisting right or interest of the executants, but also

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purported to vest whatever right or interest they might, by reason of the decisions of Courts in the previous rent suits, be said to have had in the properties covered thereby, in the defendants Nos. 3, 14 and 15 as from the date of its execution." He held, further, in respect of the contention, that there was no consideration for this last document, that it did not concern the plaintiff, whether a consideration passed or not between the two parties to the transaction, that was a matter between them and them alone, and that the plaintiff himself had ample security in the *dar-pulni* tenures. He further held that the defendants Nos. 3, 14 and 15 were in possession of the property. He accordingly, as already stated, dismissed the plaintiff's appeal. The plaintiff not content with this decision, appealed to the High Court of Calcutta, which reversed the judgment of the Subordinate Judge and decreed the plaintiff's claim as against all the defendants.

From these decrees of the High Court in the two suits, the contending defendants have appealed to this Board. A preliminary objection has been taken as to the competency of the appeal, on the ground, firstly, that the subject-matter is below the appealable value; and, secondly, that the certificate granted by the High Court is not sufficient. On both points, in their Lordships' opinion, the objection fails. The subject-matter in dispute relates to a recurring liability and is in respect of a property considerably above the appealable value. The certificate in the circumstances is quite in order.

The reasons upon which the learned Judges of the High Court have based their judgment are somewhat involved, but closely examined they amount to this: that as it had been held in the previous suits, that there was no consideration and as there could be no transfer without the proof of consideration, the transaction of July 1914 is affected by the previous decisions, and the plaintiff was entitled to go on suing the defendants as he had done heretofore. There are certain passages in the judgment which inclined their Lordships to think the learned Judges did not clearly apprehend the legal position of the parties in relation to the provisions of section 12 of the Bengal Tenancy Act. They say in one place:—

"It cannot be disputed that if the title is perfected by a proper deed and for consideration the former decisions cannot operate as *res judicata*," and then go on to say:—"But there is no consideration apart from the consideration of the previous *kobala*, and the question of consideration under the *kobala* is *res judicata*."

In the case of *Kristo Bulluv Ghose v. Kristo Lal Singh* (2) a transfer of a permanent tenure, by a registered document was held to be complete under section 12 of the Bengal Tenancy Act, as soon as the document was registered, and the same view was expressed in the case of *Hemendra Nath Mukerji v. Kumar Nath Roy* (1), already referred to. Their Lordships consider that the present controversy is covered by the latter decision.

Their Lordships are of opinion that the judgment and decrees of the High Court should be set aside and the order of the Subordinate Judge restored. The appellants will be entitled to their costs here and in the High Court.

And their Lordships will humbly recommend His Majesty accordingly.

Order accordingly.

Solicitors for the Appellant:—Messrs. Chapman Walker and Shephard.

Solicitors for the Respondents:—Messrs. T. L. Wilson & Co.

W. C. A.

(2) 16 C. 642; 8 Ind. Dec. (N. S.) 424.

BASANGOWDA VIRUPAXGOWDA v. IRGOWDATI KALLANGOWDA.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 266 OF 1921.

November 14, 1922.

Present:—Mr. Justice Marten and
Mr. Justice Fawcett.BASANGOWDA VIRUPAXGOWDA AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

IRGOWDATI KALLANGOWDA AND
OTHERS—DEFENDANTS—RESPONDENTS.*Transfer of Property Act* (I V of 1882), s. 10—*Civil Procedure Code* (Act V of 1908), s. 60—*Property retained under compromise, whether amounts to transfer—Restraint on alienation, validity of—Life-interest—Attachment under decree.*

A Hindu widow, who claimed the widow's estate in certain property which she alleged belonged to her husband, was offered maintenance only on the ground that the property belonged to the joint family. A compromise was arrived at by which she was given a restricted life-interest without power of alienation and the joint family was to have the reversion. A decree-holder against the widow urged that the restriction against alienation was void, and in the alternative that the interest of the widow as it was could be attached in execution:

Held, (1) that the compromise was a family arrangement under which the widow was to remain in the personal enjoyment of certain lands for the term of her life, and that it did not amount to a "transfer of property" within the meaning of section 10 of the *Transfer of Property Act* to attract the provisions of that section as to restraints on alienation; [p. 198, col. 2.]

(2) that the interest of the widow as it was was not liable to attachment, as the restriction on alienation prevented the widow from having a "disposing power" within the meaning of section 60 of the *Civil Procedure Code*. [p. 196, col. 2.]

First appeal from the decision of the Assistant Judge at Dharwar in *Darkhast* No. 82 of 1920.

Mr. Nilkant Atmaram, for the Appellants.
Mr. R. A. Jahagirdar, for the Respondents.

JUDGMENT.

Marten, J.—The question on this first appeal is, whether the interest of Irawa, a Hindu widow, under the agreement, Exhibit 28, can be attached in execution of the decree against her and others in this suit. The learned Judge, following the decision of Sir Charles Sargent and Mr. Justice Nanabhai in *Diwali v. Apaji Ganesh* (1), has held it cannot be attached. The appellants seek to distinguish that decision because it was before the *Transfer of Property Act* came into operation in this Presi-

(1) 10 B. 342; 5 Ind. Dec. (N. S.) 615.

dency. Alternatively, they say it was wrong.

Now, section 60 of the *Civil Procedure Code* states what property is liable to attachment or sale in execution, viz., "lands .. and, save as hereinafter mentioned, all other saleable property, belonging to the judgment-debtor, or over which, or the profits of, which, he has a disposing power which he may exercise for his own benefit. . . . Provided that the following particulars shall not be liable to such attachment or sale, namely, . . . (n) a right to future maintenance."

In *Diwali v. Apaji Ganesh* (1) which was also the case of a Hindu widow, it was held in effect that the restriction on alienation contained in the document of compromise then under consideration prevented her having a disposing power, and that consequently her interest could not be attached. It was, therefore, unnecessary to consider whether her interest under that document amounted to a "right to future maintenance" within the meaning of sub-section (n).

In the present document of compromise, Exhibit 28, the restriction on alienation is equally, if not more, emphatic than in *Diwali v. Apaji Ganesh* (1). It runs:

"I have taken for myself the property for the period of my life time, I alone shall pay *juti* . . . and I shall go on making *vahitwat*. I shall not sell or mortgage or give it on self reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid. . . . After my death, the said minor alone is owner of the said property."

In my judgment, this restriction on alienation prevents the judgment-debtor from having a "disposing power" within the meaning of section 60, and, consequently, if that restriction is valid, the property cannot be attached.

Stopping there, therefore, I am of opinion that the learned Judge was right in following *Diwali v. Apaji Ganesh* (1). I may add that this decision was followed in *Munisapthi Naidu v. Ammani Ammal* (2) where by a slip the word "not" has been omitted from the head-note.

Turning next to the *Transfer of Property Act*, the appellant contends that under sec-

(2) 15 M. L. J. 7.

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tion 10 in Chapter II the above restriction on alienation is invalid. The respondent relies on section 6 (d) which enacts that "an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him." He also relies on section 2 (d) which provides that "nothing in the second Chapter shall be deemed to affect any rule of Hindu...law."

It is stated in Shepherd and Brown's Commentary (7th Edition) on the Transfer of Property Act, at page 42:

"It may in some instances be difficult to mark the distinctions between holdings to which this paragraph [section 6 (d)] may apply and cases falling under section 10, in which it is attempted to fetter the transferee's power of alienation. A right to future maintenance cannot be attached in execution of a decree. And it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer by her, since the right exists for her personal benefit only. It may be doubted even whether she can effectually transfer her interest in property allotted to her for maintenance."

In my opinion, it is clear that section 6 (d) recognises that an interest in property may be validly created which is restricted in its enjoyment to the owner personally. The Act says the owner cannot transfer such an interest; but if the restriction was invalid, it would follow that he would be able to do so. Accordingly, in considering section 10, one has to see that it clearly applies to any particular document. Have we, then, in the present case any property "transferred subject to a condition or limitation absolutely restraining the transferee... from disposing of her interest?" Section 5 defines "transfer of property" as meaning "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

Now, in the present case, one must bear in mind the circumstances under which Exhibit 28 came into operation. The widow was claiming a Hindu widow's estate in all the lands on the allegation of a separation of interest. The minor, on the other hand, claimed that she was only entitled to main-

tenance because the lands had remained joint. The compromise arrived at was that the widow was to have a restricted life-interest in certain lands, and the minor was to take the rest of the lands and the reversion in the former lands. *Prima facie*, therefore, it would seem quite natural to restrict the widow's power of alienation and so prevent the possession or management passing out of the family.

But where do we find in this document a transfer from A to B? What the widow says is that she has taken for herself the suit property for the period of her life time; and the subsequent covenants by her make it clear that all she is intended to have is an interest in the property restricted in its enjoyment to her self personally. But that is the very type of interest referred to in section 6 (d). The deed does not expressly purport to transfer or convey anything. Nor does it decide the original point in dispute. She is to have the lands for a certain limited interest. This interest is less than that of a Hindu widow's estate which she claimed, but it is more than the bare right to maintenance which was all the minor was prepared to allow her. In my opinion, therefore, there was no such "transfer" here as is mentioned in section 10.

Nor is this any fanciful distinction. In English Law, for instance, there is a clear distinction drawn between an absolute gift followed by an attempted restriction on alienation and a gift to a man of an interest determinable on alienation. The distinctions between these two classes of cases are set out in Wace on Bankruptcy, pages 182 and 183, the latter class of interest being a valid one. The learned author proceeds at page 183:

"But a proviso for cesser on bankruptcy or alienation, without an express gift over, may be part of the original gift; and there are numerous decisions, chiefly on Wills, that a gift of real or personal estate to A. for life, with remainder over and a proviso that if A. should attempt to assign, etc., his life-interest should cease, is read as a limitation to A. during his life, or until he should attempt to assign; and upon that event over, and is valid accordingly."

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Similarly, in *In re Detmold*, *Detmold v. Detmold* (3), Mr. Justice North at page 588 said:—

"It is said that a gift over of a man's own property in the event of his bankruptcy is void, and no doubt that is so. But it has been held that a gift over in the event of a voluntary assignment by him is valid. This was established by *Brooke v. Pearson* (4) and *Knight v. Browne* (5) and I think the principle of those decisions applies to an involuntary alienation by operation of law in favour of a particular creditor."

Or, again, in the Transfer of Property Act itself we find in sections 12 and 31 instances of invalid and valid limitations on a transfer of a particular interest. I only quote these instances to show that section 10 cannot be taken merely by itself, but must be construed strictly, and that it must not be used to defeat well-recognised provisions. In the present case I am dealing with a Hindu widow, and it seems to me that the restrictions placed upon her powers in the present case were very natural ones.

In *Kuldip Singh v. Khetrani Koer* (6) there was a compromise of dispute between a Hindu widow and other members of the joint family. Under the compromise she was given possession for her life on account of maintenance of her husband's share in the property, and then followed a clause which I construe as a restriction on alienation. It provided that if the widow took or executed any sort of a document, it would be null and void. It further provided that both parties might execute a document, but any document not consented to by both parties should be null and void. Subsequently, the lady alone executed a lease for eleven years, and it was claimed that the execution of that lease was a breach of the covenant. The Court of first instance held that the covenant was invalid, but on appeal this decision was set aside, and

the judgment of the High Court proceeded: (page 871)

"We are unable to follow the reasoning upon which he (the Judge) comes to that conclusion. Admittedly, there is nothing in any Statute Law which renders such a provision inoperative. Sections 10 and 15 of the Transfer of Property Act have no application here; and we are unable to see any principle underlying those sections which can be applied to the present case, or that there was any sort of absence of equity in an arrangement of this kind. This was a settlement of a dispute, and effect should be given, as far as possible, to every portion of it. It is not at all an unreasonable provision that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any acts on her part which might cause injury to their reversionary rights. A provision of this kind is not only not contrary to law, but is one which might reasonably be made in common prudence by reversioners. There being admittedly nothing in law to show that this covenant is illegal, effect must be given to it."

It was contended before us that the covenant in that case did not amount to a restriction on alienation, but, in my opinion, that argument is erroneous.

The distinction between a compromise and an alienation or transfer is further exemplified by Lord Moulton in *Hiran Bibi v. Sohan Bibi* (7), to which my learned brother has drawn my attention.

In the result, therefore, I am of opinion that Exhibit 28 was a compromise under which the widow was to remain in the personal enjoyment of certain lands for the term of her life, and that it did not amount to a "transfer of property" within the meaning of section 10 of the Transfer of Property Act.

In that view of the case, it is unnecessary for me to consider whether the compromise is not also protected by section 2 (d) of the Transfer of Property Act, which provides that nothing in the second Chapter of the Act is to be deemed to affect any rule of

(3) (1889) 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

(4) (1859) 27 Beav. 181; 5 Jur. (N. S.) 781; 7 W. R. 638; 54 E. R. 70; 122 R. R. 364.

(5) (1861) 9 W. R. 515; 17 Jur. (N. S.) 894; 4 L. T. 206; 30 L. J. Ch. 649.

(6) 25 C. 869; 2 C. W. N. 463; 13 Ind. Dec; (N. S.) 567.

(7) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.).

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Hindu Law. Nor need I consider whether the document is merely a right to future maintenance within the meaning of section 60 (n) of the Civil Procedure Code or whether, as indicated in *Govinda Pillay v. Meenatchi Achi* (8), what the widow acquired was a right not to maintenance but to certain property or rather the usufruct of that property. In this latter case the property attached consisted of standing crops only and not of an interest in future as well as present income as in the present case. So, too, *Sunder Bibi v. Rajinder Narain Singh* (9) depends on the effect of section 60 (n).

Another authority cited to us is *Gulab Kuar v. Bansidhar* (10) where Mr. Justice Knox held that the interest of a widow in certain lands assigned to her in lieu of her maintenance allowance could not be attached. But on appeal in *Bansidhar v. Gulab Kuar* (11) the point was left open (see page 449), as it was held that no appeal lay.

In my judgment, therefore, on the true construction of the particular document we have to deal with, *viz.*, Exhibit 28, there is nothing in the Transfer of Property Act or otherwise which invalidates the restriction on alienation. Consequently, in my opinion, the decision of the learned Judge was right and this appeal ought to be dismissed with costs.

Fawcett, J.—In this appeal two points have been urged:—

(1) That defendant No. 2 had a power of disposal over the usufructuary interest of the lands, within the meaning of section 60, Civil Procedure Code, and that *Diwali v. Apaji Ganesh* (1) does not apply, or, in any case, was wrongly decided;

(2) that the case does not fall under clause (n) of section 60, *viz.*, a right to future maintenance.

As to (1) it is urged that the restrictions against alienation in Exhibit 28 are void under section 10 of the Transfer of Property Act, and that this section applies (notwith-

standing the last paragraph of section 2 of the Act) because there is no rule of Hindu Law against a widow alienating her life interest, as is indeed recognised by Sargent, C. J., in *Diwali v. Apaji Ganesh* (1) where he says a Hindu widow's estate has long been held to be transferable.

In my opinion, the answer to this is, that Exhibit 28 is not a 'transfer' of property as defined in section 5 of the Act, so as to fall under section 10, but is a compromise or family arrangement to which the Courts should give effect, notwithstanding that a party may thereunder receive a less interest than he or she would ordinarily have under Hindu Law.

The basis of defendant No. 2's title under Exhibit 28 is not a conveyance by a person having an admittedly good title to convey, but a compromise of conflicting claims. The distinction is pointed out by Lord Moulton in *Hiran Bibi v. Sohan Bibi* (7) where the compromise was held not to be an alienation but a family settlement, in which each party took a share of the family property by virtue of independent title which was to that extent and by way of compromise admitted by the other parties.

As instances where the Privy Council have recognised the validity of such compromises, in spite of their deviating from the strict rights of the parties, I may refer to *Khumni Lal v. Gobind Krishna Narain* (12), where the High Court wrongly held there was an alienation; *Lekhraj Kuntear v. Harpal Singh* (13), where there was a change of the impartible character of the estate; *Brijraj Singh v. Sheodan Singh* (14), where the compromise was upheld though there was an unequal partition among

(8) 13 Ind. Cas. 152; 22 M. L. J. 204; 10 M. L. T. 493; (1911) 2 M. W. N. 563.

(9) 63 Ind. Cas. 181; 19 A. L. J. 648; 3 U. P. L. R. (A) 109; 43 A. 617.

(10) 15 A. 371; A. W. N. (1893) 149; 7 Ind. Dec. (N. S.) 956.

(11) 16 A. 443; A. W. N. (1894) 146; 8 Ind. Dec. (N. S.) 288.

(12) 10 Ind. Cas. 477; 33 A. 356 at pp. 365; 367; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

(13) 13 Ind. Cas. 269; 34 A. 65 at pp. 70, 71; 11 M. L. T. 1; (1912) M. W. N. 16; 9 A. L. J. 40; 16 C. W. N. 217; 15 C. L. J. 72; 14 Bom. L. R. 33; 23 M. L. J. 1; 39 I. A. 10 (P. C.).

(14) 19 Ind. Cas. 826; 35 A. 337 at pp. 347, 348; 17 C. W. N. 949; (1913) M. W. N. 515; 11 A. L. J. 698; 14 M. L. T. 11; 18 C. L. J. 57; 15 Bom. L. R. 632; 25 M. L. J. 188; 40 I. A. 161 (P. C.).

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three sons; and *Kanhai Lal v. Brij Lal* (15) where the compromise was upheld, though the last male owner deprived himself of his right to claim as a reversioner against a Hindu widow.

The Courts lean in favour of such family arrangements [Halsbury's Laws of England, Volume XIV, Art. 1230, page 546; *Chabildas v. Ramdas* (16) and *Ramdas v. Chabildas* (17)]. As long ago as 1869, this Court acted on the same principle: see *Abubekar v. Maibibi* (18).

Therefore, I agree with my learned brother that section 10 of the Transfer of Property Act does not apply to the case: cf. *Kuldip Singh v. Khelrani Koer* (6).

The settlement was a reasonable one. The minor had reversionary rights under Exhibit 28, and it was proper to restrict the widow from alienating or parting with possession, which might entail litigation after her death. Nor has the widow herself objected to this restriction. On the contrary, she relies on it in her opposition to the *Darkhast*.

I think, therefore, the lower Court rightly held that defendant No. 2 had no power of disposal over the usufructuary interest of the lands. At most, all that she can dispose of is actual usufruct in hand (e.g., a standing crop), and she has no power to dispose of future usufruct, which would, in effect, be a disposal of the *corpus* of the property. Consequently, she has no disposing power over the lands sought to be attached, or the future profits thereof which it is impliedly sought to attach by the attachment of the lands.

I think also that the reasoning in the penultimate paragraph of the judgment in *Diwali v. Apaji Ganesh* (1) applies exactly to this case, and should be followed. That case was also one of a compromise.

(15) 47 Ind. Cas. 267; 40 A. 487 at p. 496; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 L. A. 118 (P.C.).

(16) 3 Ind. Cas. 257; 11 Bom. L. R. 606 at p. 631.

(17) 7 Ind. Cas. 134; 12 Bom. L. R. 621 at p. 624.

(18) 6 B. H. C. R. (A. C. J.) 77.

It is unnecessary to go into the question whether the interest sought to be attached is 'a right to future maintenance' within the meaning of section 60 (n).

I concur, therefore, that the appeal should be dismissed with costs.

N. H.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 109 OF 1922.

February 14, 1923.

Present.—Mr. Pipon, J. C.

SHER ALI—DEFENDANT—

PETITIONER

versus

KALANDAR KHAN—PLAINTIFF—
RESPONDENT.

Punjab Pre-emption Act (II of 1905), s. 3 (2), (3)—Town—Rural area included within Municipality, whether town—Presumption—Bhanamari village, whether part of Peshawar Town.

An administrative act, including a rural area within the limits of a Municipality does not necessarily operate to destroy the pre-existing character of the area and such administrative action is not in itself sufficient to make the area so included a sub-division of a town for the purposes of pre-emption. [p. 201, col. 2.]

At the same time, the inclusion of a rural area within the Municipal limits of a town is strong evidence of the urban character of that area. [p. 201, col. 2.]

Any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town, and a suburb of this nature is to be regarded as a sub-division of a town for purposes of pre-emption. [p. 201, col. 2.]

Umar Bakhsh v. Abdul Karim, 70 P. R. 1898, *Abdulla v. Punnu Ram*, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906 and *Allah Ditta v. Muhammad Nazir*, 7 Ind. Cas. 716; 84 P. R. 1910, 102 P. W. R. 1910, relied on.

The village of Bhanamari is a sub-division of the town of Peshawar for the purposes of the Punjab Pre-emption Act. [p. 202, col. 2.]

Petition for revision of the order of the Divisional Judge, Peshawar, dated the 15th March 1922, remanding the case to the Court of the Munsif, First Class, for re-admission and decision on the merits.

Mr. J. C. Vaghan, for the Petitioner.

Mr. Aurangzeb Khan, for the Respondent.

SHER ALI V. KALANDAR KHAN.

JUDGMENT.—This suit is one for pre-emption of a house in Bhanamari. The question which I have taken up on the revisional side is an important question of law or custom within the meaning of section 84 (1) (b) of the North-West Frontier Province Law and Justice Regulation is whether a house in Bhanamari is urban immoveable property within the meaning of section 3 (3) of Act II of 1905 or village immoveable property within the meaning of section 3 (2) of the same, or, in other words whether Bhanamari is part of a town or is a village. It has been held by the Divisional Court that Bhanamari is a sub-division of the town of Peshawar.

Under sub-section (3) of section 3 of both the Pre-emption Acts of 1905 and 1913 (the former of which only is in force in the North-West Frontier Province) a specified place shall be deemed a town (a) if so declared by the Local Government by notification in the Official Gazette or (b) if so found by the Courts. No places have been notified as towns for the purposes of the Pre-emption Act by the Local Government of the North-West Frontier Province. We have to see, therefore, whether Bhanamari has already been found to be a town by the Courts of this Province or if there is evidence in the present case for a finding of this nature. There is already a ruling in existence of the Chief Court of the Punjab relating to Bhanamari in the case of *Ghulam Mohd. v. Mohamad Din* decided on the 12th of June 1896. At the time when that suit was decided pre-emption was governed by the Punjab Laws Act. Section 11 of that Act laid down that the right of pre-emption shall not be presumed to exist in any town or city or in any sub-division thereof but may be shown to exist therein. Section 12 of the same Act laid down that the right of pre-emption in a village belongs to certain categories of persons in the absence of a custom to the contrary. The onus of proving that pre-emption existed in a town lay upon the person alleging it. In the case dealt with by the Chief Court the question as to whether pre-emption existed in Bhanamari in respect of a *serai* was put in issue. When the question came before the Chief Court on the 13th of December 1894 and when a remand was ordered for further inquiry the learned Judge remarked, "The

question is clearly one having reference to the merits of the case. By section 11 of the Punjab Laws Act, IV of 1872, the claimant for pre-emption of property situated in a town has to prove the existence of the right and to show by what persons and under what circumstances it is exercisable by local custom." In other words, it was clearly held, and this position was maintained throughout the judgment, that Bhanamari was a town for the purposes of pre-emption. If it was a village and not a town section 12 and not section 11 of the Punjab Laws Act would have been applicable. The finding in that case amounts, in my opinion, to a clear declaration that Bhanamari was a town and that pre-emption in it was governed by the rules relating to pre-emption in towns.

It is open, however, to parties in the present case to show that Bhanamari should, nevertheless, be found to be a village for the purposes of pre-emption by the present Court. At the same time, the onus will lie very heavily upon the person who asserts that Bhanamari is a village for the purposes of pre-emption. I am unable to see that this onus has been in any way discharged. Bhanamari has been included within the limits of the Municipality of Peshawar. It is no doubt true that an administrative act including an area within the limits of a Municipality does not necessarily operate to destroy the pre-existing character of the area and that such an administrative action is not in itself sufficient to make the area so included a sub-division of a town for the purposes of pre-emption. At the same time the inclusion of an area in Municipal limits is strong evidence of the urban character of that area. There are many rulings of the Chief Court of the Punjab to the effect that any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town, and that a suburb of this nature is to be regarded as a sub-division of a town. *Abdulla v. Punnu Ram* (1), *Umar Bakhsh v. Abdul Karim* (2) and *Allah Ditta*

(1) 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1907.

(2) 70 P. R. 1898.

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v. *Muhammad Nazir* (3) are authorities for this view. It may be said that the present case is peculiar in that Bhanamari is not an outgrowth of Peshawar City but undoubtedly had in the first instance, an independent existence as a purely agricultural settlement. It was originally founded as an ordinary agricultural village by settlers of the Orakzai tribe, the main part of which is domiciled across the administrative border. There is also, however, not the least doubt that so far as regards the site occupied by its buildings Bhanamari has lost its character in this respect and that it is in actual fact a suburb of Peshawar City. It is shown that it contains at least one industrial factory. It has been classed, though comparatively recently, for the purposes of appointment of members of the Municipal Committee as a sub-division of the City returning special members of its own. The learned Counsel for the petitioner in the present case has pointed to the fact that the Revenue Records of the Settlement of 1870 and of 1895 record in Bhanamari the ordinary customs prevalent in agricultural villages, that it is assessed to revenue and that it has two *Lambardars* responsible for the collection of revenue. This argument does not appear to me very material. It is perfectly easy to conceive that the agricultural land of Bhanamari may still be village agricultural land and there is nothing incompatible with the management of such land on the system in force in other agricultural villages with the recognition of the Bhanamari buildings as a portion of Peshawar City. Indeed, the definition given in the Acts of urban immovable property in any case excludes agricultural land. Further, I observe that both in the Records of 1870 and of 1895 Settlement it was noted that the land owners of Bhanamari were living in various quarters of Peshawar City. The connection, therefore, between the residential portion of Bhanamari and the main City of Peshawar was extremely close as far back as 1870. It lies right up against the walls of the original City of Peshawar. There is no agricultural land intervening between it and the main City. It is separated

only by a main road and that portion of it which fronts the road is indistinguishable in character from the *bazars* and commercial buildings found in Peshawar City itself. There appear to me, therefore, overwhelming grounds for holding that Bhanamari has become a portion of the town of Peshawar exactly in the same manner as suburbs of large Cities have grown up in cases dealt with by the Chief Court of the Punjab and in which such suburbs have been held to be sub-divisions of the town itself.

I have already mentioned that we have in existence a finding of the Chief Court of the Punjab to the effect that the inhabited site of Bhanamari is a town. I can see nothing to rebut the presumption raised by this ruling and I consider that, apart from it, there is clear evidence to show that Bhanamari is, except as regards its agricultural land, a portion and a sub-division of the town of Peshawar. I concur, therefore, with the finding of the Divisional Court and dismiss this application for revision with costs.

Z. K.

*Application dismissed.***MADRAS HIGH COURT.**

CIVIL REVISION PETITION NO. 49 OF 1920.

December 15, 1922.

Present:—Mr. Justice Spencer.PASUMARTI BHAGAVANULU AND
OTHERS—PETITIONERS*versus*BOLLAN SEETHARAMASWAMI AND
OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Arbitration—“All parties interested”—“Parties who have failed to appear, whether necessary parties to reference.”

From the mere fact that a certain party to a case does not put in an appearance and the case proceeds *ex parte* so far as he is concerned, it cannot be assumed that he is not an interested party within the meaning of paragraph 1 of Schedule II to the Civil Procedure Code.

Pokita Pavana Panda v. Narasinga Panda, 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538 and *Laduram Nathmull v. Nandalal Karuri*, 55 Ind. Cas. 747; 47 C. 555; 31 C. L. J. 150, relied upon.

(3) 7 Ind. Cas. 716; 84 P. R. 1910; 102 P. W. R. 1910.

PASUMARTI BHAGAVANOLU V. BOLLAN SEETHARAMASWAMI.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree, dated the 10th October 1919, of the Court of the Temporary Subordinate Judge at Ellore, in Original Suit No. 6 of 1919 (Original Suit No. 58 of 1918 on the file of the Sub-Court, Ellore.)

Mr. P. Narayanamurti, for the Petitioner.

Mr. P. Somasundaram, for the Respondents.

JUDGMENT.—The suit concerned in this Civil Revision Petition was instituted by a reversioner claiming the rights as an adopted son to have his title declared to certain properties in Schedules A, B and C and to recover possession of them from the person to whom the last male owner's wife and mother had alienated them. During the trial of the suit there were two references to arbitration under Schedule II, para. 1, Civil Procedure Code. The first was on 22nd August 1919 by plaintiff and defendants Nos. 6 to 8 who were interested in B Schedule properties. The second reference was on 29th August 1919 by plaintiffs and defendants Nos. 1, 3 and 4 who were interested in A Schedule properties.

It is now urged as the sole ground of revision by defendants Nos. 6 to 8 that the entire reference to arbitration and the arbitrator's award are invalid because defendants Nos. 2 and 5 did not join in the reference. Second defendant is the brother of first defendant and 5th defendant is the undivided son of 2nd defendant. They had no interest in the B Schedule properties over which the plaintiff and these petitioners were disputing. But there was a common issue between the plaintiff and all the defendants as to plaintiff's adoption.

Under section 506 of the Civil Procedure Code of 1882 it was necessary that all parties to a suit should join in a reference to arbitration. In *Pitam Mal v. Sadiq Ali* (1) "all the parties to a suit" was interpreted as meaning all the parties interested, and in the present Code it was so expressed.

Here the defendants Nos. 2 and 5 were *ex parte* throughout and were exonerated on 1st September, that is, seven days before the arbitrator submitted his award. From the mere fact that they did not put in an

appearance and the case proceeded *ex parte* so far as they were concerned, it cannot be assumed that they were not interested parties [vide *Polita Pavana Panda v. Narasinga Panda* (2) and *Laduram-Nathmull v. Nandalal Karuri* (3)]. It is more material that defendants Nos. 1, 3 and 4 in their written statement asserted that defendants Nos. 2 and 5 had no interest in the A Schedule properties and it has never been suggested that they had an interest in the B Schedule properties. After they were exonerated they had no further interest in the suit, even if they had an interest before. In *Haswa v. Mahbub* (4) it was held by the Allahabad High Court that it was essential that all parties who were interested at the time of the reference to arbitration should join and that otherwise the reference and the award would be invalid. There is no finding whether the defendants Nos. 2 and 5 were interested at the time of either of the two references and if necessary I should call for a finding from the Subordinate Judge on this point. But I hold that, in any case, it is not open to the defendants Nos. 6 to 8 to ask this Court to proceed under section 115, Civil Procedure Code. They did not raise this objection in their memo. of objections to the award presented in the lower Court, and they have failed to show that defendants Nos. 2 and 5 are necessary parties to the suit between the plaintiff and themselves. I, therefore, dismiss the Civil Revision Petition with costs.

V. N. V.

Petition dismissed.

(2) 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538.

(3) 55 Ind. Cas. 747; 47 C. 555; 31 C. L. J. 150.

(4) 10 Ind. Cas. 559; 8 A. L. J. 645.

(1) 24 A. 229; A. W. N. (1902) 19.

GANPATI SHANKRAPPA HEGDE v. KRISHNAPPA SHIVRAM HEGDE.

BOMBAY HIGH COURT.APPEAL FROM APPELLATE DECREE No. 271
OF 1922.

February 15, 1923.

Present:—Sir Norman Macleod, Kt., Chief
Justice, and Mr. Justice Crump.

GANPATI SHANKRAPPA HEGDE

AND OTHERS—DEFENDANTS Nos. 2 to 5

—APPELLANTS

versus

KRISHNAPPA SHIVRAM HEGDE

PLAINTIFF—RESPONDENT.

*Hindu Law—Adoption—Gift of only son in
adoption—Widow, power of—Adoption by widow—
Adopted son's right of, to contest prior aliena-
tions.*A Hindu widow can make a valid gift of her
only son in adoption. [p. 204, col. 2.]*Krishna v. Paramshri*, 25 B. 537; 3 Bom. L.
R. 73, followed.Strictly speaking, as soon as a Hindu widow
takes a boy in adoption, all alienations made
by her become ineffective against the adopt-
ed son, though it can be shown that they
were made for necessity. In the case of a
lease, however, by the widow, it is good
until the adopted son chooses to contest
it. He may be willing to take advantage of a
lease and receive rent thereunder. It is only
when he chooses to contest the lease that he is
entitled to mesne profits in addition to the rent.
[p. 204, col. 2.]Second appeal against the decision of
the District Judge, Kanara, in Appeal
No. 47 of 1921.Mr. G. N. Thakur (with him Mr. G. P.
Murdeshwar), for the Appellants.

Mr. S. S. Patkar, for the Respondent.

JUDGMENT.—The plaintiff sued for pos-
session of the suit property against the de-
fendants after cancellation of the alienations
made with respect to the same by the de-
fendant No. 1's father, Paramaya bin Subhaya
Hegde, during her minority. The property
belonged to one Shivram Hegde who died
leaving a widow, defendant No. 1, and no
son. On the 22nd August 1919 the widow
adopted the plaintiff. The first question
raised in the suit was, whether the adoption
had, as a matter of fact, taken place.
That had been found against the plaintiff
but the lower Court held the adoption had
taken place. Then it was alleged that
the adoption of the plaintiff was illegal as
he was the only son, and so could not be
given in adoption by a widow, his father
at that time being dead. However, it

was decided in *Krishna v. Paramshri* (1) that a Hindu widow can make a valid gift of her only son in adoption. Mr. Justice Ranade giving judgment said: "Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied defect ceases to be operative, and no restriction can be placed on the widow's power to make a valid gift of an only son."

The next question is, of what property should possession have been decreed to the plaintiff. The Trial Court held on issue 7(b) that certain properties only out of those claimed belonged to the estate of Shivram Hegde. The Appellate Court directed that the plaintiff should recover from defendants Nos. 2, 3 and 4 the lands in suit without considering whether the decision of the Trial Court was erroneous. The respondent, however, does not dispute the finding of the Trial Court on issue 7(b). Therefore, the decretal order must make it clear that it is only the lands found to have belonged to Shivram Hegde by the Trial Court according to its finding on issue 7(b) which could be recovered from defendants Nos. 2, 3 and 4, and that the plaintiff is entitled to possession of all lands in suit except S. Nos. 46 and 247 and such portions of S. Nos. 243, 244, 245, and 249 as have been held by the Subordinate Judge not to belong to the deceased Shivram-gauda.

The appellants objected to the order that mesne profits should be recovered from the date of the adoption until delivery of possession. Strictly speaking, as soon as the plaintiff was adopted, all the alienations of the estate made by the widow would become ineffective against him unless it could be shown that they were made for necessity. It seems that in the Trial Court it was suggested that there was legal necessity for these alienations, but the Judge has found that there is no satisfactory evidence to show that the alienations were for justifying legal necessity. We take that as meaning that there was really no evidence at all of necessity. If that were not so, then, as the Appellate Judge has not considered the question of necessity,

(1) 25 B. 537; 3 Bom. L. R. 73.

FIRM HIRA NAND-MURLI DHAR V. FIRM GURMUKH RAI-RADHA KISHEN.

it might have been necessary to remand the case to that Court for decision of that question of fact. We do not believe ourselves that there was any evidence of necessity, otherwise it would have been considered by the Trial Court, and the fact that the Appellate Court makes no mention of the question of necessity would show that the question was never really contested before the District Judge. But it might have been said that the lease was good until the adopted son chose to contest it. He might be willing to take advantage of the lease and receive rent under it. It would only be when he decided to contest the lease that the defendants would be liable to pay mesne profits in addition to the rent. Therefore, the inquiry as to mesne profits must commence from the date of the suit and not from the date of the adoption.

As the appellants were entitled to come to Court owing to the fact that the District Judge had awarded to the plaintiff all the lands in suit, and they ought to have succeeded to a small extent with regard to mesne profits, each party should bear his own costs of the appeal. The decree will be amended in accordance with the judgment.

The cross-objections are dismissed with costs.

N. H.

Cross-objections dismissed.

LAHORE HIGH COURT.

Civil Revision No. 11 of 1922.

February 10, 1923.

Present—Mr. Justice Moti Sagar.

THE FIRM HIRA NAND-MURLI DHAR,
THROUGH MURLI DHAR—PLAINTIFF—

PETITIONER

versus

THE FIRM GURMUKH RAI-RADHA
KISHEN, THROUGH RADHA KISHEN—

—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 20—
Sale of goods—Offer and acceptance—Delivery and
payment—Carrying on business—what amounts to—
Cause of action—Place of suing.*

Where proposal and acceptance are made by means of letters, the contract must be deemed to have been made at the place where the letter of acceptance is posted.

Defendants, carrying on business at Calcutta, sold goods to plaintiffs who carried on business at Amritsar. They consigned the goods to themselves at Amritsar, and endorsed the Railway receipt in favour of a Bank at Amritsar, instructing the latter to realise the price of the goods from the plaintiffs before handing over the Railway receipt to them and endorsing it in their favour. Plaintiffs sued defendants to recover damages for non-delivery of some of the goods and the suit was instituted at Amritsar. It was found that the defendants had a travelling agent at Amritsar who secured orders for them and forwarded them to the Head Office at Calcutta. He had, however, no power to enter into any contracts or to receive any monies on behalf of the defendants.

Held, (1) that it could not be said that the defendants carried on business at Amritsar within the meaning of section 20 of the Civil Procedure Code; [p. 206, col. 1.]

(2) that inasmuch as the goods had to be delivered and paid for at Amritsar the Amritsar Courts had jurisdiction to entertain the suit. [p. 206, col. 2.]

Suraj Bhan v. Punjab Cotton Press Co., Ltd., 18 Ind. Cas. 130; 45 P. L. R. 1913; 40 P. W. R. 1913, relied on.

Petition, under section 44 of Act IV of 1919, for revision of the order of the District Judge, Amritsar, dated the 3rd October 1921, affirming that of the Munsif, First Class, dated the 23rd July 1921.

Lala Fakir Chand, for the Petitioner.

JUDGMENT.—This was a suit for the recovery of Rs. 1,000 damages for the non-delivery of certain goods and was instituted in the Court of the Munsif at Amritsar. The defendants resided and carried on business at Calcutta and a preliminary objection was raised on their behalf that the Amritsar Courts had no jurisdiction to try and hear the suit. Both the Courts below have concurrently found that the Amritsar Courts had no jurisdiction and have returned the plaint for presentation to the proper Court. The plaintiffs have come up on revision to this Court and the first contention raised by Mr. Fakir Chand on their behalf is that the contract was made at Amritsar and that, therefore, the cause of action arose at that place. I am unable to agree with this contention. From the evidence it is clear that the offer was made by means of a letter sent by the plaintiffs from Amritsar to Calcutta. The acceptance was also made at Calcutta by means of a telegram.

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sent from that place to Amritsar and it is clear, in these circumstances, that the contract was made at Calcutta and not at Amritsar. It has been repeatedly held that when the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted.

Next, it is contended that the defendants have a branch office at Amritsar and that, therefore, they should be deemed to be carrying on business at Amritsar within the meaning of section 20 of the Civil Procedure Code. From the evidence of Devi Shankar, (P. W. No. 3), however, it is clear that the defendants have got no permanent office at Amritsar, but that there is only a travelling agent residing at that place who secures orders for the defendants and forwards them to the Head Office at Calcutta. He has no power to enter into any contracts or to receive any monies on behalf of the defendants. In these circumstances, it is clear that the defendants cannot be said to be carrying on business at Amritsar within the meaning of section 20, Civil Procedure Code.

Lastly, it is contended that the goods were to be delivered and paid for at Amritsar and that, consequently, the cause of action arose, at least in part if not wholly, at that place. I think there is force in this contention. From the evidence, it appears that the method of defendants doing business was that they would consign the goods to themselves and not to the customers. They would endorse the Railway receipt in favour of some Bank at Amritsar and not in favour of the customers and they would instruct the Bank to realise the price from the customers at Amritsar before handing to them the Railway receipt and endorsing in their favour. There is no doubt that the customers had to pay the freight and the Bank charges for collection of the money but, as pointed out in *Suraj Bhan v. Punjab Cotton Press Co., Ltd.* (1), the customers could have no control over the goods until they had paid the price at Amritsar and had thus obtained the Railway receipt, and endorsement in their

favour and though the Railway would be deemed to take delivery at Calcutta on behalf of the customers of goods despatched from there and consigned to the customers, it is not easy to see how the Railway could take delivery on behalf of the customers of goods which were not consigned to the latter and not in any way under their control. I have no doubt that it must have been understood between the parties that the goods should be delivered and paid for at Amritsar. I am, therefore, of opinion that the Amritsar Courts had jurisdiction to try the case. I accept the revision and, setting aside the order of the Court below remand the case to the Court of first instance under O. XII, r. 23, Civil Procedure Code, for decision on the merits. No order as to costs.

Z. K.

Revision accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS Nos. 1 AND 2 OF 1921

November 13, 1922

Present :—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

KALIANASUNDARAM PILLAI

—APPELLANT IN BOTH

versus

KARUPPA MUPPANAR AND OTHERS,
RESPONDENTS IN L. P. A. NO. 1 OF 1921,
RATNASABAPATHY PILLAI AND
OTHERS—RESPONDENTS IN L. P. A. NO. 2
OF 1921.

Registration Act (XVI of 1908), ss. 17, 47, 49—Execution of deed of gift—Adoption of son—Registration subsequent to adoption, effect of.

The effect of sections 17, 47 and 49 of the Registration Act is that if a title under a deed is complete except for registration, no subsequent alienation of or dealing with the property by the vendor or donor, as the case may be, can defeat the title, which, on registration, becomes an absolute title dating from the date of the execution of the document. Nor does the subsequent birth or adoption of a child or death of the donor or vendor have any effect in defeating a title obtained under an instrument executed before the happening of these events but registered thereafter. [p. 208, col. 2; p. 209, col. 1.]

Venkatt Rama Reddi v. Pillai Rama Reddi, 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465; (1917) M. W. N. 112; 20 M. L. T. 450, followed.

(1) 18 Ind. Cas. 130; 45 P. L. R. 1913; 40 P. W. R. 1913.

KALIANASUNDARAM PILLAI V. KARUPPA MUPPANAR.

Where a deed of gift was executed and handed over to the donee and the next day the donor adopted a son and thereafter the deed was registered:

Held, that the deed of gift was perfectly valid and the subsequent adoption did not affect its validity.

Letters Patent Appeal against the judgment of Mr. Justice Ayling, in S. A. Nos. 112 and 113 of 1919 and printed as 62 Ind. Cas. 280, preferred against the decrees of the District Court, Tanjore, in A. S. Nos. 50 and 51 of 1918 respectively (O. S. Nos. 77 and 78 of 1916 on the file of the Court of the Subordinate Judge, Kumbakonam).

These Letters Patent Appeals came on for hearing on the 6th and 10th January 1922, the Court delivered the following

JUDGMENT.—Before disposing of this appeal, we have decided to call upon the Subordinate Judge of Kumbakonam to submit a finding of the following issue:—

Was Exhibit A delivered to the trustees or any other before defendant's adoption?

The finding will be submitted in six weeks, and seven days will be allowed for objections. The parties will be at liberty to adduce fresh evidence.

In compliance with the order contained in the above judgment, the Subordinate Judge of Kumbakonam submitted the following

FINDING.—I have been directed to submit a finding on the following issue:—

"Was Exhibit A delivered to the trustees or any other, before defendant's adoption?"

2. Fresh evidence was allowed to be adduced by either party as provided in the order of the High Court. The plaintiffs re-called and examined their first witness Manickam Pillai and the defendant examined two new witnesses Kamakshi Achi and Veeraperumal Padayachi and further re-called and examined his 2nd witness Ponnusami Pillai.

3. The original judgment of this Court shows that, although Exhibit A bears date the 9th September 1891 and the defendant's adoption admittedly took place on the 10th September 1891, it was set up and contended on behalf of the defendant that Exhibit

A was executed by the late Vaithilingam Pillai not on the 9th but only after the defendant was actually adopted by him. This contention will be found discussed and eventually negatived in paragraphs 12 to 14 of the said judgment. The conclusion arrived at by this Court was also upheld by the District Court on appeal (*vide* paragraph 6 of its appellate judgment) and must now be settled.

4. The plaintiffs' 1st witness, Manickam Pillai, who is apparently the only attestor of Exhibit A now alive, has sworn that after Exhibit A was executed and completed on the 9th, it was handed over to Chidambaram Pillai, one of the two trustees named therein, on behalf of himself and Palamalai Pillai, the other trustee, who is also said to have been present at that time. His evidence is supported by the recital therein that the possession of the properties conveyed thereby was given over to the trustees on that very day and there is not, in my opinion, sufficient ground to disbelieve it. The defendant's witnesses Nos. 2 and 16 have reiterated that only a very small portion of Exhibit A was written on the date borne by it and as by that time it became late in the evening Vaithilingam Pillai secured it (the incomplete document) in his box, which was produced by his wife, Kamakshi Achi, (who has now given evidence as the defendant's 15th witness), at his instance. But the latter part of their story must fall to the ground along with the former. Inconsistent statements have been made by them and by the other witnesses examined on behalf of the defendant at the original hearing, as to when Exhibit A was actually executed and completed, and this can only establish that their evidence is not reliable at all. And as regards the evidence of Kamakshi Achi who has now been called for the first time, it is hopelessly confused and unsatisfactory.

5. The endorsement of registration on Exhibit A shows that it was Vaithilingam Pillai who presented it to the Registering Officer, the Sub-Registrar, for registration and this fact is strongly relied on by the defendant's Vakil. I do not, however, attach much value to the above circumstance, seeing that the presentation for registration took place at the house of Vai-

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thilingam Pillai and both Exhibit A and the deed of adoption executed by him, were presented at one and the same time. The plaintiffs' 1st witness, Manickam Pillai, has deposed that Chidambaram Pillai, Ramachandra Ayyar and he himself went to the Sub-Registrar and took him to the house of Vaithilingam Pillai for registering the said documents, and it was Chidambaram Pillai who placed Exhibit A in the hands of Vaithilingam Pillai for being presented to the Sub-Registrar along with the deed of adoption, and I see no reason to disbelieve his evidence.

6. I am on the whole satisfied that Exhibit A was delivered over to Chidambaram Pillai on behalf of himself and the other trustee on the 9th September 1891, i. e., the day previous to the adoption itself and the find accordingly.

These Letters Patent Appeals came on for final hearing after the return of the finding from the lower Court upon the issue referred by this Court for trial.

Mr. T. M. Krishnaswamy Iyer, for Messrs. S. Srinivasa Iyengar and S. Rangachariar, for the Appellants.—The finding is that the deed of gift was handed over to the donee on the day of execution. The adoption took place the next day and at once the rights of the adopted son intervened to prevent the deed from taking legal effect. There is no finding in the case that there was any agreement with the natural father by which the prior incomplete deed of gift was accepted on behalf of the adopted son. Without registration, the deed is incomplete. The son's right of survivorship under the Hindu Law cannot be defeated by the father by any act. But for registration, the deed would be invalid and the son's right of survivorship would have prevailed. The registration is not an act, under the circumstances, binding on the adopted son. The father's absolute powers of disposal prior to the adoption have been curtailed by the operation of the rules of Hindu Law on the adoption of the son. The decision in *Venkati Rama Reddi v. Pillati Rama Reddi* (1) merely states that where a donor

died without presenting the document for registration, the donee could present it for registration without the consent of the legal representatives. In the present case the adoption affects the legal capacity and the powers of disposition of the donor to complete the document. The son's right of survivorship cannot be defeated by registration.

[Schwabe, C. J.—The principle of the decision in *Venkati Rama Reddi v. Pillati Rama Reddi* (1) is clearly against you. We are not prepared to reconsider that judgment. It is in consonance with correct principles.]

Messrs. Rangachariar and S. Muthiah Mudaliar, for the Respondents, were not called upon to reply.

JUDGMENT.

Schwabe, C. J.—The facts of this case are that one Vaithilingam Pillai made a deed of gift of certain property on the 9th of September 1891, and it has been found as a fact—and that finding is accepted by the appellant—that that deed of gift was handed over to the donee on the day of execution. Next day the donor adopted a son, the present appellant. After the adoption the deed of gift was registered on the 15th of September 1891.

It is now contended that, as the adoption took place before the registration and on adoption the adoptee, according to Hindu Law, is in the same position as a child born to the adopter, his rights to this property had intervened and the gift is, therefore, void. Under the Indian Registration Act, 1908, (corresponding to Act III of 1877) section 47, "a registered document operates from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration." Under section 49, "no document required by section 17 to be registered shall affect any immovable property unless it has been registered." The effect of these sections, in my judgment, is that, if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor, as the case may be, can defeat

(1), 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465 (1917) M. W. N. 112; 20 M. L. J. 450.

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the title which, on registration, becomes an absolute title dating from the date of the execution of the document. In this case, upon handing over the deed of gift to the donees, on the authorities, this deed became irrevocable, and upon the subsequent registration, the title dated back to the date of its execution. It is enough to say that there is a long line of authorities not altogether uniform but ending with *Venkati Rama Reddi v. Pillati Rama Reddi* (1), a decision of the Full Bench of this Court which has now established that the subsequent birth of a child, or the adoption of a child, or the death of the vendor or donor has no effect in defeating a title obtained under an instrument executed before the happening of these events, but registered thereafter. By that decision we are bound and I think it is right to add that I entirely agree with it and, in my judgment, these appeals must be dismissed with costs.

Coutts Trotter, J.—I am of the same opinion and only desire to add a word, because I had occasion in *Venkati Rama Reddi v. Pillati Rama Reddi* (1) to consider the present state of the case-law on this subject. My brother Seshagiri Ayyar and myself came to the conclusion that certain of the cases reported in the Madras series were contrary to the general trend of authority and incorrectly decided, and I pointed out in the reference that two well-known writers of text-books had expressed the opinion that some Madras cases—I may take *Ramamirtha Ayyan v. Gopala Ayyan* (2) as a type—were wrongly decided. Accordingly, in order to set doubts at rest, we sent the case up to a Full Bench asking this question: "Whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid?" The Full Bench in that case took the same view as the one which myself and my brother Seshagiri Ayyar had indicated, and decided that the registration was perfectly valid, even although the donor or his representatives did not consent to its registration; that the donee could effect registration, and that when that was done the title would

(2) 19 M. 433; 6 M. L. J. 207; 6 Ind. Dec. (N. S.) 1007.

date back to the date of the execution of the document. That seems to me to follow the plain words of the Statute, and I do not think that, after an authoritative ruling given by this Court so lately as 1917, we should depart from it. If the appellant wishes to show that that decision is wrong, I think he must seek to do so in the Privy Council.

Kumaraswami Sastri, J.—I agree with the Chief Justice and have little to add. I think we are bound by the finding that the document was handed over to the trustees and by the decision of the Full Bench in *Venkati Rama Reddi v. Pillati Rama Reddi* (1) with which I agree.

V. N. V.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 474 OF 1920.

February 14, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

Nawab GHULAM QUTAB-UD-DIN KHAN
UNDER COURT OF WARDS, THROUGH
THE DEPUTY COMMISSIONER,
FEROZEPUR—DEFENDANT—APPELLANT
versus

SARDARA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 53, 76 (1), (e), (f)—Purchase of occupancy rights by landlord—Tenant, whether can withdraw—Suit by heir of tenant to recover occupancy lands, whether maintainable—Jurisdiction of Civil Courts.

It was not the intention of the Legislature to render the action of an occupancy tenant irrevocable once he had made an application under clause (2) of section 53 of the Punjab Tenancy Act, and he has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer. An occupancy tenant has a right to withdraw his offer made under section 53 (2) of the Punjab Tenancy Act up to such time as the landlord makes the payment contemplated by sub-section (5) of the section. [p. 210, col. 2.]

Labhu v. Hamira, 38 Ind. Cas. 944; I. P. R. 1917 Rev., approved of.

GHULAM QUTAB-UD-DIN v. SARDARA.

A suit by the heir of an occupancy tenant to recover the occupancy lands from the landlord on the ground that an alleged purchase of the occupancy right by the landlord is null and void is not barred by the provisions of section 76 (i) (e), or (f) of the Punjab Tenancy Act.

Second appeal from a decree of the District Judge, Ferozepore, dated the 15th January 1920, affirming that of the Munsif, First Class, Ferozepore, dated the 22nd March 1919.

Mr. Zafar Ullah Khan, for the Appellant.

Mr. Badr-ud-Din Kureshi, for the Respondents.

JUDGMENT.—On the 8th June 1915, one Wazira, an occupancy tenant, applied, under section 53 (2) of the Tenancy Act for the issue of a notice of sale as required by the said section. This notice was served on the landlord on the 4th July 1915, and on the 21st July 1915 the landlord, acting under clause (3) of section 53, expressed his intention to purchase the holding and asked the Revenue Officer to fix the price. In the course of the subsequent proceedings Wazira, on the 18th September 1915, expressed his unwillingness to sell his holding and thus withdrew from his application. Nevertheless, the Revenue Officer proceeded with the matter and on the 24th July 1916 fixed the price and directed the landlord to pay the same within two months. The money, it appears, was paid on the 23rd September 1916 to the Revenue Officer and possession was given to the landlord on the 6th March 1917. In October 1916 Wazira died and on the 31st October 1917 his nephews instituted a suit for possession of the occupancy holding as being the persons entitled to the same. The Courts below having decreed the plaintiffs' suit the defendant landlord has come up to this Court in second appeal through Mr. Zaffarullah Khan.

It has been contended before us that the suit was barred under section 76. (i) (e) and (f) and that no Court could take cognizance of any matter relating to applications under sections 53 and 54 of the Tenancy Act. In this view we are unable to concur as, in our opinion, the present suit does not attack either of the matters referred to in clauses (e) and (f) of sub-section (1) of section 70 of the Tenancy Act. The position really is that in answer to the suit for possession

brought by the plaintiffs the defendant-appellant has set up a sale to him by Wazira under the provisions of section 53 of the Tenancy Act. It has been contended by Mr. Zaffarullah Khan that, under section 53, once an occupancy tenant governed by that section makes an application under clause (2) he has no further right or power to withdraw his application and he is bound to proceed with the sale of the occupancy tenancy. This view was negatived in *Labhu v. Hamira* (1), where it was held by the Financial Commissioner that the occupancy tenant had a *locus penitentiae* and that it was open to him to withdraw from the proceedings at any time prior to the completion of the purchase by the landlord as determined by section 53 (5) of the Tenancy Act. We have been asked to hold that this pronouncement of the Financial Commissioner is wrong and not warranted by the terms of section 53 of the Tenancy Act. It seems to us, however, that it was not the intention of the Legislature to render the action of a tenant irrevocable once he had made an application under clause (2) of section 53, and that a tenant has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer. It will be seen that, under sub-section (5) of section 53, the Revenue Officer after having decided on the value has to fix a date by which the landlord has to pay the ascertained price, but that the landlord is not compelled to pay that price and may resile from the position taken up by him under sub-clause (3). Similarly, we think that a proper construction of this section enables the tenant to withdraw his offer up to such time as the landlord makes the payment contemplated by sub-clause (5).

We, therefore, agree with the view taken by the Courts below and dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(1) 38 Ind. Cas. 944; 1 P. R. 1917 Rev.

MOHAMMAD ALAM V. BACHCHU.

ODISH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 30 OF 1922.

November 14, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

Sheikh MOHAMMAD ALAM—DECREE-HOLDER—APPELLANT

versus

BACHCHU AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Step-in-aid of execution—Talana, payment of, whether step-in-aid.

The mere payment of *talana* in compliance with an order of the Court is not a step-in-aid of execution which would extend the period of limitation for the execution of a decree.

Appeal against an order of the District Judge, Rae Bareilly, dated the 19th May 1922, upholding that of the Munsif, Rae Bareilly, dated the 7th December 1921.

Mr. S. M. Ahmad, for the Appellant.

JUDGMENT.—The question for consideration in this case is whether the application for execution was barred by time. The last application for execution was made on the 19th July 1918 for the realization of the decretal money by the attachment of moveable property. A notice under O. XXI, r. 22 of the Code of Civil Procedure was directed to be issued, and the 8th August 1918 was fixed for hearing. On that date the judgment-debtor did not appear. The Court thereupon passed an order that the service on the judgment-debtor should be taken to be sufficient and that a warrant of attachment should issue. The decree-holder was present in person and was asked to file the requisite *talana* which he did on the 8th August 1918. He filed the *talana* and made no application at the time. The Court below held that the mere filing of *talana* did not save limitation.

It is contended on behalf of the decree-holder that an oral application was made at the time and that in any case it should be presumed to have been made. But there is no reference in the order sheet to such an application having been made or otherwise and no presumption can be made in face of the fact that the *talana* was filed in pursuance of an order passed by the Court requiring the decree-holder to file the same.

NARINDRA NATH V. KISHEN LAL.

The payment of the *talana* was a compliance with that order and not an application to take a step-in-aid of execution which could extend the period of limitation.

The appeal is, therefore, dismissed but as the respondents are not present no order is made as to the costs in this Court.

W. C. A.

*Appeal dismissed.***LAHORE HIGH COURT.**

MISCELLANEOUS FIRST CIVIL APPEAL

No. 815 OF 1920.

February 12, 1923.

Present:—Mr. Justice Broadway.

NARINDRA NATH SAHNI—APPELLANT

versus

KISHEN LAL AND ANOTHER—RESPONDENTS.

Companies Act (VI of 1882), s. 169—Appeal, delay in presenting—Extension of time—Sufficient cause—Negligence.

Appeals under the Companies Act ought to be filed with such promptitude as to render service of notice upon the respondent possible within the three weeks prescribed by section 169 of the Act. The Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. [p. 212, col. 1.]

Daulat Ram v. Woollen Mills Co., 95 P. R. 1908; 165 P. W. R. 1908, *Ghisu Mal v. Porter*, 10 Ind. Cas. 908; 33 A. 641; 8 A. L. J. 719, *Ramanappa v. Official Liquidator, Bellary Brucepella Stock and Loan Transacting Company*, 22 M. 291; 8 Ind. Dec. (N. S.) 207, relied on.

The carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by section 169 of the Companies Act and the Court should not show leniency in such matters without sufficient cause. [p. 212, col. 2.]

Hira Lal v. Himalaya Glass Works Co., 10 Ind. Cas. 433; 176 P. L. R. 1911; 100 P. W. R. 1911, followed.

Miscellaneous first appeal from an order of the District Judge in charge Liquidation Work, Lahore, dated the 16th March 1920.

Lala Dharm Das Suri, for the Appellant.

Dr. G. C. Narang and Diwan Mahesh Das, for Respondent No. 1, and Mr. Sundar Das, for Respondent No. 2.

TARIF V. ASA RAM.

JUDGMENT.—A preliminary objection is taken to the hearing of this appeal, it being urged that it is time-barred. The order appealed against was passed on the 16th March 1920. The memorandum of appeal was filed in this Court on the 1st April 1920 together with an application asking that the matter be treated as urgent. As the copy of the order appealed against did not bear a Court-fee label the memorandum of appeal was returned by the office on the same day and was re-filed with the necessary Court-fee label affixed on the 7th April 1920, that is to say, on the twenty-second day from the date on which the order appealed against was pronounced. Section 169 of Act VI of 1882, Indian Companies Act, provides a period of three weeks within which not only has the appeal to be filed but notices of appeal have to be actually served on the opposite party. The section gives the Court power to extend this period and in recognition of this power a prayer for extension was made in a foot-note to the memorandum of appeal. The admitting Judge granted an extension of time for the service of notice subject to all just exceptions.

Dr. Narang for the respondent, Pandit Kishen Bai, contended that this power to extend should only be exercised on sufficient cause being shown, and that in the present case no such cause has been made out. It is perfectly clear that the appellant in this case was guilty of negligence in that he filed a memorandum of appeal together with documents improperly stamped. In *Daulat Ram v. Woollen Mills Co.* (1) it was held that appeals under the Indian Companies Act, 1882, ought to be filed with such promptitude as to render service of notice upon the respondent possible within the three weeks prescribed by section 169 of the Act, and that the Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. In the present case it has not been suggested that the respondent was in any way responsible for the delay in filing this appeal, nor can it be urged that the delay

was due to any mistake made by an official of this Court. *Daulat Ram v. Woollen Mills Co.* (1), was followed by Chevis, J., in *Hira Lal v. Himalaya Glass Works Co.* (2), where it was held that the carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by section 169 of the Companies Act. Chevis, J., also pointed out that Courts should not show leniency in such matters without sufficient cause. In *Ghisu Mal v. Porter* (3) expression was given to the same view as that contained in *Daulat Ram v. Woollen Mills Co.* (1), and the same was the case in *Ramanappa v. Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company* (4).

In the present case the mistake is a bad one. Mr. Dharm Das Suri for the appellant has not suggested that either he, or the gentleman who filed the appeal, was ignorant of the necessity for stamping the copy of the order appealed against. It appears that from the 2nd to 5th April 1920 the Court was closed for the Easter holidays, but no reason has been shown why the appeal was not re-filed on the 6th April 1920 which does not appear to be a holiday. In these circumstances, the preliminary objection has force and the appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(2) 10 Ind. Cas. 433; 176 P. L. R. 1911; 100 P. W. R. 1911.

(3) 10 Ind. Cas. 908; 33 A. 641; 8 A. L. J. 719.

(4) 22 M. 291; 8 Ind. Dec. (N. S.) 207.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1382 OF 1921.

February 26, 1923.

Present:—Mr. Justice Gokul Prasad.

TARIF—DEFENDANT—APPELLANT

versus

ASA RAM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 34—Person cultivating land without consent of landholder—Option of landholder, to treat as tenant.

(1) 95 P. R. 1908; 165 P. W. R. 1908.

NATESA CHETTIAR v. ANNAMALAI CHETTIAR.

Under section 34 of the Agra Tenancy Act, a person who has cultivated land without the consent of the landholder, becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment, but until the landholder has exercised his option, such a person cannot be considered to be a tenant.

Sat Narain Prasad v. Ram Kumar, Sel. Dec. No. 3 of 1910, relied on.

Second appeal against the decree of the District Judge, Meerut, dated the 28th July of 1921.

Mr. Harnandan Prasad, for the Appellant.

Mr. Kailash Chandra Mital, for the Respondent.

JUDGMENT.—The only point raised in this appeal is, whether the defendant-appellant has acquired proprietary rights or occupancy rights and is consequently not liable to ejectment. The plaintiff sued for ejectment of the defendant under section 58 of the Tenancy Act, read with section 34 of the same Act. The pleas taken in defence were that the defendant had been in possession for more than twelve years and by such possession he had become either the owner of the plot or an occupancy tenant of the same and could not be ejected therefrom.

The two Courts below have concurrently found that the defendant had been in possession for more than 12 years without payment of rent but, acting under section 34 of the Tenancy Act, they have decreed the ejectment of the defendant as a non-occupancy tenant holding that the plaintiff chose to accept him as a tenant on the date when he brought the suit for ejectment. This view is supported by a ruling of the Board of Revenue in *Sat Narain Prasad v. Ram Kumar* (1). The opinion expressed by the Junior Member with which the Senior Member concurred is very clear on the point. He holds that, under section 34 of the Tenancy Act, a person who has cultivated land without the consent of the landholder becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment. It is at the option of the landlord to treat such a person either as a trespasser and sue him in the Civil Courts or as a person liable to pay rent and

sue him in the Revenue Courts, but until the landlord has exercised this option such a person cannot be considered to be a tenant. Agreeing with those remarks I hold that the suit has been rightly decreed. I dismiss this appeal with costs.

N. K.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 329

OF 1922.

November 21, 1922.

Present—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

V. S. NATESA CHETTIAR—RESPONDENT.

—APPELLANT

versus

V. E. R. M. ANNAMALAI CHETTIAR

BY HIS AUTHORISED AGENT SAMIA

PILLAI—PETITIONER—RESPONDENT.

Execution of decree—Assignment of decree by decree-holder—Transfer of decree for execution—Objection to executability of decree, whether maintainable—Provincial Insolvency Act (I.L.I. of 1907), ss. 16 (2) (b), 45 (2)—Execution of decree against insolvent—Leave of Court, whether essential.

Where a decree-holder assigns the decree and applies to the Court for the recognition of the assignment and for a transfer of the decree to another Court for execution, and the Court transmits the decree without adjudicating on its executability, the mere omission by the judgment-debtor to take objection to the assignment of the decree being recognised and to its transmission to another Court for execution, does not preclude him from raising in the Executing Court the question that the decree is not executable. [p. 210, col. 2.]

Section 45 (2) of the Provincial Insolvency Act of 1907 gives a release to the insolvent at the time of his discharge, from debts entered in the schedule. But after adjudication and before discharge, section 16 (2) (b) of the Act absolutely prohibits all creditors, whether on the schedule or not, from taking execution proceedings against the person and property of the insolvent except with the leave of the Court. [p. 214, col. 2; p. 215, col. 1.]

Appeal against the order dated the 30th August 1922 and made in Appeal Suit No. 88 of 1922 on the file of the District Court, East Tanjore, at Negapatam, on appeal

(1) Sel. Dec. No. 3 of 1910.

NATESA CHETTIAR v. ANNAMALAI CHETTIAR.

from the order dated the 19th January 1922 and made in Execution Petition No. 592 of 1921 on the file of the Court of the Principal District Munsif, Tiruvalur, in S. C. No. 11371 of 1914, on the file of the Court of Small Causes Madras.

FACTS.—A creditor who had obtained against the appellant, an insolvent, a money decree in the Presidency Small Cause Court, Madras, assigned it to the respondent. The latter applied to the Court for recognition of assignment and for transfer to Tiruvalur District Munsif's Court for execution. After notice to the insolvent who was *ex parte*, the decree was transmitted for execution. Execution was taken out in the Tiruvalur Court and the insolvent took the objection that since he had been adjudicated an insolvent, no execution lay against him. The District Munsif dismissed the application. The District Judge on appeal held the application was maintainable and remanded it to the First Court to restore it to its file and for disposal according to law. The debtor was the petitioner in insolvency and he did not include the creditor's name in the schedule filed by him.

Mr. N. S. Srinivasa Iyer, for the Appellant.—The order of the District Judge is clearly wrong. The petition was filed under the old Act and its provisions alone apply. Section 16 of the Provincial Insolvency Act of 1907 is clear and express. Once an order of adjudication is made, no creditor can proceed against the insolvent. All creditors, scheduled and nonscheduled, are placed on the same footing. The creditor's remedy is only that provided in the Act, to prove his debt in insolvency proceedings or to proceed after leave of Court.

There is no question of constructive *res judicata* or estoppel in this case on account of appellant's failure to object to recognition of assignment and to transmission for execution. The question of executability was left open and was not decided at all. The order of the lower Court is wrong on both points.

Mr. C. S. Venkatachariar (with him Mr. N. C. Vijayaraghava Chariar), for the Respondent.—The respondent's name was not included in the schedule of creditors. The protection in section 16 is only against

scheduled creditors. (See section 16 and section 24).

It is the duty of the insolvent to help in framing a schedule. Where he omits to include a creditor, he loses the benefit of the insolvency provision to that extent. The immunity from execution is a privilege which he can waive. His conduct here amounts to a clear waiver of the right if any under section 16 (2).

Section 45 (2) which deals with discharge refers only to scheduled creditors; the insolvent is not released from debts not entered in the schedule. Where there is no schedule framed or a creditor's name is omitted, the insolvency proceedings do not bar execution. See *Des Raj v. Duni Chand*, (1) and *Fida Husain v. Collector of Shahjahanpur*, (2).

Further, the prior order recognising transfer of the decree implies its executability. An application for transfer of decree is a step-in-aid of execution. *Ramachandra Aiyar v. Subramania Chettiar* (3). The insolvent by omitting to object to assignment and transmission has precluded himself from afterwards raising any question of executability of the decree. See *Subbiah Naicker v. Ramanathan Chettiar* (4).

JUDGMENT.—We do not agree with the opinion of the learned District Judge that the omission to take objection to the assignment of the decree being recognized and to its transmission to the Tiruvalur Court for execution, precluded the judgment-debtor from raising the question in the Executing Court that the decree was not then executable in the manner proposed by the decree-holder. The Small Cause Court at Madras did not adjudicate on the executability of the decree when it ordered it to be transmitted for execution.

The other distinction attempted to be made is between creditors who are on the schedule and those who are not.

At the time of an insolvent's discharge, section 45 (2) of Act III of 1907 gives a release to the insolvent from debts entered

(1) 60 Ind. Cas. 588.

(2) 25 Ind. Cas. 708; 17 O. C. 267.

(3) 14 M. L. J. 393.

(4) 22 Ind. Cas. 899; 37 M. 462 at pp. 473, 476; 26 M. L. J. 18; (1914) M.W.N. 205; 11 W. 251.

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in the schedule. But after adjudication and before discharge, section 16 treats all creditors alike as to their remedy against the person and property of an insolvent during the pendency of the insolvency proceedings. This section in clause 2 (b) absolutely prohibits execution proceedings being taken against the person and property of adjudicated insolvents except with the leave of the Court, and that was the law in force at the time when the appellant was adjudicated insolvent; and under section 6 of the General Clauses Act, the introduction of Act V of 1920, which repealed Act III of 1907, could not take away his right.

The District Judge's order is set aside and the order of the District Munsif dismissing the execution application is restored with costs here and in the District Court.

V. N. V.

Order set aside.

N. H.

OUDE JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 37
OF 1922.

December 21, 1922.

Present.—Mr. Kanhaiya Lal, J. C.
Syed AKHTAR HUSAIN AND OTHERS—
DECREE-HOLDERS

versus

QUDRAT ALI—JUDGMENT-DEBTOR.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Limitation Act (IX of 1908), s. 5, application of—Legal representative of deceased party—Delay in applying for substitution—Minority of representative—Succession Certificate, obtaining of—Delay, whether excusable.

Where there is delay in presenting an application for substitution of the representatives of a deceased party, due to the representatives being minors and to the fact that they had to obtain a Succession Certificate, there is sufficient reason to excuse the delay within the meaning of section 5 of the Limitation Act, read with O. XXII, r. 9 of the Civil Procedure Code.

Appeal against an order of the District Judge, Lucknow, dated the 26th August 1922, reversing that of the Subordinate Judge, Lucknow, dated the 2nd March 1922.

Mr. Bisheshwar Nath Srivastava, for the Appellants.

Messrs. G. N. Misra and K. P. Misra, for the Respondents.

JUDGMENT.—This appeal arises out of an execution proceeding and the question for consideration is whether an application made by the representatives of the deceased decree-holder for the substitution of their names was barred by time. The decree-holder died during the pendency of the execution proceeding on the 21st October 1918. As his legal representatives did not appear to proceed with the execution, the Court struck off the execution proceeding on the 14th December 1918.

The decree-holder had died leaving the sons and a daughter, all of whom were and are still minors. The present application for the substitution of their names was made on the 19th December 1921, more than three years after the death of the original decree-holder and more than three years after the date on which the previous proceeding was struck off. The delay was due to the fact that the legal representatives were minors, who could not have obtained execution without obtaining a Succession Certificate under Act VII of 1889. This Succession Certificate was obtained on the 31st August 1920. There is sufficient reason to excuse the delay within the meaning of section 5 of the Indian Limitation Act, read with Order XXII, r. 9, Code of Civil Procedure and Article 181 of the Indian Limitation Act. It is not necessary to consider, in the circumstances, whether section 6 of the Indian Limitation Act could apply to an application for substitution.

The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

HAYAT V. ALI MOHAMMAD.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1799 OF 1921.

November 22, 1922.

Present.—Mr. Justice Broadway.

HAYAT—PLAINTIFF—APPELLANT

versus

ALI MOHAMMAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Custom—Succession—Burden of proof—Gift in favour of sister, validity of—Makwal Jats of Isan Mahar, Tahsil and District Muzaffargarh.

The position of a sister in matters of succession in the Muzaffargarh District is a strong one.

In the Muzaffargarh District the burden lies on a collateral to show that he has a preferential right to succeed as against the sister of the last male-holder.

Hayat v. Rustam, 41 Ind. Cas. 239; 48 P. R. 1917; 118 P. W. R. 1917; *Ranjha v. Jindwaddi*, 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914, referred to.

In the Muzaffargarh District the Jats, especially the Muhammadan Jats, have very large powers of alienation and gift.

Among Makwal Jats of Isan Mahar, Tahsil and District Muzaffargarh, a gift by a male proprietor in favour of a sister or sister's son in the presence of collateral is valid.

Second appeal from the decree of the District Judge, Multan, dated the 6th May 1921, affirming that of the Munsif First Class, Muzaffargarh, dated the 4th January 1921.

Mr. Anant Ram, for the Appellant.

Lala Hargopal, for the Respondents.

JUDGMENT.—The plaintiff in this case Hayat, a Makwal Jat of Isan Mahar, Tahsil and District Muzaffargarh, instituted a suit challenging certain gifts made by Ilam Din and Mubarak in favour of their sisters Alam Khatun and Musammat Roshan and the latter's son Ali Muhammad. The plaintiff's suit being dismissed he preferred an appeal to the District Court. This appeal having proved unsuccessful he has come up to this Court in second appeal armed with a certificate from the learned District Judge under section 41 (3) of the Punjab Courts Act, III of 1914. The certificate in question states that there is a question regarding the validity of a custom, viz., the validity of a gift in favour of sisters and sister's sons as against collaterals.

Mr. Anant Ram on behalf of the appellant frankly and rightly admitted that, so far as the evidence on the record was concerned, the appellant had failed entirely to prove that such gifts were invalid by custom.

He, however, contended that the onus of proving the custom had been wrongly placed on him. Now, in the primary Court the onus was placed on him without any objection on his part. In the lower Appellate Court it was never alleged that the onus had been wrongly placed. This is apparent from the grounds of appeal to the lower Appellate Court as also from the judgment of the learned District Judge itself. The question of onus is, however, one of law and so can be taken up in second appeal. In support of Mr. Anant Ram's contention that the onus should have been placed on the other side, he drew my attention to the Customary Law of Muzaffargarh District, page 32, and particularly to the answer to question No. 10. As, however, this question does not relate either to the succession by sisters or gifts to them it does not appear to have any bearing on the matter before me. On the other hand, the answer to question No. 26, read with the answer to question No. 21, (pages 37 and 36) renders it perfectly clear that all the tribes of this District recognise that on a man dying without male lineal descendant and leaving neither widow nor daughters nor daughter's sons the property passes to his (1) father, (2) brother or their descendants, and (3) sisters or their descendants. The position of a sister, therefore, in this District in matters of succession is a strong one. Mr. Anant Ram then referred me to *Hayat v. Rustam* (1). That decision refers to Makwal Jats of Tahsil Alipur and, as the judgment shows, the decision was confined to that particular tribe in that particular Tahsil. At the same time, in that case itself it was recognised that the onus lay on the collaterals to establish a custom by which they excluded sisters. Mr. Anant Ram then cited *Ranjha v. Jindwaddi* (2) in which it was held that among Biloches of the Muzaffargarh District collaterals in the 5th and 6th degree had failed to prove that they excluded sisters. It was specifically held that the entry in the *Riwaj-*

(1) 41 Ind. Cas. 239; 48 P. R. 1917; 118 P. W. R. 1917.

(2) 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914.

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i-am in favour of sisters threw the *onus probandi* on the collaterals. I have, therefore, no hesitation whatever in agreeing with the Courts below that it was for the plaintiff in this case to show that he had a preferential right to succeed as against the sisters of Mubarik and Ilam Din. Admittedly, the appellant has adduced not a single instance in support of his case, whereas on the other side there are several instances established. Further, in the Muzaffargarh District the Jats, especially the Muhammadan Jats, have very large powers of alienation and gift, and Mr. Anant Ram admitted that he was unable to press the matter with regard to this portion of the case. I confess I am unable to see on what grounds the certificate was granted and the appeal is dismissed with costs.

Z. K.

*Appeal dismissed.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 1384 OF 1921.

February 20, 1923.

Present.—Mr. Justice Daniels.

THE COLLECTOR OF BULANDSHAHR—

PLAINTIFF—APPELLANT

versus

RAM SARUP AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 13—Weightment dues, suit for—Jurisdiction of Court of Small Causes.

A suit to recover weightment charges due under a contract entered into between the parties is not excluded from the jurisdiction of a Court of Small Causes, and if the valuation is below Rs. 500 a second appeal will not lie.

Second appeal from a decree of the First Additional Judge, Aligarh, dated the 30th July 1921.

Mr. L. M. Banerji, for the Appellant.

Mr. G. Agarwala, for the Respondents.

JUDGMENT.—A preliminary objection is raised to this appeal on the ground that no second appeal lies under section 102 of the Code of Civil Procedure. The valuation was admittedly under Rs. 500. The only question is whether the suit was excluded from the jurisdiction of Small Cause

Courts by Schedule II of the Provincial Small Cause Courts Act. The case set forth in the plaint is that the defendants entered into a contract with the plaintiff's predecessor to pay him a sum of Rs. 210 for the right to collect weightment dues; that they only paid a portion of the amount due from them, and that a sum of Rs. 61-7-0 including interest is still due. It is suggested on behalf of the appellant that the case comes under clause 13 of the Schedule, being a suit to enforce payment of allowances called *malikana*, *haq*, cesses, or other dues. The suit is not, however, to enforce payment of cesses or dues from persons by whom these dues were payable. It is a right to recover a sum due under a contract entered into between the defendants and the plaintiff. The appellant contends that on the merits the Court below has overlooked the ruling in *Sadanand Pande v. Ali Jan* (1). I am, however, precluded from going into this question as, in my opinion, the preliminary objection is correct and no second appeal lies. I, therefore, dismiss the appeal with costs.

N. K.

Appeal dismissed.

(1) 5 Ind. Cas. 288; 32 A. 193; 7 A. L. J. 176.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NOS. 1642 AND 1643 OF 1922.

November 30, 1922.

Present.—Justice Sir Francis Oldfield, Kt., and Mr. Justice Krishnan.

RAJA RAJESWARA SETHUPATHI

alias MUTHU RAMALINGA

SETHUPATHI AVERGAL,

—PETITIONER

*versus*ARUNACHELAM CHETTIAR—
RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 109, 110, O. XLV, r. 4—Leave to appeal to His Majesty in Council—Precedents, value of—Applicability of s. 47, whether substantial question of law—Consolidation of suits for appeal to Privy Council, when permissible.

RAJA RAJESWAR SETHUPATHI V. ARUNACHALAM.

Leave to appeal to His Majesty in Council cannot be granted in a case under section 109 (c) of the Civil Procedure Code merely because leave to appeal has already been granted in respect of another case involving the same question. [p. 219, col. 1.]

Makund Sarup v. Richard Ross Skinner, 5 Ind. Cas. 583, not followed.

A question relating to the effect on a particular case of section 47 of the Civil Procedure Code as debarring the plaintiffs from proceeding by suit instead of in execution of a decree already obtained, is not such a substantial question of law within the meaning of section 109 (2) of the Civil Procedure Code as to entitle a party to leave to appeal to His Majesty in Council. [p. 219, col. 1.]

Moti Chand v. Ganga Prasad Singh, 24 A. 174; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.). *Sadagopa Chariar v. Krishnamoorthy Rao*, 30 M. 185; 9 Bom. L. R. 663; 4 A. L. J. 333; 11 C. W. N. 585; 17 M. L. J. 240; 2 M. L. T. 204; 5 C. L. J. 566; 34 I. A. 93 (P. C.), referred to.

Under O. XLV, r. 4 of the Civil Procedure Code, consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. [p. 218, col. 2.]

Where two suits were determined by two distinct judgments in the Court of first instance and appeals therefrom were originally heard together and decided by one judgment but an application for review in one of them was allowed and another judgment given.

Held, that the judgments in the suits were different and distinct in both the Courts and that the second requirement under O. XLV, r. 4 of the Civil Procedure Code was not fulfilled and consolidation for the purposes of valuation could not be allowed. [p. 219, col. 1.]

Bhagwan Singh v. Bhavani Das-Bhagwan Das, 59 Ind. Cas. 794; 43 A. 223; 18 A. L. J. 1119; 2 U. P. L. R. (A.) 411, distinguished.

CIVIL MISCELLANEOUS PETITION

No. 1642 OF 1922.

Petition praying that, in the circumstances stated therein, the High Court will be pleased to grant leave to appeal to His Majesty in Council against the decree, dated 3rd November 1921, of the High Court in Appeal No. 374 of 1919, preferred against the decree of the Court of the Subordinate Judge, Ramnad, at Madura, in Original Suit No. 58 of 1917.

CIVIL MISCELLANEOUS PETITION

No. 1643 OF 1922.

Petition praying that, in the circumstances stated therein, the High Court will be pleased to consolidate the appeals to His Majesty in Council against the decrees of the High Court in Appeal Suits Nos. 373 and 374 of 1919 (Original Suits Nos. 57 and 58 of 1917 on the file of the Court of the

Subordinate Judge, Ramnad, at Madura, for purposes of pecuniary valuation).

Mr. A. Krishnaswami Aiyar, for the Petitioner.

Messrs. K. V. Krishnaswami Aiyar and N. Swaminatha Iyer, for the Respondent.

ORDER.—These are applications for leave to appeal to His Majesty in Council against the decision of this Court in A. S. No. 374 of 1919 and for consolidation of the suit in question in that appeal and the suit in question in Appeal No. 373 of 1919 in respect of which leave to appeal has already been given, the latter application being made under O. XLV, r. 4, Civil Procedure Code. The consolidation is asked for, for the purpose of valuation; and it is not disputed that unless consolidation is allowed, the case in Appeal No. 374 of 1919 will not fulfil the requirement of section 110, Civil Procedure Code, in respect of the amount of the subject-matter of the suit in the Court of first instance or the subject-matter in dispute in appeal.

Under O. XLV, r. 4, consolidation is admissible, only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. We can easily hold that the two suits in question before us do involve substantially the same questions for determination. As regards, however, the second requirement in the order, the facts are that the suits were determined in the Court of first instance by two distinct judgments. In this Court the A. S. Nos. 373 and 374 of 1919 were, no doubt, originally heard together and decided by one judgment. There was, however, afterwards in A. S. No. 374 of 1919 an application for review of that judgment and, eventually, that appeal was re-heard on review and another judgment was given on the 3rd November 1921. The judgment of that date, no doubt, did not in any way modify the portion of the earlier judgment, in respect of which leave to appeal has been granted and is now asked for. That, however, does not, in our opinion, affect the character of the judgment of the 3rd November 1921, as the judgment is in Appeal No. 374 of 1919.

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and as that judgment is distinct from the judgment in Appeal No. 373 of 1919 the earlier judgment was, of course, adopted so far as it still stood in the latter judgment A. S. No. 374 of 1919; but that did not entail that the latter judgment was not the judgment in that appeal and the final adjudication, against which a further appeal would have to be taken. In these circumstances, we cannot hold that the second requirement of O. XLV, r. 4, that the suits to be consolidated were decided by the same judgment has been met, since the judgments deciding them were, in our opinion, certainly different in the Court of first instance and were distinct in this Court. There is, therefore, no room for the application of such an authority as *Bhagwan Singh v. Bhavani Das-Bhagwan Das* (1). The petition for consolidation failing, it is not possible for us to treat the valuation in Appeal No. 374 of 1919 as fulfilling the requirement of section 110 Civil Procedure Code.

We are then asked to certify the case as a fit one for appeal under section 109 (2), Civil Procedure Code. The decisions as to fitness for appeal with reference to that provision are, no doubt, wide. But it seems to be well established that there must be some substantial question of law of general interest involved [see *Moti Chand v. Ganga Prasad Singh* (2) and *Sadagopa Chariar v. Krishnamoorthy Rao* (3)]. We cannot see how such a question arises in the case before us, since the matter for appeal is only the effect on a particular case of section 47, Civil Procedure Code, as debarring the plaintiff from proceeding by suit instead of in execution of a decree already obtained.

It is then suggested that the case is covered by section 109 (c), Civil Procedure Code, because leave has already been granted in respect of another case, A. S. No. 373 of 1919, involving the same question as this. The only authority for this very wide construction of

section 109 (c) is *Makund Sarup v. Richard Ross Skinner* (4). We are not prepared to act on the principle suggested without more and better authority.

In these circumstances, the petitions must fail and must be dismissed with costs.

V. N. V.

Petitions dismissed.

(4) 5 Ind. Cas. 583.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 75 OF 1922.

November 9, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

SITA RAM—PLAINTIFF—APPLICANT

versus

LALTA AND ANOTHER—DEFENDANTS—

OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree, application to set aside—Court, power of, to determine nature of security.

Upon an application made to a Small Cause Court to set aside an *ex parte* decree, it is open to the Court to direct whether the security should be paid in cash, or in property, and if it gives a direction one way or the other, a reasonable time must be allowed for carrying out that direction.

Revision against an order of the Subordinate Judge, Bara Banki.

Mr. Ghulam Hasan, for the Applicant.

Mr. Basdeo Lal, for Opposite Parties Nos. 1 and 2.

JUDGMENT.—An application was made by some of the defendants to set aside an *ex parte* decree obtained against them by the present applicant from the Small Cause Court. The decretal money was not deposited with the application. The Court required the defendants to deposit the decretal money and fixed a date for the hearing of the application. On that date two days' further time was granted and within that time the decretal money was deposited. The Court below has accepted that deposit as a sufficient compliance of section 17 of the Provincial Small Cause Courts Act (IX of 1887). There is a conflict of opinion in regard to the power of the Court to receive such deposit after the appli-

(1) 59 Ind. Cas. 794; 43 A. 223; 18 A. L. J. 1119; 2 U. P. L. R. (A.) 411.

(2) 24 A. 174; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.).

(3) 30 M. 185 at p. 190; 9 Bom. L. R. 663; 4 A. L. J. 333; 11 C. W. N. 585; 17 M. L. J. 240; 2 M. L. T. 204; 5 C. L. J. 566; 34 I. A. 93 (P. C.).

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cation is filed but the decision in *Raghu-
dan v. Badal* (1) holds good and governs
a case of this character. It is open to the
Court, according to that decision, to direct
whether the security should be paid in cash
or in property, and if it gives a direction
one way or the other, a reasonable time
has to be allowed for carrying out that
direction.

The application is, therefore, dismissed
with costs.

W. C. A.

Application dismissed.

(1) 3 O. C. 296.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1712 OF 1922.

February 7, 1923.

Present.—Mr. Justice Campbell.MUHAMMAD DIN, MINOR, THROUGH ALI
MUHAMMAD, HIS FATHER—DEFENDANT

—APPELLANT

versus

LABH SINGH AND OTHERS—PLAINTIFFS

KALU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Custom.—Non-proprietors, right of, to transfer
house.—*Mauza Raja Jang, Tahsil Kasur, District
Lahore.*

Several previous sales of their houses by non-
proprietors in a village, even where acquiescence
by the proprietors is proved, do not necessarily
imply a renunciation by the proprietors of their
discretionary right to object to subsequent sales
or establish a custom recognising such sales as
authorised by the proprietors. [p. 221, col. 1.]

Kharak Singh v. Alladitta, 85 P. R. 1882, *Maya
Das v. Jani Muhammad*, 13 P. R. 1889, *Buta
Mal v. Ruldu*, 40 P. R. 1889, *Khudayar v. Kapur
Singh*, 50 P. R. 1889 and *Harsahai v. Ganga Ram*,
7 P. R. 1900, P. L. R. 1900, p. 145, followed.

Mauza Raja Jang, in Tahsil Kasur, District
Lahore, is a village and not a town. [p. 220, col. 2.]

[Non-proprietors of *Mauza Raja Jang* have not
by custom the right to transfer their rights of resi-
dence in the village without the consent of the
proprietors. [p. 220, col. 2.]

Second appeal from the decree of the
Senior Subordinate Judge, Lahore, dated
the 18th March, 1922, affirming that of the
Munsif First Class, Kasur, dated the 29th
July, 1921.

Lala Tirath Ram, for the Appellant.

Lala Kishen Chand, for the Plaintiff-
Respondent.

JUDGMENT.—The suit was by certain
proprietors in the village of Raja Jang
for possession of a site sold by Faqiria, a
sweeper by caste and a non-proprietor,
to another non-proprietor Muhammad Din
tarkhan. The plaintiffs based their suit
on the allegation that such a sale
by non-proprietor was not sanctioned by
custom. The defendant pleaded that Raja
Jang is a town and not a village, that non-
proprietors have the right to transfer their
sites and that Faqiria was full owner.

The Trial Court decreed the suit and the
decree was upheld on appeal by the Senior
Subordinate Judge who granted a certificate
for second appeal under section 41 (3) of
the Punjab Courts Act stating the question
regarding the existence of custom to be whe-
ther a non-proprietor in Raja Jang can
transfer his right of residence in the village
without the consent of the proprietor
or has the right to remove *malba*. The first contention is that the finding
of the Courts below that Raja Jang is a
village is erroneous. I find no evidence
on the record of the population of this place
except an obviously exaggerated statement
by a defence witness named Hazara Singh
that there are 5,000 or 7,000 houses. There
is no evidence that any trade is carried on.
According to other evidence produced by the
defendants, there is no Municipal Committee
and no Bazars. There are two primary
schools and most of the houses are *Kachcha*.
On the other hand, it is proved that the
organization of Raja Jang is that of an
ordinary prosperous village in the Punjab,
and no grounds have been established on
which it can be held to be a town.

The second contention is that the evidence
on the record establishes the right of a non-
proprietor resident to transfer his right
of residence and the materials of his house
without the consent of the proprietor of the
site. The defendants produced in all three
witnesses. The first, Sundar Singh, states
that he being a *Zargar* purchased sites from
Nabi Bakhsh, weaver, and Faiz *Khoja*. He
did not say whether the proprietors con-
sented to the sale. He was unable to pro-
duce any sale-deed by Nabi Bakhsh but
he exhibited the sale-deed of the purchase

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from Faiz Khoja. The second witness, Hazara Singh Mirasi, stated that he had purchased land from two Christian sweepers, Chandu and Roshan, and he produced the sale-deeds. He stated that no one objected and that he did not obtain permission to make the purchase from anybody. The third witness, Roshan, says that twelve or fourteen years ago he purchased four marlas from the defendants, that a sale-deed was executed, but that he had not brought it to Court.

This was all the evidence and it is manifestly quite insufficient. It has often been ruled by this Court, e.g., in *Kharak Singh v. Alladitta* (1), *Maya Das v. Jan Muhammad* (2), *Bu'a Mal v. Ruldu* (3), *Khudayar v. Kapur Singh* (4) and *Harsahai v. Ganga Ram* (5) that several previous sales, even where the acquiescence by the proprietors is proved, do not necessarily imply a renunciation by the proprietors of their discretionary right to object to subsequent sales or establish a custom recognising such sales as authorised by the proprietors.

A number of deeds was presented to the Trial Court after the hearing of the case had been concluded, but no proof was offered of their genuineness and they cannot be accepted as evidence that the transaction which they profess to record in fact took place.

The appellant has failed to establish his case and the appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 85 P. R. 1882.

(2) 13 P. R. 1889.

(3) 40 P. R. 1889.

(4) 50 P. R. 1889.

(5) 7 P. R. 1900; P. L. R. 1900, p. 145.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION NO. 17 OF 1922.

October 25, 1922.

Present.—Mr. Batten, J. C., and

Mr. Hallifax, A. J. C.

MOHANLAL BALBHADRA—DEFENDANT

—APPELLANT—APPLICANT

versus

Rai Bahadur BISSESARDAS DAGA—

PLAINTIFF—RESPONDENT—

NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 109 (c)
—Leave to appeal to Privy Council—Important questions of law.

In order that leave to appeal to the Privy Council should be granted the questions involved in the appeal must generally be important in the way that the decision of them will affect a large number of persons.

Application for leave to appeal to His Majesty in Council against the decree, dated the 9th January 1922, passed in First Appeal No. 84 of 1920.

Dr. H. S. Gour, for the Applicant.

Sir Bepin Krishna Bose, for the Non-Applicant.

ORDER.—This Court's judgment did not affirm that of the lower Court but the value of the subject-matter in dispute is a few rupees less than Rs. 5,000. To say that the case involves "very difficult and intricate questions of law" is to say that it involves "substantial questions of law." If that were sufficient to bring it within the meaning of clause (c) of section 109, the word *and* at the beginning of the last clause of section 110 would be superfluous. The questions involved must generally be important in the way that the decision of them will affect a large number of persons. On the facts disclosed in this case it is clear that the decision will affect nobody in these Provinces except the appellant. The application for leave to appeal is rejected and the applicant will pay all the costs of the opposite party which we assess at Rs. 30.

G. R. D.

Application rejected.

RAM KISHAN DAS v. JAGANNATH PRASAD.
**ODDH JUDICIAL COMMISSIONER'S
 COURT.**

SECOND CIVIL APPEAL NO. 174 OF 1922.

August 25, 1922.

Present—Mr. Ashworth, J. C.

RAM KISHAN DAS—PLAINTIFF—

APPELLANT

versus

JAGANNATH PRASAD—DEFENDANT

NO. 2—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 35—
 Costs—Appellate Court, duty of—Appeal, second,
 interference by, High Court.

Under section 35 of the Civil Procedure Code it is the duty of an Appellate Court to award costs or make some direction as to costs, and the failure to make such provision, amounts to a failure to comply with the law, and as such is open to correction in second appeal. [p. 223, col. 1.]

The High Court will, in second appeal, interfere with an order of the lower Appellate Court varying the order of the Trial Court in the matter of costs, when such variation is based on either a wrong view of the law, or on a supposed fact for which there is no evidence whatever. [p. 223, col. 1.]

Appeal against the decree of the Third Additional District Judge, Lucknow, dated the 21st February 1922, modifying the decree of the Additional Subordinate Judge, Lucknow, dated the 13th June 1921.

Mr. *Hakim-ud-din Siddiqi*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent.

JUDGMENT.—In this second appeal the appellant, Ram Kishan Das, who was plaintiff in the Court of first hearing, appeals from the decree of the lower Appellate Court as to costs. The appellant, Ram Kishan Das, brought a suit against one Jagannath Prasad on the basis of an indemnity bond, dated 28th November 1920, by which a third party, Jagat Narain, charged certain immoveable property with the payment of two debts created by him by pro-notes. Jagannath Prasad had purchased the property charged and the plaintiff's suit was for recovery of the debts on the basis of the indemnity bond by sale of the property. We are not concerned with the decree against defendant No. 1, Jagat Narain. As against the second defendant, who is respondent in this appeal, the Court of first hearing decreed Rs. 346 odd with interest on the finding that the consideration for the indemnity bond was only good to this extent. It directed that the plaintiff-appellant and the defendant No. 2 respondent should bear

their own costs. In first appeal to the Third Additional District Judge this order of the Court of first hearing as to costs was set aside and it was directed that the defendant No. 2, respondent, ought to get his costs on the Rs. 700 which he had succeeded in getting cut off the face-value of the indemnity bond. The lower Appellate Court admitted that the appellant had also pleaded that the whole of the security bond was not binding on him but remarked that this was merely a legal plea. It also apparently by inadvertence failed to pass any orders as to the costs of appeal to be borne by the parties to the appeal.

The plaintiff appeals against this order on two grounds. He maintains that the lower Appellate Court's order reversing the order of the Court of first hearing as to costs should be set aside; and, secondly, that the lower Appellate Court's failure to award any costs of the appeal should be deemed an order requiring the parties to pay their own costs and as such should be set aside in favour of an order awarding the plaintiff-appellant his costs in the lower Appellate Court.

A preliminary objection is taken by the respondent-defendant No. 2 that no appeal lies. It will be convenient, in considering this question, to keep separate the question of the propriety of the lower Appellate Court's order as to costs in the Court of hearing from its failure to award any particular costs in the appeal. Reliance is placed by the respondent on *Maula Bakhsh v. Musammat Masuman* (1) where it was held that a second appeal lies against an order about costs only when the order of the first Appellate Court is contrary to some specified law and not otherwise. That ruling is, however, inapplicable to the present case. It dealt with an order as to costs passed by a lower Appellate Court in respect of proceedings before it. Doubtless, where there is an appeal against the costs awarded by any Court in respect of the proceedings before it the fact that judicial discretion is vested in any Court to award costs in respect of such proceedings will be a reason for a further Appellate Court refusing to interfere except on certain strong grounds with which we are not concerned.

(1) 8 O. C. 251.

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Where, as in this case, the lower Appellate Court has interfered with the order of the Court of hearing as to costs, there appears to me no reason why the legality of the lower Appellate Court's order should not be open to question in second appeal. The Court of hearing had directed that the parties should bear their own costs. The lower Appellate Court varied this order because it held that the plea of the present respondent that the indemnity bond was altogether invalid was merely a legal plea. If this reason be treated seriously then it was wrong in law as there is no distinction made by the law between pleas based on facts and pleas based on law so far as the apportionment of costs is concerned. What I think was meant by the lower Appellate Court was that the plea that the indemnity bond was altogether invalid, was not seriously taken up and occasioned no trouble to the Court or litigants. That this was not so, however, is clear from the fact that the invalidity of the security bond was seriously contended in the appeal of the respondent before the lower Appellate Court. It is not permissible, therefore, to disregard this plea as taken in the Court of first hearing. In the circumstances, I think that the variation by the lower Appellate Court of the costs of the Court of first hearing was based on either a wrong view of the law or on a supposed fact for which there was no evidence whatever, and, in any case, varied the first Court's decree as to costs on a ground that was insufficient in point of law. The lower Appellate Court's decision, therefore, as to the costs in the Court of first hearing was bad in law and is liable to be upset in second appeal.

As regards failure of the lower Appellate Court to make any orders as to the costs of the appeal, I am of the opinion that section 35 of the Code of Civil Procedure must be construed to impose upon the Court a duty that it shall award costs or make some direction as to costs. The failure of a Court to make any direction could no, doubt, be remedied by way of review but it is equally open to a party to appeal against a decree which fails to make provision for costs. The failure to make such provision amounts, in my opinion, to a failure to comply with

the law and as such is open to correction in second appeal.

Consequently, I allow this appeal and, setting aside the order of the lower Appellate Court as to costs, I restore the order of the Court of first hearing that the parties shall bear their own costs in the First Court and I make an order as to costs of first appeal that the present appellant shall get his full costs of that appeal. He will also get his costs of this appeal.

W. C. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 367
OF 1922.

December 18, 1922.

Present.—Justice Sir N. R. Chatterjea,
Kt., and Mr. Justice Cuming.

HEMANGINI DEVI AND ANOTHER—
DEFENDANTS NOS. 1 AND 2—APPELLANTS
versus

RAJA BEJOY SINGH DUDHARIA—
PLAINTIFF—RESPONDENT.

Trespass—Building on land belonging to another—Knowledge of builder, effect of—Building without permission—Building, removal of—Acquiescence, doctrine of.

If a person begins to build on land supposing it to be his own and the real owner, perceiving the mistake, abstains from setting him right and leaves him to persevere in his error, he will be allowed, in equity, to assert his title to the land. But if he builds, knowing it to be the property of another, nothing will prevent the real owner from afterwards claiming the land, with the full benefit of the expenditure upon it. [p. 225, col. 2.]

Ramsden v. Dyson, (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926 and *Beni Ram v. Kundan Lal*, 26 I. A. 58; 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.), relied on.

When a person writes a letter to another asking permission to construct a building upon his land and makes the construction in the expectation that permission will be granted but without waiting for it, he does so at his own risk. [p. 226, col. 2.]

Where a person builds on another's land the acquiescence of the owner will deprive the latter of his legal rights, only when the acquiescence amounts to fraud. There are several requisites necessary to constitute

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fraud. In the first place, the person making the building must have made a mistake as to his legal rights. Secondly, he must have expended some money or must have done some act, not necessarily upon another's land on the faith or mistaken belief. Thirdly, the owner, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the person making the building. Fourthly, the owner must know of the latter's mistaken belief of his rights. Lastly, the owner must have encouraged the person making the building in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. When all these elements exist, there is fraud of such a nature as will entitle a Court to restrain the owner from exercising his legal rights. [p. 226, col. 1.]

Willmott v. Barber, (1880) 15 Ch. D. 96 at p. 105; 43 L. T. 95; 28 W. R. 911, relied on.

Appeal against a decree of the District Judge, Murshidabad, dated the 23rd of November 1921, reversing a decree of the Munsif, First Court at Jangipur, dated the 31st of January 1920.

Dr. *Jadu Nath Kanjilal*, for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for a declaration of right of way and for a mandatory injunction for the removal of an overbridge which the defendants had constructed over the pathway. We denied plaintiff's title and also pleaded that plaintiff was estopped from obtaining an injunction inasmuch as he acquiesced in the building of the overbridge. The First Court declared plaintiff's title but refused the mandatory injunction asked for. On appeal the suit has been decreed in full. On the 20th of November 1918, we wrote a letter to the plaintiff praying for permission to build the overbridge. The plaintiff did not condescend to reply to that letter. The plaintiff's local agent resides in the locality. The finding is that the overbridge was built in the presence of the Rajah's agent. He did not object to our building. I submit all this clearly proves acquiescence on the plaintiff's part. If that is so, the plaintiff is neither entitled to mandatory injunction nor to damages. See *Kerr on Injunctions* (3rd Edition) 17; 117; 484. The acquiescence of an agent is sufficient. See *Woodroffe on Injunctions* (4th Edition) 113; *Benode Coomaree Dossee v. Soudaminy Dossee* (1), *Noyana Misser*

v. Rupikun (2), *Anath Nath Deb v. Galstain* (3), *Chandra Nath Pal v. Sree Gobind Chowdhury* (4), *De Bussche v. Alt* (5).

Babu *Mohendra Nath Roy* (with him Babu *Ramani Mohan Chatterjee*), for the Respondent.—There is no substance in the appeal. As regards the question of title it is concluded by findings of fact. As regards acquiescence, see *Willmott v. Barber* (6) where the fundamental propositions were laid down. The finding is that he did not wait for the Rajah's permission. See *Ramsden v. Dyson* (7), *Smith v. Smith* (8); section 55, Specific Relief Act. The learned Judge was quite right in holding that there was no acquiescence. See *Shyam Lal Ghosh v. Rameswari Basu* (9).

Dr. *Kanjilal*, replied in brief.

JUDGMENT.

Chatterjee, J.—This appeal arises out of a suit for a declaration of the plaintiff's right to a pathway, and for a mandatory injunction for the removal of an overbridge, which the defendants had constructed over the pathway, on the allegation that the pathway was a private pathway belonging to the plaintiff, and that the defendants had no right to construct the overbridge.

The defendants, among other things, denied the plaintiff's right, and also pleaded that the plaintiff was precluded, by reason of acquiescence in the construction of the overbridge, from having it demolished.

The Court of first instance declared the title of the plaintiff to the disputed pathway but refused the mandatory injunction to demolish the overbridge, and gave the plaintiff a decree for Rs. 100 as damages.

On appeal by the plaintiff, the learned District Judge directed the removal of the overbridge.

(2) 9 C. 609; 12 C. L. R. 300; 4 Ind. Dec. (N. S.) 1054.

(3) 12 C. W. N. 519; 35 C. 661.

(4) 6 C. W. N. 308.

(5) (1878) 8 Ch. D. 286 at p. 314; 47 L. J. Ch. 381; 38 L. T. 370.

(6) (1880) 15 Ch. D. 96 at p. 105; 43 L. T. 95; 28 W. R. 911.

(7) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

(8) (1875) 20 Eq. 500; 23 W. R. 771; 32 L. T. 787.

(9) 33 Ind. Cas. 273; 23 C. L. J. 82.

(1) 16 C. 232 at p. 266; 3 Ind. Dec. (N. S.) 167.

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The defendants have appealed to this Court.

The first contention raised is that a certain letter by which the defendants had asked for the permission of the plaintiff for the erection of the overbridge was no evidence of the title of the plaintiff, and that the question of title should have been decided upon other evidence.

There is no doubt, however, that the letter contained a clear admission of the plaintiff's title and both the Courts below have found that the plaintiff's title was proved. The main contention, however, is that the Court below ought to have held that there was acquiescence on the part of the plaintiff and that the Court, therefore, was not justified in directing the removal of the overbridge.

It appears that the defendants, on the 20th November 1918, wrote the letter referred to above, asking for permission to erect the overbridge. No orders appear to have been passed on this letter and the defendants without waiting for any order built the overbridge. The plaintiff's local agents were residing very near the place and they did not raise any objection. It is accordingly contended that this amounted to acquiescence on the part of the plaintiff which precluded him from having a mandatory injunction. The cases of *Noyna Misser v. Rupikin* (2) and *Benode Coomaree Dossee v. Soudaminy Dossee* (1) have been relied upon on behalf of the appellants.

In the second case, the question was whether a building which had obstructed the entrance of light into the plaintiff's buildings should be demolished, when the plaintiff had not taken prompt steps. Wilson, J., observed: "When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be."

The building to be demolished, however, in that case was not erected upon any land belonging to the plaintiff and the case, therefore, is quite distinguishable from the present.

The first case related to an agricultural holding. The tenant of an agricultural

holding planted the land of his *jote* with mango trees to the knowledge, but without the consent, of the landlord, thus changing the character of the land. More than three years afterwards, the landlord sued for a mandatory injunction to have the mango trees removed. It was held that having stood by for more than three years and allowed the tenants to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction. It was the case of a tenant, and it is unnecessary to consider under what circumstances a landlord is entitled to a mandatory injunction against his tenant.

Here the defendant was a stranger. So far as strangers are concerned, the law on the point appears to be quite settled. In the leading case of *Ramsden v. Dyson* (7) it was observed that, "if a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake, abstains from setting him right and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it".

The principle was referred to by the Judicial Committee in the case of *Beni Ram v. Kundan Lal* (10), (which was a case of a tenant). Their Lordships pointed out that the rule of equity "might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected."

The circumstances under which the owner of a legal right will be precluded by his acquiescence, from asserting it, was considered by Fry, J., in *Willmott v. Barber* (6); the learned Judge observed: "It has been said that the acquiescence which will deprive a man of his legal rights must amount

(10) 26 I. A. 58; 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

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to fraud, and, in my opinion, that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which it calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly, or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

As stated above, the defendants in the present case were under no mistake about their rights, they were perfectly aware that the land belonged to the plaintiff, and they wrote a letter to the plaintiff asking for permission to construct an overbridge. The principal ground upon which the doctrine of acquiescence is applied, namely, that the party must have made a mistake as to his right, therefore, does not apply to the present case.

It is contended, however, on behalf of the appellants that after having written that letter, the defendants expected that the plaintiff would agree to the construction, and that having regard to the fact that no steps were taken to prevent the construction of the overbridge by the local agents and

the further fact that one of them when invited to the house of the defendants passed over the bridge, and did not object to it are relied upon as acquiescence on the part of the plaintiff. Our attention has been drawn to the provisions of section 56 (j) of the Specific Relief Act which lays down that an injunction cannot be granted when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. It is further contended that the acquiescence of the agent is sufficient to bind the plaintiff.

There may be cases where the acquiescence of the agent is binding on the principal. In the present case, however, the letter was admittedly written to the Raja himself and not to his local agents. The defendants constructed the overbridge without waiting for the plaintiff's permission, and if they constructed it in the expectation that permission would be granted, they must be taken to have done so at their own risk.

Under these circumstances, I do not see how the mere fact that the plaintiff's local agents did not raise an objection to the construction of the overbridge could be held to be acquiescence on the part of the plaintiff. The permission, as stated above, was asked for not from them but from their master, the plaintiff himself, and there is nothing to show that the plaintiff was aware of the construction of the overbridge or that his local agents had any authority to sanction the construction of the overbridge. As to the fact of one of the agents having passed over the overbridge when invited to the defendants' house that must have been *after* its construction as he could not have passed over it unless the construction was completed or nearly so. There was some criminal proceeding in connection with the overbridge, and it does not appear that there was much delay in instituting it, and, shortly after, this suit was instituted.

The last contention was that the overbridge having been completed, the plaintiff could only ask for damages and not an injunction. But the principle applicable to such cases has already been pointed out above. If the land belongs to the plaintiff and the defendants, with full knowledge that they have got no right to the land, erect a structure on it, there is no reason

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why the plaintiff should suffer the structure made upon his land to stand and submit to be compensated with damages.

On the whole, I think that the decision of the lower Appellate Court is correct and this appeal must be dismissed with costs.

Cuming, J.—I agree.

N. K.

Appeal dismissed.

ALDAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1420 OF 1921.

February 26, 1923.

Present:—Mr. Justice Gokul Prasad.

BENARSI—PLAINTIFF—

APPELLANT

versus

BHULLU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Mortgage—Sale under decree of prior mortgagee—Puisne mortgagee not impleaded—Property purchased of, by prior mortgagee—Suit for sale by puisne mortgagee—Prior mortgagee, whether necessary party.

A puisne mortgagee cannot sue successfully for a decree for sale of the mortgaged property without impleading a prior mortgagee who has already purchased the mortgaged property in execution of a decree for sale on his mortgage without impleading the puisne mortgagee.

Second appeal from a decree of the District Judge Benares, dated the 8th August 1921.

Mr. K. Verma, for the Appellant.

Messrs. Harnandan Prasad and G. Agarwala, for the Respondents.

JUDGMENT.—The question raised in this appeal is a very short one, namely, whether the puisne mortgagee can sue successfully for a decree for sale of the mortgaged property without impleading a prior mortgagee who has already purchased the mortgaged property in execution of a decree for sale on

his mortgage without impleading the puisne mortgagee.

The Courts below have answered this question in the negative and have dismissed the plaintiff's puisne mortgagee's suit for sale.

He comes here in second appeal and contends that, under the new Code of Civil Procedure, the puisne mortgagee can bring the mortgaged property into sale without impleading a prior mortgagee. That rule would, of course, apply in an ordinary case in which the property belongs to the mortgagor, but here the relief claimed by the puisne mortgagee is against the mortgaged property which has been sold in satisfaction of a decree on a prior mortgage to which he was not a party. The ordinary rule of a property being sold in execution of a prior mortgage is that the property is sold free of all puisne incumbrances and the only right which a puisne mortgagee has, is the right to redeem the prior mortgage and bring the property to sale, but because of his not being so impleaded he cannot get rid of his liability to redeem the prior mortgage. In the present case, as I have already stated above, the proprietary rights in the property have vested in the prior mortgagee and the puisne mortgagee cannot have those rights sold without paying up the prior mortgage. What the plaintiff wants really is to have the property purchased by the prior mortgagee sold to satisfy the later debt without redeeming the prior mortgage. This cannot be allowed. He could only redeem the prior mortgage by making the prior mortgagee a party to the suit. He did not intend to do so, and he must suffer the consequences. He cannot sell the property in the absence of the owner thereof. In my opinion the Courts below were right. I therefore dismiss this appeal with costs including in this Court fees on the higher scale.

N. H.

Appeal dismissed.

JHIBU v. BALAJI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 171 OF 1922.

February 17, 1923.

Present.—Mr. Halifax, A. J. C.

JHIBU—APPLICANT

versus

BALAJI—NON-APPLICANT.

Tort-feasors—Knowledge of illegality—Contribution.

The rule that there can be no right of contributions *inter se* between two wrong-doers applies where the wrong-doers knew or ought to have known that they were doing an illegal or wrongful act; but if they acted under a *bona fide* claim of right and had reason to suppose that they had a right to do what they did, then the right of contribution *inter se* exists. [p. 228, col. 2.]

Suput Singh v. Imrit Tewari, 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N. S.) 1066, *Sreeputty Roy v. Loharan Roy*, 7 W. R. 384, *Merryweather v. Nixan*, (1799) 2 Sm. L. C. (5th Ed.) 546; 8 T. R. 186; 16 R. R. 810; 1 Sm. L. C. (10th Ed.); 383, 101 E. R. 1337, *Farebrother v. Ansley*, (1808) 1 Camp. 342 and *Adamson v. Jarvis*, (1827) 4 Bing. 66; 12 Moore 241; 5 L. J. (O. S.) C. P. 68; 29 R. R. 503; 130 E. R. 693, relied on.

Appeal against an order of the Judge, Small Cause Court, Nagpur, dated the 30th June 1922, in Civil Suit No. 2441 of 1921.

Mr. V. D. Kale, for the Applicants.

Mr. D. P. Tiwari, for the Non-Applicant.

ORDER.—The first plaintiff is a brother of one Kashinath Kunbi, deceased; the defendant is the son of another brother and the remaining five plaintiffs are the sons and grandsons of two other brothers of theirs. One Bhagwan obtained a decree against the parties to this suit for possession of certain land on the strength of a lease of it given to him by Kashinath's widow, and subsequently sued them for the mesne profits derived from it during the period of their wrong possession. He obtained a decree for an amount which was paid in full by the plaintiffs, and they have now sued the defendant for contribution of his share. In the Small Cause Court where it was tried the suit was dismissed without examination of its merits on the ground that a suit for contribution between joint tort-feasors is not maintainable. In *Vayangara Vadaka Vittil Manja v. Pariyangot Padingara Kuruppath* (1) and *Fakire v.*

Tasaddug Husain (2) the two cases cited by the learned Judge as supporting this view, it is distinctly explained that that statement of the rule in respect of contribution between joint wrong-doers is much too wide.

2. *Suput Singh v. Imrit Tewari* (3) contains a full statement of the rule that has always been accepted as correct. In that case a decree had been passed against both parties for damages for felling a number of palm trees, and Garth, C. J., and Mitter, J., said: "The first and main question is, whether, as between the persons against whom jointly the decree in the former suit was pronounced, there is any right of contribution at all, and this depends [according to the rule laid down in the Full Bench case, to which we have been referred, *Sreeputty Roy v. Loharam Roy* (4)] upon the question, whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit for contribution would lie [see also *Merryweather v. Nixan* (5) and *Farebrother v. Ansley* (6)]. But, on the other hand, if the defendants in the former suit were not guilty of a wrong in that sense, but acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did, then, no doubt, they might have a right of contribution *inter se*; and in such case the Judge in the Court below was bound to enquire what share they each took in the transaction, because, according to circumstances, one or more of them might be excused altogether or in part from contributing; as, for instance, (to use an illustration put by Sir Barnes Peacock), one of them might have acted as servant and by the command of

(2) 19 A. 462; A. W. N. (1897) 107; 9 Ind. Dec. (N. S.) 297.

(3) 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N. S.) 1066.

(4) 7 W. R. 384.

(5) (1799) 2 Sm. L. C. (5th Ed.) 546; 8 T. R. 186; 16 R. R. 810; 1 Sm. L. C. (10th Ed.) 383; 101 E. R. 1337.

(6) (1808) 1 Camp. 342.

(1) 7 M. 89; 2 Ind. Dec. (N. S.) 647.

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the others, or the others might have been the only persons benefited by the wrongful act; in which case those who were alone benefited, or who ordered the servant to do the act, would not be entitled to contribution."

3. This was followed in *Vayangara Vadaka Vittil Manja v. Pariyangot Padingara Kuruppath* (1), one of the two rulings mentioned in the judgment of the lower Court, and the plaintiff was held not to be entitled to a contribution of a share of the costs which both parties had been ordered to pay as defendants in a previous suit, but only for the reason that he was solely responsible for putting forward the defence in that suit. The learned Judges said: "Acting on the principles laid down in *Suput Singh v. Imrit Tewari* (3) we think that the plaintiff is not entitled to contribution against the defendant. The Judge laid down, rather too widely a rule that there cannot be contribution for costs between two parties ordered to pay them. Whether there is to be contribution, depends on the nature of the defence by each party, and whether the defence was made on reasonable grounds. We dismiss the petition."

4. *Suput Singh v. Imrit Tewari* (3) was again followed in *Kishna Ram v. Rakmini Sewak Singh* (7) in which Straight and Brodhurst, J.J., said: "It is, no doubt, a well-known legal truism that 'no action for contribution is maintainable by one wrong-doer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the tort committed by them both' *Merryweather v. Nixan* (5). But this rule has this limitation, that it is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act' Best, C. J., in *Adamson v. Jarvis* (8)."

(5). In *Lakshmina Ayyan v. Rangasami Ayyan* (9) the tort in question was an act that both parties knew to be illegal and wrongful but it was pointed that the

"clear proposition of law that one tort-feasor cannot recover contribution from another is subject to still another 'important qualification, viz., that where the loss arising from the illegal contract is adjusted so that the adjustment is equivalent to a payment, the adjustment cannot be disturbed.' The suit was held not to be one for contribution between tort-feasors at all but one for the enforcement of a contract subsequent to the tort, and it was by that that the rulings in *Vayangara Vadaka Vittil Manja v. Pariyangot Padingara Kuruppath* (1) and *Suput Singh v. Imrit Tewari* (3) were distinguished. In *Gobind Ghunder Nundy v. Srigobind Chowdhry* (10) what the learned Judges called the "wholesome rule" which is set out above in the extract from the judgment in *Suput Singh v. Imrit Tewari* (3) was again enforced.

6. The second of the two cases mentioned in the judgment of the lower Court is *Fakire v. Tasaduq Husain* (2). There again *Suput Singh's* case (3) was cited with approval and the principle laid down in it was followed, the suit being dismissed in accordance with that principle. The learned Judges said: "That there may in some events be contribution between wrong-doers is shown from the judgment in *Suput Singh v. Imrit Tewari* (3). That decision can, therefore, hardly be called authority for the view that there can never be such contribution, as has been done in the lower Court."

7. Mention has also been made of the judgments of the Privy Council in *Jotindra Mohun Lahiri v. Guru Prosunno Lahiri* (11) and *Guru Prosunna Lahiri v. Jotindra Mohan Lahiri* (12), which are two stages of the same case. The question with which we are now concerned was not raised before their Lordships, but it appears from the report of the earlier case (at page 600*) that the Calcutta High Court dealt with the appeal "after deciding in the plaintiff's favour an objection to the suit that, the

(7) 9 A. 221; A. W. N. (1887) 31; 5 Ind. Dec. (N. S.) 581.

(8) (1827) 4 Bing. 65; 12 Moore 241; 5 L. J. (O. S.) C. P. 63; 29 R. R. 523; 130 E. R. 611.

(9) 17 M. 78; 3 M. L. J. 272; 6 Ind. Dec. (N. S.) 53.

(10) 24 C. 330; 1 C. W. N. 179; 12 Ind. Dec. (N. S.) 887.

(11) 31 C. 597; 31 I. A. 94; 8 C. W. N. 63; 8 Sar. P. C. J. 645 (P. C.).

(12) 35 C. 323; 7 C. L. J. 454; 35 I. A. 32 (P. C.).

* Page of 31 C.—[Ed.]

TIRLOCHAN PRASAD SINGH v. BHAGWATI.

plaintiff being a joint wrong-doer with the defendants, could not sue them for contribution." This decision was doubtless in accordance with that in *Sarbat Singh's case* (3) and if there had been any possible doubt of its correctness, it would almost certainly have been called in question before their Lordships.

8. Now, it cannot be suggested that the conduct of any of the parties to the present suit in holding possession against Bhagwan of the property of which mesne profits were decreed was to their knowledge illegal or wrongful or that any of them acted in the matter otherwise than in good faith under a claim of right which there was reason to suppose was valid. The dismissal of the suit will accordingly be set aside and the case will be remanded to the lower Court for a decision on its merits, that is to say, mainly a decision of the relative amounts of benefits derived by each party from possession of the land. The costs of these proceedings, in which Rs. 15 will be allowed as Pleader's fee, will be costs in the suit.

G. R. D.

Case remanded.

HONOURABLE JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 137 OF 1921.

November 22, 1922.

Present:—Mr. Daniels, A. J. C.

Babu TIRLOCHAN PRASAD SINGH AND OTHERS—APPLICANTS

versus

BHAGWATI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XXII, rr. 3, 9. O. XLIII, r. 1 (k). Suit dismissed in default in ignorance of death of plaintiff—Refusal to set aside dismissal—Procedure.

An order under O. IX, r. 8 of the Civil Procedure Code dismissing a suit for default of prosecution on a date when the plaintiff was dead, in ignorance of such death, is a nullity.

An order under r. 3, O. XXII of the Civil Procedure Code dismissing an application to set aside an order such as the above is not appealable; the proper remedy of the party affected is an application to the Court under r. 9 of O. XXII to set

aside the abatement, and if this application is also dismissed, the order of dismissal is appealable under r. 1 (k) of O. XLIII of the Code.

Revision against an order, dated the 27th May, 1921, of the Subordinate Judge, Partabgarh, confirming an order of the Munsif, Kunda, dated the 18th December 1920.

Mr. Bisheshar Nath Srivastava, for the Applicants.

Mr. Radha Krishna, for Opposite Party No. 1.

JUDGMENT.—This is an application in revision in connection with a suit which has been held to have abated. The case was dismissed in default of appearance of the plaintiff on 20th April 1920, the date fixed for hearing. The order purported to be passed under O. IX, r. 8, Civil Procedure Code, but in fact the plaintiff was dead on that date though neither the Court nor any of the parties was aware of it. In accordance with the principles laid down by the Privy Council in *Debi Bakhsh Singh v. Habib Shah* (1) the order passed was a nullity. Under the Law of Limitation then in force the legal representatives of the deceased had six months from the date of his death within which to apply to be brought on the record. On 31st August 1920, which was admittedly within six months of his death, an application was presented under O. XXII, r. 3 by the second son of the deceased, a minor, and certain trustees said to have been appointed under the Will of the deceased to manage his estate during the minority of the eldest son. On 18th December 1920 the learned Munsif dismissed the application on the ground that both the Will and the trust were denied by the contesting respondents and neither had been proved. Against that order the applicants appealed. The learned Subordinate Judge who heard the appeal dismissed it on the ground that no appeal lay from the order complained of, the appellants' remedy being an application under the second clause of r. 9 of O. XXII i.e. by application to set aside the abatement. Against this order dismissing the appeal the present revision is filed.

(1) 19 Ind. Cas. 526; 35 A. 331; 16 O. C. 1194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9. 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 40 I. A. 151 (P. C.).

PEERAKHA LALKHA V. BAPU KASHIBA MALI.

It is common ground that an order under O. XXII, r. 3 is not open to appeal. O. XLIII, r. 1 (h), Civil Procedure Code, allows an appeal from an order under r. 9, O. XXII, but no appeal is allowed against an order under r. 3. The contention of the applicants' Counsel in this Court is, that the application of 31st August 1920, though it purported to be under r. 3 of O. XXII, was really under r. 9. His contention is that the original order of dismissal for default on 20th April 1920 was really an order of abatement and that this subsequent application of 31st August should be treated as having been made under r. 9. This contention is untenable. The order of dismissal for default could not possibly be an order passed under O. XXII for two reasons. In the first place, no order of abatement could be passed when all the parties concerned were unaware of the fact of the plaintiff's death. In the second place, no such order could be passed till the period of limitation had expired. The Privy Council case of *Debi Bahksh Singh v. Habib Shah* (1), already referred to, has been relied on by both sides. In that case an order of dismissal for default was passed under similar circumstances, the plaintiff being dead at the time. On an application under O. XXII, r. 3, the Deputy Commissioner brought on the record the legal representative and directed the case to proceed. This Court set aside that order on the ground that O. XXII was only applicable while the suit was pending and that, in consequence of the previous dismissal for default, the suit was no longer pending when the application was made. The Privy Council set aside this contention and held that the Deputy Commissioner's order was manifestly correct and should be restored. The applicants rely on the fact that in the body of the judgment as reported the application of the plaintiff's son to have his name substituted is described in one place as an application under O. XXII, r. 9. This appears to be clearly a misprint or slip for r. 3, since in the very next sentence their Lordships go on to say that the application was well within the period of six months limitation. Now six months limitation was applicable only to an order under r. 3; the period of limitation for an application under r. 9 was sixty days only

under Art. 171 of the Limitation Act. The order of the Court is, therefore, correct.

It was also attempted to build an argument on the use of the word "dismissed" in r. 9 of the Order. It was urged that the word "dismissed" was not used in the previous rules and, therefore, the words "abates or is dismissed under this order" might include an order of dismissal passed not under this Order but under r. 9. Applicants' learned Advocate had omitted to notice that the word "dismissal" is used in the second clause of r. 8.

I have been asked to treat this application in the alternative as an application for revision of the Munsif's order of 18th December 1922. I am not prepared to do this for two reasons. In the first place, without expressing any opinion on the merits of the application, it is not shown that the matter comes within the provisions of section 115, Civil Procedure Code. In the second place, there was a remedy open to the applicants in the form of an application under O. XXII, r. 9. It does not necessarily follow that the effect of the present order is to deprive them of all further remedy. An application under r. 9 would, no doubt, now be out of time unless good ground for extending the time can be pleaded, but if such application is made the Court below will, no doubt, give full consideration to any plea which may be urged on the basis of section 14 of the Limitation Act.

I dismiss the application for revision with costs.

W. C. A.

Application dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 149 OF 1922.
January 31, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
PEERAKHA LALKHA—APPELLANT
versus

BAPU KASHIBA MALI—RESPONDENT.

Prior and subsequent purchaser—Prior purchase,
notice of—Burden of proof—Registration—Notice.

GIRDHARI V. ABDULLAH.

Where a prior purchaser seeks to dispossess a subsequent purchaser the onus is upon him to prove that the latter had notice of the prior purchase—mere registration by itself is no notice.

Himatlal Motilal v. Vasudeo Ganesh, 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634, distinguished.

Second appeal from the decision of Joint Judge of Poona, in Appeal No. 298 of 1920, confirming the decree passed by the Subordinate Judge, Junnar, in Civil Suit No. 505 of 1919.

Mr. B. G. Rao, for the Respondents.

JUDGMENT.

Macleod, C. J.—One Nazukbi, the owner of the suit property, passed an agreement in plaintiff's favour on April 2, 1907, to sell the land to the plaintiff. On September 4, 1907, Nazukbi agreed to sell the land to one Chimaji. Chimaji obtained a sale-deed on October 18, 1907. The plaintiff obtained his sale-deed on November 1907. All those documents were registered. The defendants purchased the land from Chimaji on July 28, 1914. On August 2, 1919, the plaintiff filed this suit to recover from the defendants the suit property alleging that the defendants dispossessed him on July 28, 1914. That is the date of the defendants' sale-deed from Chimaji. The plaintiff failed to prove that he had been in possession in 1914 and had been dispossessed.

The question is whether Chimaji took his sale-deed in October 1907 with notice of the previous agreement by Nazukbi to sell the same property to the plaintiff. It has been urged that registration of the agreement of April 2, 1907, was notice to Chimaji. But it has now been settled by a decision of the Privy Council that registration by itself is no notice. There must be other circumstances in the case from which the Court could come to the conclusion that Chimaji had notice of that agreement. It has been urged that the onus lay upon Chimaji, or the defendants claiming through him, to prove that they had no notice of the prior agreement, and the case of *Himatlal Motilal v. Vasudeo Ganesh* (1) was relied upon. That case must depend upon its own facts, and from the judgment it appears that the lower Court had come to the conclusion

that the appellants-defendants had knowledge of the plaintiff's contract prior to the date of the conveyance; but if that case is to be considered as an authority for the proposition that a person in the position of the defendants in this case has to prove the negative, that he took without notice of the prior agreement to sell, then, with the greatest respect, I cannot agree. The defendants had a title, and any body seeking to dispossess them must prove his prior right to possession. If the plaintiff had simply proved his prior agreement and nothing more it cannot possibly be said that he would be entitled to a decree. But if that proposition were correct it would follow that the plaintiff would be entitled to a decree merely on proving his prior agreement of sale, unless the defendants proved that, although they had title and possession, they had no notice of the agreement. In my opinion the decision of the Court below was correct and the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 155 OF 1922.

November 30, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

GIRDHARI AND OTHERS—DEFENDANTS—
APPELLANTS

versus

ABDULLAH, alias MASITA—PLAINTIFF
—RESPONDENT.

Appeal, second—Finding of fact, interference with—Letters Patent Appeal.

A finding of fact should not be disturbed in second appeal. Where a Single Judge of the High Court interferes in second appeal with a finding of fact of the lower Appellate Court, his judgment is liable to be set aside in a Letters Patent Appeal.

Appeal, under section 10 of the Letters Patent, from the order of Mr. Justice Brasher, passed in Civil Appeal No. 1282 of 1921, on the 25th May 1922, reversing that of the District Judge, Karnal, dated the 3rd March 1921.

(1) 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634.

USUF ALI V. AMIN.

Mr. Sagar Chand, for the Appellants.

Mr. B. D. Kureshi, for the Respondent.

JUDGMENT.—This appeal must succeed on the short ground that the finding of fact arrived at by the learned District Judge could not be disturbed on second appeal. The vital question for determination was whether the land in dispute was the property of the plaintiff at the time of the institution of the suit, and the Trial Court, after discussing all the relevant evidence, came to the conclusion that the plaintiff, on whom the *onus* rested, had failed to discharge it. The learned District Judge on appeal after disposing of the only contention urged before him confirmed the judgment of the Trial Court and dismissed the appeal. He evidently endorsed the finding of the original Court on the question of ownership, and we consider that the matter could not be re-agitated in the Court of second appeal.

It is unnecessary to discuss the antiquarian question whether the plaintiff's ancestors were or were not the owners of the property 60 or 70 years ago, and how they lost their title. One thing, however, is beyond dispute that in 1902 the defendants or their ancestors got possession of this very land in execution of a decree obtained by them against certain persons, and it appears that the plaintiff or his ancestors had no concern at that time with the land. It is useless to pursue the subject any further because, as stated above, the finding of fact reached by the learned District Judge was against the plaintiff, and that finding was no longer open to challenge.

We accordingly accept the appeal and, setting aside the order of remand, restore the decree of the District Judge. The plaintiff must pay the costs incurred by the defendants in all the Courts.

Z. K.

*Appeal accepted.***BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL No. 29 OF 1922.

March 9, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

Sayad USUF ALI—PLAINTIFF—
APPELLANT

versus

Sayad AMIN alias PAPA MIYA—

—DEFENDANTS—RESPONDENTS.

Execution of decree—Decree for possession and mesne profits—Stay of execution on production of sureties—Application for determination of future mesne profits—Step-in-aid of execution—Sureties not made parties—Limitation against sureties, saving of—Limitation Act (IX of 1908), Sch. I, Art. 182.

The plaintiff obtained a decree in 1907 for possession, and mesne profits, past and future. In March 1908 he filed a *darkhast* for the recovery of possession and past mesne profits. In the meanwhile, the judgment-debtor got the execution stayed under the order of the High Court after sureties had passed security bonds for the due fulfilment of the decree. The High Court confirmed the decree in September 1915 and the execution proceedings that had been stayed were continued and the decree-holder recovered possession and past mesne profits in 1916. In April 1918, the plaintiff made an application for the determination of the future mesne profits from the date of the decree, making the judgment-debtor only the party. On ascertaining the mesne profits the plaintiff put in the present *darkhast* in January 1920 for recovering from the judgment-debtor or the sureties the amount of future mesne profits so determined:

Held, that the *darkhast* of 1920 was time-barred as against the sureties, inasmuch as limitation as against them ran from 1915, the date of the High Court decree, and though the application to ascertain the amount of mesne profits was made to keep the decree alive as against the judgment-debtor it would not keep the decree alive as against the sureties. [p. 235, col. 1.]

An application for the ascertainment of the mesne profits awarded by a decree, prior as well as subsequent to its date is not a proceeding in the suit but a proceeding in execution and comes within Art. 182 of the Indian Limitation Act. [p. 236, col. 2.]

Second appeal against the decision of the Assistant Judge with A. P. at Sholapur, in Appeal No. 56 of 1921.

Mr. P. B. Shingne, for the Appellant.

Mr. G. S. Mulgaonkar, for Respondent
No. 5.

JUDGMENT.—The plaintiff obtained a decree in Suit No. 871 of 1906 in the Court

USUF ALI C. AMIN.

of the First Class Subordinate Judge of Sholapur on the 10th December 1907 by which he was awarded possession with past and future mesne profits of the property in suit. In March, 1908, he filed a *darkhast* for executing the decree for recovering possession and the past mesne profits. Meanwhile, the defendant preferred an appeal but the appeal was dismissed. The defendant preferred a second appeal and in the second appeal further execution of the decree was stayed under the orders of the High Court after three sureties passed security bonds for the due fulfilment of the decree that might be eventually passed against the defendant. The High Court confirmed the decree of the First Court on the 14th September 1915, and the execution proceedings that had been stayed were continued. The plaintiff recovered possession and the past mesne profits in July 1916, and the proceedings terminated. Since then the question of future mesne profits had not been agitated.

The decree was passed in 1907 under the Civil Procedure Code of 1882 according to the provisions of which mesne profits would have to be ascertained in execution. The Appellate Court might have passed a decree under the Code of 1908 directing an enquiry as to mesne profits under O. XX, r. 12, but it refrained from doing so. In April 1918 the plaintiff made an application for determination of the future mesne profits from the date of the decree. This application was treated as an application in the suit and the decree was made final in February 1919 determining the amount of mesne profits from 1906 to 1916. It was wrong to consider that application as an application in the suit and it must be, for the purpose of this appeal, treated as a proceeding in execution. The sureties were not made parties in this proceeding. But when the mesne profits had been ascertained the present *darkhast* was taken out by the plaintiff on the 3rd January of 1920 for recovering the amount of future mesne profits, so determined, from the judgment-debtor or from the three sureties. Both the lower Courts have held that the *darkhast* was time-barred as against the sureties.

It may be that the sureties were not necessary parties in the plaintiff's applica-

tion for ascertaining the mesne profits; see *Raj Raghbar Singh v. Thakur Jai Indra Bahadur Singh* (1). But it does not follow that, although the sureties were not necessary parties to the application to ascertain the amount of mesne profits, the decree had been kept alive against them by reason of that application. In *Puran Chand v. Roy Radha Kishen* (2) it was held that neither Art. 178, nor Art. 179 of the Indian Limitation Act applied to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of section 211 or 212 of the Code of Civil Procedure. The learned Judges there seemed to have thought that, although the proceedings for the ascertainment of mesne profits were proceedings in execution, still they were of an interlocutory nature and that there was nothing that could be executed under section 255 of the Code until the actual amount of mesne profits had been found and determined. All the authorities on that question were referred to by this Court in *Gangadhar v. Balkrishna* (3) in which it was held that an application for the ascertainment of the mesne profits awarded by a decree, prior as well as subsequent to its date, was not a proceeding in the suit but a proceeding in execution and came within Art. 182 of the Indian Limitation Act of 1908. The decision in *Rebala Ramana Reddi v. Rebala Babu Reddi* (4) was followed in preference to the decisions of the High Courts of Calcutta and Allahabad. Then, in *Narayan v. Timmaya* (5) it was held that the application to execute the decree against the surety was barred by time since the decree could not be treated as passed jointly as against the judgment-debtor and the surety, within the meaning of Art. 179 Explanation 1, paragraph 2, of the Second Schedule to the Limitation Act.

(1) 55 Ind. Cas. 550; 22 Bom. L. R. 521; 22 O. C. 212; 6 O. L. J. 682, 38 M. L. J. 302; 18 A. L. J. 263; 42 A. 158; 46 I. A. 228; 13 L. W. 82 (P. C.).

(2) 19 C. 132; 9 Ind. Dec. (N. S.) 534.

(3) 61 Ind. Cas. 448; 23 Bom. L. R. 263; 45 B. 819.

(4) 18 Ind. Cas. 586; 37 M. 186; 13 M. L. T. 79; (1913) M. W. N. 114; 24 M. L. J. 96.

(5) 31 B. 50; 8 Bom. L. R. 807.

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In this case, therefore, the Limitation as against the sureties ran from the date of the High Court order of 14th September of 1915. Though the application to ascertain the amount of mesne profits was made to keep the decree alive against the judgment-debtor, it would not keep the decree alive as against the sureties, as this application was made more than 3 years after 14th September of 1915. Therefore, the application against the sureties was time-barred. If the contention of the appellant is right, it would follow that the decree-holder might keep the decree alive against the sureties by making applications for the ascertainment of mesne profits, which might extend to the full time allowed for the execution of the decree. It seems to us that under the provisions of the Code of 1882 the period for executing the decree would not be extended unless proper steps were taken for ascertaining the mesne profits within the period prescribed for taking steps in execution.

The appeal therefore, fails and must be dismissed with costs.

S. R. P. & N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1850
OF 1920.

June 16, 1922.

Present.—Justice Sir Asutosh Mukherjee,
Kt., and Mr. Justice Chotzner.

GOPAL CHANDRA PAL, PLAINTIFF—
APPELLANT

versus

KADAMBINI DAS AND OTHERS—
P. O. f. m. RESPONDENTS.

Hindu Law—Joint family—Partition—Widowed daughter-in-law—Maintenance, right to—Cause of action when arises—Limitation Act (I X of 1908), s. 28, whether extinguishes right to maintenance.

Under the Hindu Law a widowed daughter-in-law has no legal right to maintenance as against the self-acquired property of her father-in-law, if her husband died during the lifetime of her father-in-law. But although the obligation of the father-in-law to maintain his widowed daughter-in-law is

only moral and not legal when he has no ancestral assets in his hands, the position of the heir who takes his estate by inheritance is different. What was a moral obligation in respect of the father ripens into a legal obligation when the estate passes into the hands of his heirs who are not entitled to evade liability merely because they do not receive the estate by inheritance but by way of gift or testamentary disposition. [p. 237, col. 1.]

Rai Karnali v. Tarwadi Dolairam, 25 B. 263; 2 Bom. L. R. 894, dissented from.

Siddessury Dasee v. Janardan Sarkar, 29 C. 557; 6 C. W. N. 530; *Indubala Dasee v. Panchunani Dasee*, 28 Ind. Cas. 578; 21 C. L. J. 292; 19 C. W. N. 1169; *Narayanarao Ramchandra Pant v. Ramabai*, 6 I. A. 114; 3 B. 415; 3 Ind. Jur. 332; 2 Shome L. R. 274; 3 Shome L. R. 190; 3 Sph. P. C. J. 617; 4 Sar. P. C. J. 24; 6 C. L. R. 162; 2 Ind. Dec. (N. S.) 276 (P. C.), *Kedar Nath Goondoo Chowdhry v. Hemangini Dassi*, 13 C. 336; 6 Ind. Dec. (N. S.) 725; *Khetkur Monce Dosee v. Kasheenath Doss*, 2 B. L. R. 111; 1 J. 151; 10 W. R. (F. B.) 89; 1 Ind. Dec. (N. S.) 659; *Meenakshi Ammal v. Rama Aiyar*, 18 Ind. Cas. 34; 37 M. 396; 13 M. L. J. 97; 24 M. L. J. 106; (1913) M. W. N. 40; *Janki v. Nand Ram*, 11 A. 194; A. W. N. (1889) 50; 13 Ind. Jur. 347; 6 Ind. Dec. (N. S.) 552; and *Yamunabai v. Madanubai*, 23 B. 608; 1 Bom. L. R. 95; 12 Ind. Dec. (N. S.) 1406, relied upon.

When joint property of a Hindu family is partitioned, provision may be made for the maintenance of such female members of the family as are entitled to maintenance from the estate. [p. 238, col. 1.]

Kedar Nath Goondoo Chowdhry v. Hemangini Dassi, 13 C. 336; 6 Ind. Dec. (N. S.) 725; and *Cemthoney Dasee v. Ramnath Bysept*, (1843) Bulton 189; 1 Ind. Dec. (O. S.) 758, followed.

Section 28 of the Limitation Act does not extinguish a right to maintenance. The cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled. [p. 237, col. 2.]

Rungammal v. Echammal, 22 M. 305; 9 M. L. J. 1; 8 Ind. Dec. (N. S.) 217; *In the goods of Gubinda Chandra*, 23 Ind. Cas. 539; 12 C. W. N. 1111; *Kedar Nath Goondoo Chowdhry v. Hemangini Dassi*, 13 C. 336; 6 Ind. Dec. (N. S.) 725; and *Siddessury Dasee v. Janardan Sarkar*, 29 C. 557; 6 C. W. N. 530, followed.

Appeal against a decree of the Additional District Judge, Howrah, dated the 12th May 1920, modifying that of the Additional Subordinate Judge, Howrah, dated the 28th January 1919.

Babu Atul Chandra Dutt, for the Appellant: The plaintiff is the appellant. The appeal arises out of a suit for partition. The plaintiff and defendant No. 1 are brothers. The defendant No. 3 is the widow of another brother who predeceased the plaintiff's father. Her plea is that she is entitled to maintenance. The First Court decreed the suit. On appeal the Court below has held that defendant No. 3

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is entitled to maintenance. I submit she is not entitled to any maintenance inasmuch as the estate never vested in her husband, who died while the father was living. See *Bai Parvati v. Tarwadi Dolatram* (1). Under the circumstances the father-in-law was not legally bound to maintain his widowed daughter-in-law. The father being the sole owner could have either willed or gifted away the properties to any one he liked. In that case the daughter-in-law could not have legally objected to such act as she had no legal right to maintenance against the father-in-law. It follows, therefore, that the estate vesting in the heirs of the father-in-law is also not liable for maintenance of the daughter-in-law who had no vested right in the estate during the lifetime of the father-in-law. In the present case we hold the properties under a gift from the father. Therefore, she cannot follow the estate in our hands. My next point is, that her claim is barred by limitation under Art. 129 of the Indian Limitation Act. Therefore inasmuch as she is incompetent to sue for maintenance, she is also incompetent to claim it in the present suit. It is admitted that she was refused maintenance when she asked for it from us more than 12 years ago. My last submission is, that she is not entitled to claim maintenance in the present suit. The present suit is for partition. She has other remedies open by a regular suit for maintenance. I submit in view of these facts the learned Judge was wrong in decreeing maintenance to defendant No. 3.

Babu Asita Ranjan Chatterji, for the Respondents.—It may be that a father-in-law has only moral obligations to maintain a widowed daughter-in-law. But it is an elementary principle that the moral obligation ripens into a legal obligation when the estate comes into the hands of his heir whether by way of gift, Will or inheritance. That makes no difference at all. See *Siddessury Dassee v. Janardan Sarkar* (2). The decision in *Bai Parvati v. Tarwadi Dolatram* (1) is not applicable. See *Indubala Dasee v. Panchumani Dasee* (3). As

regards limitation, I submit plaintiff's refusal did not extinguish my right to maintenance. The right to maintenance accrues from time to time and in this respect it is distinguishable from other rights. See *Narayanarao Ramchandra Pant v. Ramabai* (4), *Kedar Nath Coondoo Chowdhry v. Hemangini Dassi* (5). There is also the further fact that I have been maintained all along by defendant No. 1. As regards the last point I submit it is quite competent for a Court to decree maintenance in a partition suit.

Babu Atul Chandra Dutt, replied in brief.

JUDGMENT.—This is an appeal by the plaintiff in a suit for partition of joint property. The plaintiff and the first defendant are two brothers and this litigation was commenced by the plaintiff for division of the properties jointly held by them. Subsequently, the third defendant, the widow of another brother of the plaintiff and the first defendant, who is now dead, was joined as a defendant. The husband of this lady died during the lifetime of the father of the plaintiff and consequently never became entitled to the properties of his father. The lady claimed that provision might be made in the decree for her maintenance. The District Judge has given effect to this contention: and the only point in controversy in this appeal is, whether provision should be made for her maintenance in the decree for partition. Three points have been raised before us; namely, first, that the added defendant has no right of maintenance as against the estate received by her brother-in-law from their father; secondly, that if she had any such right, that has been extinguished by lapse of time; and thirdly, that if she has a subsisting right, it cannot be enforced in a suit for partition.

As regards the first question, reliance has been placed by the plaintiff-appellant upon the decision in *Bai Parvati v. Tarwadi Dolatram* (1). We are of opinion that the decision mentioned cannot be

(1) 25 B. 263; 2 Bom. L. R. 894.

(2) 29 C. 557; 6 C. W. N. 530.

(3) 28 Ind. Cas. 578; 21 C. L. J. 292; 19 C. W. N. 1169.

(4) 6 I. A. 114; 3 B. 415; 3 Ind. Jur. 332; 2 Shome L. R. 274; 3 Shome L. R. 190; 3 Suth P. C. J. 617; 4 Sar. P. C. J. 24; 6 C. L. R. 162; 2 Ind. Dec. (N. S.) 276 (P. C.).

(5) 13 C. 336; 6 Ind. Dec. (N. S.) 725.

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defended on principle. It is now well settled that a widowed daughter-in-law has no legal right to maintenance as against the self-acquired property of her father-in-law, if her husband died during the lifetime of her father-in-law. This was enunciated by a Full Bench of this Court in *Khettur Monee Dossee v. Kasheenath Doss* (6), and the position has since then been accepted without question, as will appear from the judgment of the Madras High Court in *Meenakshi Ammal v. Rama Aiyar* (7). But although the obligation of the father-in-law to maintain his widowed daughter-in-law is only moral and not legal, when he has no ancestral assets in his hands, the position of the heir who takes his estate by inheritance is different. What was a moral obligation in respect of the father ripens into a legal obligation when the estate passes into the hands of his heirs. In support of this proposition it is sufficient to refer to the cases of *Janki v. Nand Ram* (8) and *Siddesury Dassee v. Janardan Sarkar* (2). But it has been argued on behalf of the plaintiff that this principle is not applicable when the father-in-law has made a testamentary disposition of his property or has during his lifetime made a gift of his property. This is supported by the decision in *Bai Parvati v. Tarwadi. Dolatram* (1). But we are unable to accept the contention that the daughter-in-law is not entitled to maintenance out of the property in the hands of a donee or devisee. If the contention of the appellant were to prevail, it would be possible for the father-in-law to evade his moral obligation and to protect his estate after his death from the claim of the daughter-in-law, which, according to well-established rules, at this stage ripens into a legal claim. It is on this principle that a contrary view has been maintained in the cases of *Yamunabai v. Manubai* (9), *Ringammal v. Echimmal* (10). These decisions were

(6) 2 B. L. R. A. C. J. 15; 10 W. R. (F. B.) 89; 1 Ind. Dec. (N. S.) 65.

(7) 18 Ind. Cas. 34; 37 M. 396; 13 M. L. T. 97; 24 M. L. J. 106; (1913) M. W. N. 40.

(8) 11 A. 194; A. W. N. (1839) 30; 13 Ind. Jur. 347; 6 Ind. Dec. (N. S.) 552.

(9) 23 B. 603; 1 B. O. L. R. 95; 12 Ind. Dec. (N. S.) 401.

(10) 22 M. 305; 9 M. L. J. 14; 8 Ind. Dec. (N. S.) 217.

mentioned with approval in the cases of *In the goods of Gobinda Chandra* (11) and *Indubala Dasee v. Panchumani Dasee* (3). We hold accordingly that the plaintiff is not entitled to evade liability merely because he received the estate of his father not by inheritance but by way of gift during his lifetime. That this view is well-founded on principle is clear from the long line of cases which establish the right of the widow to maintenance out of the estate of her husband when it was passed into the hands of his heirs. It is not suggested that the position of the widowed daughter-in-law is for all purposes so identical with that of the widow, who in certain events, is entitled to succeed to the estate of her husband. But we do not see why a distinction should be made between the position of the widow and the widowed daughter-in-law in respect of the particular question now raised before us.

As regards the second point, it is argued that the claim for maintenance is barred by limitation. Reliance has been placed upon Art. 129 of the Second Schedule to the Limitation Act which ordains that a suit to enforce a right of maintenance must be instituted within 12 years from the date when the right is denied. In the case before us it is found that many years ago the added defendant asked for maintenance from the plaintiff and she met with a prompt refusal. This, in our opinion, does not necessarily lead to the conclusion that her right has been extinguished. It may be conceded that if she were to institute a suit against the plaintiff she might find herself in a position of considerable embarrassment. Section 28 of the Limitation Act does not extinguish this right. As was pointed out by the Judicial Committee in *Narayanarao Ramchandra Pant v. Ramabai* (4), followed in *Siddesury Dassee v. Janardan Sarkar* (2), the cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled; and the same view was taken in the cases of *Kedar Nath Coondoo Chowdhry v. Hemangini Dasi* (5) and

(11) 23 Ind. Cas. 539; 17 C. W. N. 1141.

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Siddessury Dassee v. Janardan Sarkar (2). In the present case the added defendant has been maintained for many years past by the first defendant, and it has consequently been not necessary for her to take recourse to proceedings in law. That is not a reason why provision should not be made for her maintenance in the present litigation.

As regards the third point, it has been contended that a provision for maintenance should not be made in a suit for partition, like the present but that the added defendant should be left to her remedy, if any, by a separate suit. It has been maintained, however, in this Court for a long series of years, as is indicated by the decisions in *Comulmoney Dossee v. Ramnath Bysack* (12) and *Kedar Nath Coondoo Chowdhry v. Hemangini Dass* (5), that when joint property is partitioned, provisions may be made for the maintenance of such female members of the family as are entitled to maintenance from the estate. This course is manifestly convenient. As a result of this litigation, properties jointly held by the plaintiff and the first defendant will cease to be joint properties and thereafter each party will be at liberty to alienate what may be allotted to him. It is precisely at this point of time that the right of the added defendant to maintenance out of the estate originally belonging to her father-in-law should be safeguarded by the decree which effects a dissolution of the joint estate.

We hold accordingly that the decree made by the District Judge is in this respect substantially correct and should be affirmed. The appeal is accordingly dismissed with costs.

B. N. S. *Appeal dismissed.*
(12) (1843) Fulton 189; 1 Ind. Dec. (O.S.) 758.

OUDE JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 39 OF 1922.
December 4, 1922.

Present—Mr. Daniels, A. J. C.

GAYA DIN SINGH—PLAINTIFF.

APPELLANT.

versus

CHAUHARJA PANDE—DEFENDANT.

—RESPONDENT.

Jurisdiction—Civil or Revenue Court—Dispute

between tenants—Oudh Rent Act (XXIII of 1886), s. 108 (10).—"Illegally ejected," meaning of. The Civil and not the Revenue Court has jurisdiction to adjudicate upon a dispute between two parties both claiming to be tenants of the same land under the same *zemindar*, where the claimant has never held possession of the land. [p. 239, col. 1.]

The words "illegally ejected" in section 108 (10) of the Oudh Rent Act imply that the plaintiff must have been in possession and are not applicable to a case in which he had never been in possession. [p. 239, col. 1.]

Appeal against an order, dated the 2nd May 1922, passed by the Officiating District Judge, Rae Bareilly, setting aside the decree of the Munsif, Partabgarh, dated the 17th August 1921.

MR. RUDHA KRISHNA SRIVASTAVA, for the Appellant.

MR. K. P. MISRA, for the Respondent.

JUDGMENT.—This is an appeal against an order returning a plaint for presentation to the Revenue Court. The order was passed by the Officiating District Judge on appeal from the decree of the Munsif. The plaintiff-appellant asks that the order be set aside and the appeal restored to the file of the lower Appellate Court and heard on the merits. The respondent has filed cross-objections. While not abandoning the plea of jurisdiction they urged that, instead of returning the plaint, the Courts below should have dismissed the suit as not maintainable.

The facts of the case are these. One Bhagwat was tenant of the plots in suit. He died in March 1920. On his death the *zemindars* granted a lease of the plots to the plaintiff Gaya Din Singh. This lease is alleged in the plaint as a part of the plaintiff's cause of action. It is common ground, however, that Gaya Din Singh was never put in possession of the plots. On 1st October 1920 the defendant, Chauharja Pande, claiming to be the heir and successor of Bhagwat filed a suit against the *zemindars* for recovery of possession under section 108, clause (10) of the Oudh Rent Act. He was successful in that suit and a decree was given in his favour. While the suit was pending Chauharja and Gaya Din Singh entered into an agreement on 30th December 1920 that in case Chauharja succeeded in the suit he would divide the land with Gaya Din Singh. It is now common ground

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between the parties that this agreement was invalid. In the plaint in the present suit it was, however, alleged as part of the plaintiff's cause of action, and on the basis of it and of his previous lease from the *zemindars* he sued the defendants for possession of half the plots in suit. His suit was decreed by the Munsif. On appeal the learned District Judge held that the suit was not maintainable in a Civil Court and returned the plaint as already stated.

The only question which it is necessary to determine at this stage is the question of jurisdiction, which is the only question decided by the Court below. The question is whether a dispute between two parties both claiming to be tenants of the same land under the same *zemindar*, where the claimant has never held possession of the land, is within the jurisdiction of the Civil or of the Revenue Court. On this question I have come reluctantly to the conclusion that the appeal must succeed. I say reluctantly because I believe the intention of the Legislature should have been that a question of this kind should be decided by a Revenue Court. There is the authority of *Kalap Nath v. Mata Dan* (1), a Single Judge case of this Court, for the view that the Civil Court is the proper Tribunal. If this were a case in which the plaintiff might by impleading the *zemindar* have filed a suit in the Revenue Court under section 108 (10) of the Oudh Rent Act, I might have been inclined to think in spite of that decision that such a suit was his true remedy. In this case, however, the plaintiff has never been ejected for he has never held possession. It was held in *Raghubar Dayal v. Chandan* (2) that the words "illegally ejected" implied that the plaintiff must have been in possession and were not applicable to a case in which he had never been in possession. The same view was taken in *Chandrika Bakhsh Singh v. Raghunath Kunwar* (3). It is not suggested that there is any other provision of the Oudh Rent Act under which the suit might have been brought.

I, therefore, allow the appeal and remand the case to the Court below with instructions to restore to its file the appeal which was instituted before it and to proceed to decide that appeal on the merits. Costs here and hitherto will abide the result.

W.C.A.

Appeal allowed.
Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1192 OF 1922.

December 21, 1922.

Present:—Mr. Justice Broadway.

PARS RAM AND OTHERS—DEFENDANTS—

APPELLANTS.

versus:

HUKMAN SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Custom—Hindu Law—Marriage between Khatri male and Brahmani woman, validity of.

It is dangerous to seek to extend custom by such logical processes as analogy. [p. 240, col. 1.]

Bhambul Devi v. Nardin Singh, 29 Ind. Cas. 572, 39 P. R. 1915, 103 P. W. R. 1915, 8 P. L. R. 1916, followed.

The initial presumption in the case of high caste Hindus is in favour of their following their personal law and the onus of proving any special or general agricultural custom lies on the person asserting the existence of such. [p. 240, col. 2.]

A marriage between a Khatri male and a Brahmani woman is not valid under the Hindu Law. [p. 240, col. 2.]

Sahib Ditta v. Bala, 50 P. R. 1900, P. L. R. 1900, p. 155, distinguished.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 7th February 1922, affirming that of the Munsif, first Class, Hoshiarpur, dated the 26th July 1921.

Mr. Bishan Narain, for the Appellants.

Mr. M. L. Puri and Lala Fakir Chand, for the Respondents.

JUDGMENT.—Mahesha, a Khatri, holding land as an occupancy tenant, died leaving him surviving *Musammam Gurjo* and five sons by her. Hukman Singh and Harnam Singh, proprietors in the village instituted a suit for a declaration that Mahesha had died without lawful issue and that they (the plaintiffs) were entitled to resume the occupancy tenancy. The defence

(1) 28 Ind. Cas. 859, 18 O. C. 48.

(2) 10 O. C. 23.

(3) 18 Ind. Cas. 284, 16 O. C. 103.

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set up was that *Musammat* Gurjo had been married to Mahesha and that this marriage was valid according to custom, (in spite of the fact that she was a Brahmani woman) and that, therefore, the issue of the marriage was legitimate. The Trial Court found that Mahesha, a Khatri, had gone through some sort of ceremony with *Musammat* Gurjo, a Brahmani, and had lived with her as man and wife ever since, but that such a marriage was illegal under Hindu Law and no custom had been proved which would render it legitimate. The plaintiffs were accordingly granted a decree as prayed.

Pars Ram and the other sons of Mahesha appealed to the District Judge, who after discussing the points raised, came to the conclusion that the *factum* of marriage itself was doubtful, but that whether an actual marriage had taken place or not it was invalid according to Hindu Law and there was not sufficient proof of any custom validating such a connection.

Pars Ram and his brothers have come up to this Court in second appeal having obtained a certificate under section 41 (3) of the Punjab Courts Act, III of 1914. I have heard Mr. Bishan Narain on their behalf. The certificate granted relates to a question regarding the validity of a custom, *viz.*, whether a union between a Khatri and a Brahmani woman does or does not constitute a valid marriage. Mr. Bishan Narain quite frankly and properly admitted that such a marriage was not sanctioned by Hindu Law. He also frankly admitted that the evidence on the record did not establish the custom set up. He contended, however, that inasmuch as it has been held that a Hindu Jat may by custom marry a Brahmani woman, a presumption should be raised in favour of a Khatri being able to do the same. He drew my attention to *Sahib Ditta v. Bela* (1) which relates to Hindu Jats alone. As pointed out in *Bhambul Devi v. Narain Singh* (2), it would be dangerous to seek to extend custom by such logical processes as analogy. According to Ellis' Notes on Punjab Custom, pages 17-19, the initial presumption

in the case of high caste Hindus is in favour of such Hindus following their personal law, and the onus of proving any special or general agricultural custom lies on the person asserting the existence of such. In these circumstances, I am unable to hold that the appellants have made out any case on which it can be held that by custom, general or special, a marriage between a Khatri male and a Brahmani woman is valid.

I accordingly dismiss this appeal but, in the circumstances of the case, allow the parties to bear their own costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 285 OF 1922.

February 1, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice and Mr. Justice Crump.

DAMODAR JAGJIVAN—PLAINTIFF—

APPELLANT

versus

GOVINDJI JIVABHAI—DEFENDANT

No. 1—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 80—
—Transferee from insolvent prior to adjudication
—Objection by Official Assignee to entry of trans-
feree's name in Record of Rights—Suit for declaration
of right to possession—Official Assignee, notice to,
whether necessary.*

The mere fact that the Official Assignee, in whom the estate of an insolvent has vested objects before the Revenue Authorities to the entry of plaintiff's name in the Record of Rights in respect of property purchased by the latter from the insolvent prior to his adjudication, does not entitle the Official Assignee to notice under section 80 of the Civil Procedure Code prior to a suit for declaration of right to obtain possession. [p. 241, col. 1.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 142 of 1921, reversing the decree passed by the First Class Subordinate Judge, Thana, in Civil Suit No. 376 of 1919.

Mr. R. W. Desai, for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession of the land and tram-cars, which he alleged he purchased from the first defendant on January 7, 1908. He

(1) 50 P. R. 1900; P. L. R. 1900, p. 155.

(2) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916.

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lost possession owing to Govindji Jivabhai acting in collusion with the second defendant Balkrishna Jagannath Patil. Govindji had been adjudicated an insolvent, and the Official Assignee could have been made a party. It appears that plaintiff intended to make him a party, but in the title of the suit "Govindji Jivabhai insolvent and on behalf of him the Official Assignee" is absolutely wrong. The Official Assignee ought to have been sued personally, so that if the plaintiff wished to sue him, Govindji would have been the first defendant, the Official Assignee, as assignee of the estate and effects of the insolvent Govindji, the second defendant, and Balkrishna Jagannath the third defendant. The suit was decreed in the lower Court. In appeal, the Judge on the merits was in favour of that decision but considered that the plaintiff's suit was bad for want of notice under section 80 of the Civil Procedure Code. That provides that where a suit is instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, notice should be given. It is not clear in respect of what act of the Official Assignee the suit was brought. It appears to me that the plaintiff suing on title was justified in filing the suit without giving notice. In the note to section 80 of Mr. Mulla's Civil Procedure Code it is said:

"The only class of suits in which it is necessary to give notice to a public officer is where the suit is founded upon tort, in other words, where the suit is for damages for some wrong inadvertently committed by him in the discharge of his official duties, and no notice is necessary if the suit is founded upon contract or any other cause of action."

What the plaintiff stated in his plaint was, "defendant Govindji has applied in the High Court of Bombay for being adjudged insolvent and all his property is vested in the Official Assignee, who has objected to the entry of the land in the name of the plaintiff in the Record of Rights. That is the act of which really the plaintiff is complaining. He is suing for a declaration of his title to get possession. In my opinion he can do so without having to give notice under section 80. The appeal is allowed, the decree of the lower Appel-

late Court set aside and the decree of the trial Court restored with costs throughout

Crump, J.—I agree. I can find no act on the part of the Official Assignee in this case which comes within the scope of section 80 of the Code of Civil Procedure. All that is alleged in the plaint is that the Official Assignee objected to the entry of the land in the name of the plaintiff in the Record of Rights. The real cause of action is that the plaintiff being dispossessed is suing to recover possession, with which suit the Official Assignee had nothing whatever to do. If the Official Assignee has taken up a certain attitude with regard to the first defendant's property, it is not such an act as is contemplated by section 80 of the Code, and beyond this attitude on the part of the Official Assignee there is nothing to show that the Official Assignee has any connection with the present suit. It, therefore, appears idle to contend that any notice is required to be given before the suit is instituted.

W. C. A.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 13 OF 1922.

November 9, 1922.

Present:—Pandit Kanbaiya Lal, J. C.
GIRWAR SAHAI—JUDGMENT-DEBTOR
—APPELLANT

versus

MANGAL—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 23—Execution of decrees—Attachment, issue of, before service of notice—Attachment, reasons for issue of, not recorded, effect of.

The issue of an attachment before the service of the notice issued under r. 22, O. XXI of the Civil Procedure Code, is a mere irregularity, and does not invalidate the execution proceedings. Although the reasons for the issue of such an attachment should be recorded at the time, a failure to do so will not *per se* render the attachment invalid.

Appeal against an order of the District Judge, Sitapur, dated the 13th January 1922, upholding an order of the Munsif,

FOOLCOOVERBAI v. KESHRESINGH.

Sitapur, dated the 14th February 1922.

Mr. Mohammad Ayub, for the Appellant.

Mr. H. C. Dutt, for the Respondent.

JUDGMENT.—The issue of an attachment before the service of the notice issued under O. XXI, r. 22 of the Code of Civil Procedure was, in the absence of any sufficient cause justifying an apprehension that the property sought to be attached would be removed or transferred, a mere irregularity and the execution proceeding is not thereby rendered invalid. If there was any reason for the issue of an attachment before an order was passed under O. XXI, r. 23, of the Code, it should have been recorded at the time. The failure to record the reason does not, however, *per se* render the attachment invalid.

The appeal is, therefore, dismissed with costs.

W. C. A.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 20, 1922.

Present:—Lord Phillimore, Lord Carson, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

FOOLCOOVERBAI—PLAINTIFF—

APPELLANT—

versus

• Rai Saheb KESHRESINGH RAJMAL

DEFENDANT—RESPONDENT.

Hindu Law—Will appointing heir—No provision for widow—Presumption—Residence and maintenance of widow.

Where a Hindu makes a Will in which he deliberately makes no express provision with reference to his wife, it cannot be assumed that his intention was that his wife should be in the same position as if he had died intestate the proper implication, if any, to be made is that he was satisfied that the maintenance and residence out of his estate to which she was entitled would be sufficient maintenance for her.

A Hindu (Jain) made a Will whereby he appointed a certain person as his heir and declared that he should act under the orders of his wife. The Will further provided that if no male issue were born to the appointed heir, and it were necessary to adopt a son, then during the lifetime of the testator's wife the selection should be made with her consent. After the death of the testator the widow brought a suit for declaration of her rights as a Hindu widow, alleging that under the terms of the Will the testator did not dispose of his estate during her lifetime.

Held, that the testator had disposed of the estate to the appointed heir and that the widow was only entitled to rights of maintenance and residence.

Appeal from the High Court Bombay.
Messrs. Chapman and Raikes, for the Appellant.

Messrs. De Gruyther, K. C., and Brown, for the Respondent.

JUDGMENT.—This suit was brought by the plaintiff, the widow of one Chandmulji, for the determination and declaration of her rights in Chandmulji's estate. Chandmulji was a rich Jain who lived at Rutlam and carried on business there, at Bombay and other places. The property to which he was entitled at his death he held as the last survivor of a joint family. His Will, dated the 16th June 1907, is in the following terms:—

"I alone [and] the owner of the immoveable [and] moveable properties acquired by revered, the most illustrious Magniramji and Bhutsingji Punamchandji Dipchandji Sobhagmulji Chandmul. If a male issue be born to me, then he shall remain [shall be] the owner. Should perchance a son be not born to me, then [in that case] my heir is Chiranjiv Keshrising. Should a heir [*i.e.*] a son be born to Chiranjiv Keshrisingji, then he shall be the heir in the future. Should perchance no son be born to Chiranjiv Keshrising and should it be necessary to bring [a son] from [some] other place; then during the lifetime of my wife [a son] from our Gotra shall be brought [adopted] with the consent of my wife. Hereafter, in connection with the adoption of a son Chiranjiv Keshrising's wife shall have no authority. I appoint Chiranjiv Keshrising [to be] my heir. He shall act under the orders of my wife. At present I have been carrying on the management of the shops belonging to me in the Rutlam Taluka. Chiranjiv Keshrising shall carry on [the management] in that manner. And he shall live at both places [*i.e.*] at Kota and Rutlam for half of the period [at one place and for the other half at the other place]. I have, during my lifetime, authority to make alterations in this testamentary writing. [This is] all. The 16th of June in the Christian year 1907.

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"The 5th of *Jeth Sud* of [Samvat] 1964, the day of the week Sunday. The handwriting of Chandmul Bafna himself written at Rutlam."

The defendant and respondent Keshringsh named in the Will is an agnate and claims to be a great-grandson of the brother of Chandmulji's great-grandfather. On the same date that the Will was executed the respondent signed a writing addressed to the deceased to the following effect:—

"Further, if you appoint me your heir, I will conduct myself towards you and the worshipful and respected Kakiji just as a child [conducts] himself towards [and] obey the orders of his parents. I will not ever change in [such my] conduct [towards you]. You may rest assured as to [such conduct on] my part. The most worshipful Hamirmalji Saheb has entrusted [or made over] the ownership of the shop [or shops] under him at Kota to you. So you are the owner [thereof]. I will do [all] work relating to the shop [or shops] under you at Kota according to your orders. I will stay for half the time [i.e., half the year] at Kota and for the [other] half at Rutlam. You have made [your] testamentary writing. I will act agreeably to the same in all respects. If, by the Grace of God, any progeny [son] be born to you, he will be owner of the Rutlam [shop]. There will not be any manner of objection [to the same] on my part. If a son be not born to you, and if you appoint me heir, I will, according to your orders, attend on you and on the respected Kakiji. The son who may be born to me will be heir after me. If perchance a son be not born to me and if it be necessary to take [a boy] in adoption, I will take one in adoption during the lifetime of the worshipful and the respected Kakiji Saheb, according to the directions of the worshipful and respected Kakiji Saheb."

The said Chandmulji died on the 21st June 1907 leaving no issue. The contention on behalf of the plaintiff is that under the terms of the Will the testator did not dispose of his estate during her lifetime; that there was, therefore, an intestacy under which the plaintiff is entitled to a Hindu widow's estate. It was also alleged that having regard to the document executed

by the respondent, the property was held in trust for the testator's widow, the plaintiff. This latter contention, however, although raised in the first two reasons set forth in the appellant's case, was not pressed.

The only question to be decided is as to whether on the true construction of the Will there was such an intestacy as aforesaid so as to create a widow's estate. Both the Courts before whom the suit has been held decided that the contention of the plaintiff could not prevail and that she took no interest under the Will. They, however, determined that she was entitled to the right of maintenance and residence, and ordered that it should be referred to the Commissioner of the Court for taking account to ascertain what provision should be made for the maintenance and residence of the plaintiff. The right of the plaintiff to such maintenance and residence was admitted by the respondent. Their Lordships are of opinion, that the contention of the plaintiff fails and that there is no reason for holding that there was any intestacy during the lifetime of the plaintiff.

The words of the Will, "Should perchance a son be not born to me, then in that case my heir is Chiranjiv Keshringsh," and the subsequent words, "I appoint Chiranjiv Keshringsh [to be] my heir," are sufficient words to pass the property from the date of the death of the testator, and although the subsequent terms of the Will as to the adoption of a son with the consent of the testator's wife in the event of no son being born to the respondent, and other expressions used, may appear to give an unusual authority to the wife, there is nothing in them to cut down the express terms of the Will appointing defendant to be the testator's heir. It was urged that the authority given to the wife in the letter procured from the respondent by the testator shows an intention on the part of the testator to leave his wife in a position of a Hindu widow, and that having regard to this provision in the Will, their Lordships ought to assume the testator's intention of desiring his wife to be in the same position as if he had died intestate. Their Lordships are of opinion, that such an intention cannot be implied in a case where the testator has made a Will in which he

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has deliberately made no express provision with reference to the plaintiff. As before stated, the testator was a rich man, and the proper implication, if any, to be made is that he was satisfied that the maintenance and residence out of his estate to which his wife is admittedly entitled would be sufficient provision for her. Their Lordships think it unnecessary in this suit to make any declaration as to the extent of the rights of the defendant under the said Will, and that it is sufficient to confirm the reference in the order of the 13th January 1919 for taking accounts to ascertain what provision should be made for the maintenance and residence of the plaintiff herein and the rest of the order following upon this declaration. Subject to this alteration, their Lordships think that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondent:—Messrs. Lee and Pemberton.

W. C. A. & N. H. *Appeal dismissed.*

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ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL, NO. 140 OF 1922.

December 4, 1922.

Present:—Mr. Daniels, A. J. C.

MAHDI—DEFENDANT—APPELLANT
versus

GAJADHAR—PLAINTIFF—RESPONDENT.

Court-Fees Act (VII of 1870), s. 7 (v) (d)—Suit for possession by usufructuary mortgagee—Court-fee payable—"Market-value", meaning of.

In a suit for possession as usufructuary mortgagee, the Court-fee payable is on the market-value of the mortgagee interest in the property, i.e., the mortgage-money, on payment of which the property can, at any time, be redeemed.

The expression "market-value," in section 7 (v) (d) of the Court-Fees Act, means the market-value of the subject-matter of the suit.

Second appeal against the decree of the District Judge, Rae Bareilly, dated 22nd March 1922, confirming the decree of the Munsif, dated 25th January 1922.

Mr. Ali Muhammad, for the Appellant.

Mr. Zakur Ahmad, for the Respondent.

JUDGMENT.—In this case the plaintiff

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sued for possession as usufructuary mortgagee. The case is one to which section 7 (v) (d) of the Court-Fees Act applies and the property has to be valued on the market-value. The appellant has valued the property on the amount of the mortgage-money. The office has objected that the valuation is insufficient, having regard to the price which the land would fetch on a sale. On this basis there would be a deficiency in the Court-fee paid by the defendant-appellant in this Court and by the plaintiff in the Court below. The parties contend that the word "market-value" in section 7 of the Court-Fees Act must mean the market-value of the subject-matter of the suit, which in this case is not a proprietary interest but a mere mortgagee interest in the property. The value of this interest cannot be greater than Rs. 200 because it can be redeemed at any time on payment of this amount. This reasoning appears to be sound and there is some authority in favour of it. In *Ram Raj Tewari v. Girmandan Bhagat* (1) and *Radha Prasad Singh v. Pathan Ojah* (2) it was held that in a suit for ejectment of a tenant the subject-matter is the value of the tenant's interest which was in dispute. This particular case is now provided for in clause (xi) (cc) of section 7. I, therefore, decide that the Court-fee paid is correct. A date will now be fixed for the hearing of the appeal.

W. C. A.

Order accordingly.

(1) 15 A. 63; A. W. N. (1892) 240; 7 Ind. Dec. (N. S.) 75.

(2) 15 A. 363; A. W. N. (1893) 148; 7 Ind. Dec. (N. S.) 95.

PRIVY COUNCIL.

APPEAL FROM THE ODDH JUDICIAL COMMISSIONER'S COURT.

April 17, 1923.

Present:—Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

BISWA NATH SINGH—PLAINTIFF—
APPELLANT

versus

JUGAL KISHORE AND OTHERS—
DEFENDANTS—RESPONDENTS.

Construction of document—Wajib-ul-arz—
Hindu widow—Adoption.

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A group of villages was owned by Hindus; belonging to the same caste. In the *wajib-ul-araiz* of some villages it was stated that widows could adopt sons to their deceased husbands without having an authority from them to that effect. In the *wajib-ul-araiz* of the other villages it was simply stated that the widows could adopt:

Held, that the statements were not inconsistent and amounted to the same thing that the widows could adopt without an authority to that effect from their deceased husbands.

Appeal from a judgment of the Judicial Commissioner, Oudh, dated the 4th January 1919, reversing a judgment of the Subordinate Judge, Sitapur, dated the 10th April 1917.

Messrs. Dunne, K.C., and Dube, instructed by Messrs. Barrow, Rogers & Nevill, for the Appellant.

JUDGMENT.

Sir John Edge.—This is an appeal by Bishwanath Singh, the surviving plaintiff, against a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Sitapur and dismissed the suit. The suit is for the possession of a two-thirds share of the village Pakauri in the District of Sitapur.

The other plaintiff in the suit was *Musammal* Gulab Kuar, who is now dead. She was the widow of Baldeo Bakhsh Singh, who died sonless in or about 1891. He was a Hindu and by caste a Raghubansi, and lived in the village of Bamhnawan in the District of Sitapur and owned the village of Pakauri. The widow adopted on the 17th October 1915 the appellant as a son to her deceased husband, who had given her no authority to adopt a son to him. The question which their Lordships have had to consider in this appeal is whether that adoption was valid; and apparently that was the only question as to which there was a contention in the Appellate Court. The learned Judges of the Appellate Court, in their judgment, said:—

"There are thus two points for decision in this appeal, namely, whether *Musammal* Gulab Kuar had authority from her husband to adopt, and, secondly, whether failing such authority she had a right of (by) custom to adopt without authority from her husband."

The fact of the adoption is not now disputed and is beyond dispute. The family to which Baldeo Bakhsh Singh belonged was

subject to the Law of the Mitakshara as interpreted by the School of Benares, according to which an adoption by a widow of a son to her deceased husband would be invalid if made without an authority to adopt given to her by her husband, unless such an adoption was authorised by a custom of the family.

The evidence that there was such a custom in this family consisted of statements as to the right of widows to adopt sons to their deceased husbands contained in the *wajib-ul-araiz* of eight villages which had been recorded in the Settlement of 1871, that is about forty-four years before the adoption in question here. One of those villages was the village of Bamhnawan, in which Baldeo Bakhsh Singh had lived; at least two other of the villages were villages in which he or members of his family were interested as proprietors; and the remaining four villages were villages in which members of his caste had been interested, although their relationship to his family was not proved. There was also some oral evidence of witnesses in support of the custom.

In the *wajib-ul-araiz* of Bamhnawan and in some of the other *wajib-ul-araiz* it was stated that widows could adopt sons to their deceased husband without having had the authority of their husbands to adopt. In the other *wajib-ul-araiz* it was simply stated that widows could adopt. In their Lordships' opinion these statements meant the same thing, that is that widows could adopt sons to their husbands although they had had no authority from their husbands to adopt; it was so that the Subordinate Judge construed the *wajib-ul-araiz*, and he found that the custom was proved. The Appellate Court was of opinion that the mere statement in a *wajib-ul-araiz* that a widow could adopt meant that a widow, who had the authority of her husband to adopt, could make an adoption to him, and consequently held that the statements as to the custom were not consistent and that the custom was not proved. It did not occur to the learned Judges of the Appellate Court that if the statement that a widow could adopt meant that she could adopt if she had had the authority of her husband to adopt, the statement was not a statement of a special family custom, and was unnecessary, as it would be merely

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a statement of a right which a Hindu widow of a sonless Hindu enjoys everywhere in India, except possibly in families governed by the Law of the Mithila School.

Their Lordships are of opinion that the custom was proved and that the adoption of the appellant was valid. It may be mentioned that the learned Judges of the Appellate Court did not doubt the credibility of the witnesses as to the custom, whose evidence the Subordinate Judge has accepted as true, but they thought that it had not been proved that these witnesses belonged to the family to which Baldeo Bakhsh Singh had belonged.

This appeal has been heard *ex parte*, no respondent having appeared. As the appeal has been heard *ex parte* the Counsel for the appellant has drawn their Lordships' attention to the fact that the learned Judicial Commissioners have not in their judgment expressed a finding on the seventh ground of the appeal to their Court, which was as follows:—"7. That the lower Court should have held that the deed, dated the 10th September 1894, was executed for legal necessity." The deed of the 10th September 1894 was a mortgage of the village Pakauri granted by the widow while she was in possession of a Hindu widow's interest in the estate. On that mortgage a decree for sale was made and at the sale the two-thirds share in the village now claimed by this appellant was purchased by some of the defendants to this suit. The Subordinate Judge had found in this suit that the mortgage was not made for necessity. The learned Judicial Commissioners said in their judgment that: "They (the defendants) denied the adoption and they denied the widow's power to adopt. They also pleaded that even if the adoption was proved, it could not affect the interest acquired by the purchasers before the adoption. On this last pleading no issue was framed and nothing has been said in argument in appeal. It must, therefore, be taken to have dropped." The question as to whether the mortgage was or was not granted for necessity was involved in the question as to whether the purchasers at the sale under the decree had acquired title by their purchase... In their Lordships' opinion the learned Judicial Commissioners were, under the circumstances, justified in holding, as they did, that the

only question which remained for them to decide in the appeal was the question as to the validity of the adoption.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs and the decree of the Subordinate Judge should be restored and affirmed.

N. H.

Appeal allowed.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 158
OF 1922.

January 30, 1923.

Present—Sir MORMAN MACLEOD, Kt.,
Chief Justice, and Mr. Justice CRUMP.

LALA MIYA—DEFENDANT NO. 2—

APPELLANT

versus

MANUBIBI AND OTHERS—PLAINTIFFS

NOS. 2 AND 3 AND DEFENDANT NO. 3—

RESPONDENTS.

Muhammadian Law—Decree against one of several heirs—Remaining heirs, whether bound.

Where in a suit against one of several heirs of a deceased Muhammadan, a decree is obtained by the plaintiff, the remaining heirs are not bound by the decree, nor do their interests in their father's estate pass by sale in execution of that decree. [p. 247, col. 1.]

Second appeal against the decision of the District Judge, Ratnagiri, in Appeal No. 248 of 1919.

Mr. G. N. Thakor (with him Mr. G. B. Chitale), for the Appellant.

Mr. H. C. Croyajee (with him Mr. A. G. Desai), for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs sued to recover possession by redemption of the property described in clause (c) of paragraph 2 of the plaint. The properties originally belonged to Bhauddin who left a widow Hemida Bili, a son Daud, and two daughters who are plaintiffs Nos. 2 and 3. After Bhauddin's death, a suit was filed by a creditor of his

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and only Daud was made a party, but as he was a minor Hamida Bibi, his mother, was impleaded as his guardian and filed a written statement on his behalf. In execution of the decree which was passed in favour of that creditor, certain property belonging to the estate of Bhauddin was put up for sale. That property had already been mortgaged to one Abas in 1878, so that the heirs of Bhauddin were only entitled to the equity of redemption which was purchased by Ali, father of Abas. The present defendants Nos. 1 and 2 are the sons of Abas. A decree for redemption was passed in favour of plaintiffs Nos. 2 and 3 by the Trial Court, and that has been confirmed in appeal.

The main question is whether the daughters of Bhauddin were deprived of their right to the property by the decree passed against Daud and the subsequent sale. Ordinarily speaking, they would not be bound by the decree in a suit to which they were not parties, nor would their interest in their father's estate pass by the sale in execution of that decree. That was decided by a Bench of this Court in *Mirkha Imamkha v. Bhagirathi Mahadeo Abhyankar* (1). The learned Judges in that case considered the decisions in *Khurshetbibi v. Keso Vinayek* (2) and *Davalara v. Bhimaji Dhondo* (3). Mr. Justice Heaton said: "My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khurshetbibi v. Keso Vinayek* (2), if that case be held to affirm that the theory of substantial representation derived from the Hindu Law applies to Muhammadans. For, to follow that case, if it so decides, would be to accept without any stated reason for doing so, the application to Muhammadans of a rule evolved out of Hindu Law; and to do this would, we think, be to set aside the principles underlying the decision of the Full Bench of this Court in *Isa Ahmed Mograria v. Abhramji Ahmadji* (4)."

(1) 51 Ind. Cas. 18; 43 B. 412; 21 Bom. L. R. 329.

(2) 12 B. 101; 6 Ind. Dec. (N. S.) 553.

(3) 20 B. 338; 10 Ind. Dec. (N. S.) 787.

(4) 41 Ind. Cas. 761; 41 B. 588; 19 Bom. L. R. 579 (F. B.).

We think it is advisable to follow the latest decision on the point, which is also supported by the opinion of Sir Roland Wilson in his *Digest of Anglo-Muhammadan Law*, 3rd Edition. See also paragraphs 566, 567 of F. B. Tyabji's *Principles of Muhammadan Law*. The plaintiffs Nos. 2 and 3 will, therefore, be entitled to redeem, but the decree as drawn up by the Trial Court is too wide as these plaintiffs would only be entitled to redeem to the extent of their shares in the estate of Bhauddin, which would be 7/32 each. The case must go back to the Trial Court to ascertain the exact amount which they must pay, and what properties should be redeemed by such payments, as there are five properties in suit, and we are told that only four of these properties were purchased by the defendants at the sale in execution of the decree in Suit No. 691 of 1880. If that is the case, the fifth property is only subject to the mortgage; Exhibit 84. We do not know whether it really makes very much difference because plaintiffs Nos. 2 and 3 are entitled to consider that the sale does not in any way affect their interests. Therefore, all five properties may be taken as subject to the mortgage and liable to be redeemed. On the plaintiffs Nos. 2 and 3 paying the redemption money they will be entitled to be placed in joint possession with the defendants. The plaintiffs Nos. 2 and 3 will be entitled to their costs in this Court and in the Court below. Liberty to plaintiffs Nos. 2 and 3 to apply when they pay the money in execution for partition.

W. C. A.

Case sent back.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 41 OF 1923.

April 5, 1923.

Present:—Mr. Justice Moti Sagar.

THE FIRM RAMCHAND-DIWAN CHAND
—PLAINTIFFS—PETITIONERS

versus

THE FIRM PRITHVI CHAND & Co.—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 101,

115—Order staying suit—Revision.

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An order staying a suit under section 10 of the Civil Procedure Code is not a decision of a case within the meaning of section 115 of the Civil Procedure Code and is not open to revision. [p. 250, col. 2.]

(Case-Law discussed.)

In order to come to a finding as to whether the requirements of section 10 of the Civil Procedure Code have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the section, and if it does, it cannot be said that it has acted illegally in the exercise of its jurisdiction or that it has failed to exercise a jurisdiction which was vested in it by law. [p. 250, col. 2; p. 251, col. 1.]

Petition, under section 44, Act IX of 1919, for revision of the order of the Senior Subordinate Judge, Rawalpindi, dated the 4th December 1922, staying the trial of the suit under sections 10 and 151, Civil Procedure Code, pending the decision of the Karachi case.

Pandit Sheo Narain, R. B., for the Petitioner.

Mr. M. S. Bhagat, for the Respondent.

JUDGMENT.—This is an application under section 44 of the Punjab Courts Act for revision of an order passed by the Senior Subordinate Judge of Rawalpindi staying the trial of a suit under sections 10 and 151 of the Civil Procedure Code. The petitioners brought a suit for a declaration that a certain award was invalid, and that an injunction be issued against the defendants restraining them from enforcing that award. The defendants contended that a suit between the same parties in which the matter in issue was directly and substantially the same was pending in the Court of the Judicial Commissioner at Karachi and that, therefore, the suit at Rawalpindi, which was subsequently instituted, should be stayed in accordance with the provisions of section 10 of the Civil Procedure Code. The Senior Subordinate Judge has given effect to this plea, and has ordered stay of the suit. The plaintiffs have applied for revision of the order of the Senior Subordinate Judge.

A preliminary objection is raised before me by the respondents that this is not a case in which this Court can interfere in revision with reference to the terms of section 115 of the Civil Procedure Code. In order to bring the matter within this section, the first thing to be determined is whether there is a "case", which has been decided by a Court. It is contended for the respondents that, there is no such case, inasmuch

as the Subordinate Judge has not decided anything at all but that all what he has done is to stay the further progress of the suit till such time as the other suit at Karachi is decided. It is urged that this is merely an interlocutory order, and that this does not decide any of the matters in controversy between the parties. Pandit Sheo Narain, on the other hand, contends that section 10 is wholly inapplicable; and that in ordering stay of the suit the Court has either acted illegally in the exercise of its jurisdiction or failed to exercise a jurisdiction which was vested in it by law. In either case he contends that the decision is one which involves a question of jurisdiction and that, therefore, all the requirements of section 115 of the Civil Procedure Code or section 44 of the Punjab Courts Act are fulfilled. A large number of authorities has been cited on both sides, and I must confess that the question is not free from difficulty. I have carefully read all the authorities cited, and have taken time to pronounce my orders. The conclusion at which I have arrived is that the preliminary objection is well-founded, and that it must be held that the Subordinate Judge's order does not amount to a decision of a case.

It was held by a Full Bench of the Chief Court in *Pandit Rama Kant v. Pandit Rajdeo* (1) that the word "case" in section 622 of the Civil Procedure Code (1882) does not necessarily, in every case, mean the whole case but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided by the Code. This definition of the word "case" was unhesitatingly accepted in a later case reported as *Mahtab Rai v. Kaman Lal* (2) and it was held in that case that the meaning of the word could not be extended any further. In *Sawan Mal v. Kanhaya Lal-Gopal Das* (3) Mr. Justice Martineau held that the decision of a Court on the point of jurisdiction, with regard to which no special procedure is laid down in the Code, is not a decision of a "case." In the case of *Buddhoo Lal v. Mewia Ram* (4) a Full Bench of the Allah-

(1) 60 P. R. 1897 (F. B.).

(2) 51 P. R. 1899.

(3) 59 Ind. Cas. 680; 40 P. W. R. 1921.

(4) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 58 (F. B.).

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abad High Court have adopted the same view, and have held that the decision of a Subordinate Court that it had jurisdiction and that a suit was cognisable by that Court is not open to revision, inasmuch as no case has been decided by the Court below within the meaning of section 115 of the Civil Procedure Code. In *Ishar Das-Dharm Chand of Amritsar v. Buta Mal-Durga Das of Amritsar* (5) an order refusing to stay a suit under section 10 of the Civil Procedure Code was held not open to revision on the same grounds. The learned Judge in that case followed a recent decision of Mr. Justice Banerji in *Sultanat Jahan Begam v. Sundar Lal* (6) in which it was laid down that an application under section 10 of the Civil Procedure Code for the stay of a suit is not a "case" and that an order for stay passed on that application is not a decision of a case within the meaning of that word in section 115 of the Civil Procedure Code. In *Mela Ram v. Rikhi Kesh* (7) Mr. Justice Abdul Raoof held in similar circumstances that a revision from an order staying a suit under section 10 of the Civil Procedure Code was not competent, inasmuch as it was not the decision of a case within the meaning of section 115.

Pandit Sheo Narain, however, relies upon *Ramachandram Pillai v. Neelambal Achi* (8), *Bishen Devi v. Bishen Chand* (9), *Paira Mal v. Raj Narain* (10), *Ratan Lal v. Bala Parshad* (11), *Sivaprosad Ram v. Tricomdas Coverje Bhoja* (12), *Sital Singh v. Silla Bakhsh Singh* (13) and *Bibhuti Bhusan Pal v. Lalit Mohun Pal* (14), in which it is urged that a contrary view has been taken. In my opinion, almost all of these authorities are distinguishable and are not of any material assistance to

the plaintiffs. The case reported as *Ramachandram Pillai v. Neelambal Achi* (8) is a decision of the Madras High Court by Mr. Justice Phillips and relates to a case where a Subordinate Court had refused to stay the suit under section 10 of the Civil Procedure Code. A revision was preferred against this order to the High Court and it was held by the learned Judge that cases in which a Subordinate Court had refused to stay proceedings under section 10 of the Civil Procedure Code were to be distinguished from those in which proceedings had been ordered to be stayed. The case of *Sultanat Jahan Begam v. Sundar Lal* (6) was distinguished on this ground alone. The learned Judge observed that that was a case in which the order sought to be revised was an order of stay and not of a refusal to stay and that the Court had thus not assumed jurisdiction which it did not possess. In my opinion, this authority is wholly inapplicable and, if it helps at all, it helps the respondents and not the petitioners.

The case reported as *Bishen Devi v. Bishen Chand* (9) is certainly in point. It was held in this case by Mr. Justice Martineau that an order staying proceedings under section 10 of the Civil Procedure Code, is an order deciding a case within the meaning of section 44 of the Punjab Courts Act and is, therefore, open to revision. The weight of this authority, however, has been considerably shaken by a later judgment of the same Judge reported as *Ishar Das-Dharm Chand of Amritsar v. Buta Mal-Durga Das of Amritsar* (5) in which an order refusing to stay a suit under section 10 was held not open to revision on the ground that it was not the decision of a case within the meaning of section 115. I wholly fail to understand why an order staying a suit should stand on a different footing from an order refusing to stay a suit. Both are cases for which no independent remedy, or a different procedure, is provided by the Civil Procedure Code, and it appears to me that there is no difference in essence in the two orders.

In *Paira Mal v. Raj Narain* (10) it was held that before an order, under section 10 of the Civil Procedure Code, can be made, it must be shown that the Courts in which the two suits are pending are of concurrent

(5) 67 Ind. Cas. 870; 4 L. L. J. 425; (1923) A. I. R. (L) 54.

(6) 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431.

(7) 69 Ind. Cas. 111; 33 P. W. R. 1922; (1923)

A. I. R. (L) 69.

(8) 70 Ind. Cas. 5; 16 L. W. 607; (1923) A. I. R. (M) 88.

(9) 61 Ind. Cas. 830.

(10) 53 Ind. Cas. 467; 114 P. R. 1919.

(11) 44 Ind. Cas. 986; 58 P. R. 1918; 23 P. W. R. 1918; 113 P. L. R. 1918.

(12) 27 Ind. Cas. 917; 42 C. 926.

(13) 50 Ind. Cas. 212; 6 O. L. J. 96.

(14) 23 Ind. Cas. 906.

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jurisdiction in the sense that the suit to be stayed could be tried by the Court in which the first suit was instituted. The correctness of this authority is not disputed. In the present case there can be no question that the Court of the Judicial Commissioner at Karachi would be fully competent to try the case which has now been stayed by the Senior Subordinate Judge of Rawalpindi. This authority, therefore, is not at all in point.

The next case relied on is *Ratan Lal v. Bala Parshad* (11). In this case there was no question as to the competency of a High Court to entertain a revision from an order staying a suit under section 10 of the Civil Procedure Code. The case related to an entirely different state of things, and it was held that, where a lower Court has passed an entirely illegal order, the Chief Court will set it aside in the exercise of its inherent powers of revision.

Next, reliance was placed on *Sivaprosad Ram v. Tricomdas Coverje Bhoja* (12). This case is certainly not in point. In this case two suits were instituted one after the other. An application was made under section 10 of the Civil Procedure Code for stopping the second suit. The Judge passed an order staying the suit holding that the decision in the previous suit would operate as *res judicata* between the two defendants in that case and would, therefore, bar the second suit. The High Court on revision held that the matter in issue in the two suits was not the same, that the parties were not litigating under the same title and that section 10 was wholly inapplicable. It further held that the Court had no jurisdiction to decide the question of *res judicata* in a proceeding under section 10, and that its only jurisdiction was to stop the second suit if the requirements of section 10 of the Civil Procedure Code had been fulfilled. In the present case the learned Subordinate Judge has given no finding on the question of *res judicata*. On the contrary, after an examination of both the suits, it has come to the conclusion that the matter in issue in the two suits is identical, that the parties are litigating under the same title, and that the case is fully covered by section 10 of the Civil Procedure Code. I am unable to understand how the authority relied on is of any assistance to the plaintiffs.

It may further be observed that this case was relied on by the Counsel for the petitioner in the case reported as *Mela Ram v. Rikhi Kesh* (7) in support of his contention that a revision was competent. Mr. Justice Abdul Raoof, however, followed *Sultanat Jahan Begam v. Sundar Lal* (6) in preference to this authority.

The case reported as *Bibhuti Bhusan Pal v. Lalit Mohun Pal* (14) is not in point either. In that case a Subordinate Court had acted under section 151 of the Civil Procedure Code. The High Court held that where a Court acts under that section in a case where it should not have done, it is competent to the High Court to interfere and set matters right. In the present case the Court has acted mainly under section 10 of the Civil Procedure Code, and section 151 has been relied on only in a subsidiary manner.

The last case on which reliance is placed by Pandit Sheo Narain is *Sital Singh v. Sital Bakhsh Singh* (13). It was held in that case that an order under section 10 of the Civil Procedure Code staying a suit amounts to a decision that the Court has, under existing circumstances, no jurisdiction to proceed with the trial of the suit and that, if wrongly passed, it refused to exercise a jurisdiction vested in the Court and is, therefore, open to revision under section 115 of the Civil Procedure Code. This is a decision of the Oudh Judicial Commissioner's Court and follows *Sivaprosad Ram v. Tricomdas Coverje Bhoja* (12), which, in my opinion, is wholly inapplicable to the facts of the present case. Moreover, this judgment entirely loses sight of the definition of the word "case" as given in the Full Bench authority of this Court reported as *Pandit Rama Kant v. Pandit Rajdeo* (1). It is impossible to hold that an order staying a suit under section 10 of the Civil Procedure Code is "a decision of a case" within the meaning of section 115 of the Civil Procedure Code any more than a decision by a Subordinate Court in a case in which the only question is whether it has or has not jurisdiction to go on with a suit. In order to come to a finding as to whether the requirements of section 10 have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the section, and if it

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does; I am wholly unable to understand how it can be said that the Court has acted illegally in the exercise of its jurisdiction or that it has failed to exercise a jurisdiction which was vested in it by law. In my opinion, therefore, the preliminary objection must prevail, and it must be held that the order of the Subordinate Judge does not amount to a decision of a case.

Accordingly, I dismiss the application for revision with costs.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 341-B OF 1921.

March 24, 1923.

Present:—Mr. Kotwal, A. J. C.

MUL CHAND—PLAINTIFF—APPELLANT
versus

RADHABAI AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Vakalatnama—Omission of Pleader's name—
Power of attorney whether vitiated.*

J., a Pleader, filed in a case a power-of-attorney which was duly signed by his client and accepted by him. The power-of-attorney was on a printed form, bearing the name in print of A., another Pleader who had nothing to do with the case. A.'s name was not scored out nor was that of J. entered, although the power was signed by J.:

Held, that in view of the fact that no one but J. was intended to be employed and that he accepted the employment, the omission of his name from the power-of-attorney was due to an oversight and amounted to a mere irregularity which did not vitiate his employment or the power-of-attorney.

Appeal from a decree of the District Judge, Amraoti, dated the 10th July 1921, in Civil Appeal No. 255 of 1920.

Mr. D. T. Mangahnurli, for the Appellants.

Messrs. M. R. Bobde and J. Sen, for the Respondents.

JUDGMENT.—It is not disputed that on the merits as found by the lower Appellate Court there must be a decree in favour of the plaintiff against defendants Nos. 3 and 4 to the extent

of the assets of the deceased Krishnarao in their possession. The question to be decided here is whether the dismissal of the suit by the lower Appellate Court on the ground that the plaint was not properly presented is correct.

The plaint is signed by the plaintiff and Mr. Jatkar who described himself as "Pleader for plaintiff." It was presented by Mr. Jatkar on the 25th April 1919 and was returned apparently to Mr. Jatkar to be re-presented with the plaintiff's account-books. It was represented by Mr. Jatkar with the books on the 12th May 1919. Mr. Jatkar filed a power of attorney which is signed by the plaintiff and is accepted by him. The power of attorney is on a printed form in the name of "Mr. M. S. Aane, B.A., B.L., Vakil, Yeotmal." This name is also in print. Mr. Jatkar's name is not entered in the power anywhere. The names of the parties in the power of attorney appear to be written in the same hand as the contents of the plaint.

It seems to me that the omission to enter Mr. Jatkar's name is only due to an oversight and is accidental. I feel unable to accept the suggestion that the power of attorney was really given to Mr. Aane whose name appears in it. If in the power of attorney the space for the Pleader's name had been left blank and Mr. Aane's name had been entered in manuscript that might have been a ground for inferring that Mr. Aane was meant to be appointed. As it is, no importance can be attached to the entry of Mr. Aane's name. Mr. Aane has had nothing to do with the presentation of the plaint or the conduct of the suit. He has not accepted the power of attorney nor does it appear that it was ever delivered to him. It is not unlikely that a copy of the printed form of power of attorney was borrowed from Mr. Aane or his clerk and by oversight Mr. Aane's name was not scored out and that of Mr. Jatkar entered. The fact that Aane's name is in print must have helped the oversight. If a blank space had been left for the Pleader's name the oversight might not have so easily occurred. It is clear from the circumstances of the case that none but Mr. Jatkar was intended to be employed and that he accepted the

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employment. The omission, I think, is a mere irregularity which does not vitiate his employment or the power of attorney, *vide Shambu Nath v. Badri Das* (1). I hold that the plaint was properly presented. I set aside the decree of the lower Appellate Court and order that a decree be passed in the favour of the plaintiff for the amount claimed in the plaint with costs in all Courts against defendants Nos. 3 and 4 to the extent of the assets of the deceased Krishnarao in their possession. Respondent No. 2 tried to support the other respondents' case. I award her no costs.

N. K.

Appeal allowed.

(1) 61 Ind. Cas. 410; 43 A. 392; 19 A. L. J. 183.

PRIVY COUNCIL.**APPEAL FROM THE CALCUTTA HIGH COURT.**

January 23, 1923.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

**RAJANIKANTA PAL AND OTHERS—
APPELLANTS**

*versus***JAGAMOHAN PAL—RESPONDENT.**

Hindu Law—Joint family—Joint estate, blending of, with separate estate—Presumption.

When members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests, the presumption is in favour of the whole property becoming joint. It makes no difference whether separate estate is brought into the joint family account or the joint family property is brought into the separate account. [p. 254, col. 1.]

Suraj Narain v. Ratan Lal, 40 Ind. Cas. 988; 40 A. 159; 44 I. A. 201; 21 C. W. N. 1065; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 189 (P. C.), relied on.

Appeal from the judgments and decrees of the Calcutta High Court in A. S. Nos. 26 of 1918 and 1 of 1919 reversing those of the Subordinate Judge.

Messrs. *Lowndes and Dube*, for the Appellant.

Messrs. *A. M. Dunne and C. Bagram*, for the Respondent.

JUDGMENT.—The facts in this case have been carefully investigated both by the Subordinate Judge and by the High Court, with the result that many of the

points originally in dispute are now determined, and the two that remain depend upon the true inference to be drawn from ascertained circumstances and not from the consideration of what those circumstances may be. Upon these two questions there is a difference of opinion between the Subordinate Judge who decided in favour of the appellants and the High Court, by whom his judgment in this respect was reversed. The nature of the points involved will be best understood after a statement of the relevant facts.

Lal Mohan Pal, who died on the 23rd February 1891, originally carried on business with one Paju Lal in the sale of yarns and cloths. This business ended in 1882 and therefrom Lal Mohan Pal started a similar business, the Head Office being at Dacca, with branch places of business at Calcutta and elsewhere. He was, in this business, assisted by his three sons, Madan Mohan Pal, Jaga Mohan Pal and Radha Gobinda Pal. After the death of Lal Mohan Pal, this business was carried on by the three sons jointly as a joint family business, and Madan Mohan Pal asserted that the original capital of the business was largely composed of monies, amounting to Rs. 16,000 and upwards, due to him for services rendered to the original firm. The third son, Radha Gobinda Pal, died on the 1st November 1902, having made a Will, of which he appointed his brother, Jaga Mohan Pal, as the executor. He had no sons living at the date of his Will or of his death, and only one wife, Kusum Kumari, who survived him. He conferred upon his wife the power to adopt a son, and provided that if a son was adopted and died within fifteen years unmarried or childless, his wife should adopt another son, and if he died in similar conditions she should adopt a third. He gave his wife the yearly profits of all his immoveable property, except certain monthly allowances in favour of his daughter, such profits to be received by her till the adopted son should attain twenty-one years, and thereafter one-half of the profits was to be received by his wife and one-half by the son. After the death of the wife all the immoveable property was

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to go to the adopted son, with the provision that until such son had attained twenty-one, the estate should remain in the hands of his executor. He gave all his movable property or *karbar* to Jaga Mohan Pal, and directed that after realising the debts of the *karbar* he should pay out of the balance Rs. 2,000 to his wife for performing meritorious acts, Rs. 500 to his spiritual preceptor, Rs. 2,000 to the idol Iswar Radha Syamsurder Jiu, and Rs. 600 to his three sisters, and such sum as would accrue as profit on the investment of Rs. 2,500 for chaitable purposes. He died in 1902 and Probate of the Will was granted to the executor. A dispute subsequently arose between Jaga Mohan Pal, the executor, and Madan Mohan Pal, the eldest son of Lal Mohan Pal. This dispute was due to the assertion by Madan Mohan Pal that he had originally contributed to the business Rs. 16,942 in his father's lifetime, and this he claimed as his share in the original joint capital of the business. This was finally settled by the defendant abandoning his claim, and both he and Jaga Mohan gave up their intention of opening separate businesses and the joint business was continued.

Following upon this, Madan Mohan Pal gave his third son, Jadu Nath Pal, in adoption to his brother Jaga Mohan Pal; and the fourth son, Preonath Pal, as adopted son to the wife of Radha Gobinda Pal. Jadu Nath Pal died in December 1906, and following upon his death a breach occurred in the family so that Madan Mohan Pal took his meals separately, gave notice to the defendants dissolving the joint family business, and finally instituted the suit out of which this appeal has arisen claiming that he was entitled on partition to a two-thirds share of the joint properties, the moveables and the business.

The property in respect of which this claim was made was separated under a variety of heads, but all that need now be considered were those that were contained in schedule 3 and schedule 5 (*kha*). The first included immoveable property that had been acquired after Radha Gobinda's death, and the second, investments, Government paper, and houses. In respect of these the Subordinate Judge

gave the plaintiff only one-third and the High Court two-thirds, the present appeal being brought by the widow and Preonath, claiming that a one-third was all that he was entitled to obtain.

The real question for determination, therefore, is whether these properties were acquired under circumstances which made them part of the joint family estate in which the widow and the adopted son were entitled to a one-third, or whether they belonged to the business which, after the death of Radha Gobinda, was owned as to two-thirds by the plaintiff, and one-third by Radha Mohan. It is important to remember that the parties are governed by the *Daya-baga* Law by virtue of which it was possible for the deceased brother to make a valid bequest of his share, but except to the extent to which that Will affected the joint family it remained joint, with the result that, apart from the business, the immoveables and all the property not actually included in the gift to Jaga Mohan Pal was joint family property. The business was, of course, under the control of the two elder brothers, and it appears that from the date of the death of the third brother no alteration whatever was made in the way in which the accounts were kept. The payments in respect of obtaining the Probate of the Will, which though not great in extent are several in number, were all made out of the business accounts. The payment of the monies for the Probate itself was made in the same manner; but the legacy of Rs. 2,000 to the widow, and the like legacy to her as *shebait* of the idols, remained unpaid. The income received from the real estate was all through shown under separate heads and nowhere distinguished as between the business and the joint estate, and although it is said that the income from the latter was only Rs. 1,100 a year, yet none the less it was all treated in the same way.

It is quite true, as has been pointed out; that having regard to the nature of the items being carefully specified, both in respect of receipt and payment, it would have been possible to have prepared from the books a further account showing how the respective estates stood in relation to each other, and it is also said that the actual monies paid to the widow and the adopted

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son exceeded the amount of their interest in the joint estate of which they were members; while, finally, and this is perhaps the strongest point of all, the method of blending the two sets of items was continued by Rajanikanta, even after the dispute had begun. These circumstances all deserve consideration, but their Lordships do not think that they have sufficient weight to displace the general presumption that arises when members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests.

In a case before this Board, *Sura Narain v. Ratan Lal* (1) it was pointed out that the effect in such transactions was to cause the whole property to become joint and the only real distinction that can be drawn between that case and the present is that there separate estate was brought into a joint family account instead of as in this case the joint family property being brought into the separate accounts. Their Lordships are unable to see that this distinction is sufficient to defeat the appellant's claim. The real question for determination is what is the true conclusion to be drawn when people united, as the present parties were, by bonds of close relationship and living as a joint family, drawn for the joint family expenses out of a fund enriched by other contributions. They think that the result is accurately stated by the Subordinate Judge, in the following words:—

"If the members of a joint Hindu family confuse the incomes of their joint properties with their separate properties, their intention presumably is that the properties acquired with such mixed up funds are for the benefit of the joint family. It should be noticed that not only these acquisitions and improvements made in this case with the amalgamated and confused funds, but the incomes arising from such acquisition and improvements were again partly spent also for joint family expenses and purposes, and the balances were again mixed up and confused from year to year to acquire properties and make improvements."

(1) 40 Ind. Cas. 988; 40 A. 159; 44 I. A. 201; 21 C. W. N. 1065; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180 (P. C.).

Indeed, the fact urged on behalf of the respondents that the joint family expenses exceeded all the property which, according to their contentions, was properly joint in their Lordships' opinion tells against the respondents instead of in their favour. They think, therefore, that the decree of the High Court should be varied by providing that of the Items Nos. 1—3 in schedule 5 (*kha*) the plaintiff gets only one-third as also in schedule 3, and that the provision in said decree for payment of interest on the sum Rs. 4,000 be omitted. The cross-appeal will be dismissed. The appellants are entitled to their costs of these appeals, but their Lordships will not vary the order as to costs in the High Court, and they will humbly advise His Majesty to this effect.

Solicitors for the Appellants.—Messrs. W. W. Box & Co.

Solicitors for the Respondents.—H. S. L. Polak.

N. K.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT

NO. 248 OF 1923.

FEBRUARY 20, 1923.

Present:—Mr. Justice Mulla.

SUKHANAND GURUMUKHRAI

—PLAINTIFF

VERSUS

BHIMRAJ R. POTDAR

—DEFENDANT

Bombay High Court Rules, 1922, r. 215, applicability of—Partnership, denial of—Originating summons.

Rule 215 of the Rules of the Bombay High Court, 1922, Original Side, as amended, has no application where a partnership is denied, the question, therefore, as to the existence of the partnership itself cannot be determined by originating summons.

Sir Thomas Strangman, for the Plaintiff.

Mr. Selvad, for the Defendant.

JUDGMENT.—This is an originating summons for reliefs usual in a partnership action. The defendant denies the partnership, and it is contended on his behalf that the question as to the existence of the partnership is not one that can be disposed of on an originating summons. The correspondence annexed to the written statement shows that the plaintiff was aware at the date of the institution of the suit that the defendant

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had denied the partnership. For the plaintiff it is contended that the amendment of the rule as to the originating summons in partnership cases indicates an intention that such a question can now be determined by originating summons.

The old rule 213 was as follows:—

"When the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute, any partner in a firm or his representatives may take out an originating summons returnable before the Judge sitting in Chambers against his partners, or former partners, or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of taking the accounts of, and winding up, such partnership."

This rule was amended in January 1919, and it now appears among the High Court Rules as rule 215. It is as follows:—

"Any partner in a firm or his representatives may take out an originating summons returnable before the Judge sitting in Chambers against his partners, or former partners, or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of taking the accounts of, and winding-up, such partnership and for the determination of any question arising in such partnership whether to be dissolved or wound-up or not."

On comparing the two rules it will be observed that the words "when the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute," which occurred in the old rule, are omitted, and the words "and for the determination of any question arising in such partnership whether to be dissolved or wound-up or not" are added.

It is argued for the plaintiff that the omission of the words "when the existence of a partnership is not in dispute" has the effect of bringing within the scope of the rule questions as to the existence of a partnership. I am unable to accede to this contention. Rule 212 begins with the words "A vendor or purchaser"; rule 214 begins with the words:—"Any mortgagee or mortgagor"; the present rule begins with the words: "Any partner." As to rule 212 it was held by Pratt, J., in an unreported

case (*Ebrahim Haji Mahomed v. Haji Tar Mahomed Abba Shariff* [(1921) O. C. J. Suit No. 221 of 1921 decided by Scott, J.] that it did not apply where either party denied the agreement for sale. That rule does not contain the words "where the fact of the agreement for sale is not in dispute." As to rule 214 it has never been suggested that it applies where the factum of a mortgage is in dispute. Rule 209, clause (g), provides for the determination by originating summons of "any question arising in the administration of the estate or trust." As to this rule it has never been held that it applies where a trust is denied. On the other hand, it was held under the corresponding English rule (Order IV, r. 3 (g)), where an action was brought by writ to determine whether the defendant was a trustee of a settlement and for his discharge and for the appointment of a new trustee, that the action was rightly brought by writ, and not by originating summons: *Elworthy v. Harvey* (1).

I think that rule 215 does not apply where the existence of a partnership is in dispute. Almost all the rules as to originating summons are a reproduction of the corresponding English rules. There is no rule corresponding with the old rule 213 or the new rule 215 among the Rules of the Supreme Court. The words "when the existence of the partnership is not in dispute" seem to have been used in the old rule *ex majore cautela*. In omitting these words from rule 215, the rule has been brought into line with rule 212 as to vendor and purchaser and rule 214 as to mortgagor and mortgagee. The summons is, therefore, discharged with costs Counsel certified.

W. C. A. *Summons discharged.*

(1) (1889) 60 L. T. 30; 37 W. R. 364.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 53 OF 1922.

November 29, 1922.

Present:—Mr. Daniels, A. J. C.

Musammal ISLAMAM—APPELLANT

versus

Musammal MAQBULAN AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 7,

ISLAMAM V. MAQBULAN.

8—Appointment of guardian—Notice to interested party not given; effect of—Person other than applicant appointed—Separate application, whether necessary.

It is open to a person who should have been, but who has not been, served with notice of an application for appointment as guardian, to object in revision to an order granting such application.

Sections 7 and 8 of the Guardians and Wards Act do not necessarily require that, when once proceedings for the appointment of a guardian of a minor have been properly instituted, a separate application should be taken from the person whom the Court appoints, though in practice it may be usual to take one.

Mr. J. K. Banerji, for the Appellant.

Mr. Muhammad Ayub, for the Respondent.

JUDGMENT.—This is an appeal against an order appointing *Musammam* Maqbulan guardian of the property of *Musammam* Saghir-un-nissa, the four year old daughter of Mubarak Ali, deceased. *Musammam* Maqbulan is the sister of Mubarak Ali and the aunt of the child.

One Ikram Hussain originally applied for guardianship and notices were issued. At the hearing it was found that he was an unsuitable person. The present appellant, *Musammam* Islamam, is the child's mother. She was represented at the hearing but she was found to be unsuitable, having married a second husband and having on the death of Mubarak Ali taken possession of his entire property and mortgaged it. From among the persons available the learned District Judge selected the respondent as the person best fitted to act as guardian and appointed her, taking security from her for the due administration of the property. Against this order *Musammam* Islamam appeals.

It is admitted on her behalf that she is disqualified from being appointed guardian herself. At the hearing it was suggested that either her own mother, the child's maternal grandmother, *Musammam* Ghariban, should be appointed or an Officer of the Court. She now asks for the order to be set aside and either a fresh enquiry be made or *Musammam* Ghariban appointed as guardian. The grounds on which she attacks the order are:—

(1) That no notice of the proceedings was sent to *Musammam* Ghariban.

(2) That no evidence was taken as to *Musammam* Maqbulan's fitness,

(3) That *Musammam* Maqbulan has an interest adverse to the minor, and

(4) That no formal application was taken from *Musammam* Maqbulan.

I very much doubt the *bona fides* of the appellant. The appellant's efforts are mainly directed to securing the appointment of her mother *Musammam* Ghariban, but *Musammam* Ghariban herself has not so far shown any interest in the proceedings. She has not objected to the appointment of *Musammam* Maqbulan nor has she made any application to be appointed herself. It is true that she was not served with notice of Ikram Hussain's application as she should have been, but it has been held by this Court in *Jhandeshur v. Baij Nath* (1) that it is open to a person on whom notice should have been served, to come forward and object in revision to the order passed. The guardianship of the property usually vests in the father's relations and if *Musammam* Islamam is unsuitable it is *prima facie* probable that her mother would be so. The latter is, moreover, said to be sixty years of age.

As regards the alleged hostile interest, it consists of the fact that the respondent and another sister of Mubarak Ali filed a suit against the appellant and her transferees to recover their share of Mubarak Ali's estate. In their plaint they wrongfully stated the share to which they were entitled as seven annas. In fact, however, they entered into a compromise by which they accepted less than their legal share. This does not show that the respondent is in any way an unfit person to be guardian. Sections 7 and 8 of the Guardians and Wards Act do not necessarily require that when once proceedings have been instituted at a proper application a separate application should be taken from the person whom the Court appoints, though certainly in practice it is more usual to take one. In my opinion the irregularity which occurred in not serving notice on *Musammam* Ghariban would not justify me in the circumstances of this case in setting aside the order which has been passed.

I accordingly dismiss the appeal. I make no order as to costs.

W. C. A.

Appeal dismissed.

(1) 27 Ind. Cas. 121; 18 O. C. 66; 1 O. L. J. 761;

NAR SINGH v. EMPEROR.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 537 OF 1921.

November 29, 1921.

Present:—Mr. Kanhaiya Lal, J. C., and
Mr. Daniels, A. J. C.

NAR SINGH—ACCUSED—APPELLANT
versus

EMPEROR—COMPLAINANT.

*Evidence Act (I of 1872), s. 35—Confession—
Certificate by Magistrate, whether conclusive.*

A certificate recorded by a Magistrate under section 35 of the Evidence Act as to the voluntariness of a confession made to him is good *prima facie* evidence of the fact which it records. The certificate, however, is not conclusive and the facts may be proved which may lead the Court to think that the confession was not really voluntary. [p. 258, col. 1.]

Appeal against an order of the Sessions Judge, Hardoi, dated the 12th October 1921.

Mr. St. G. Jackson, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant Nar Singh has been convicted by the Sessions Judge of Hardoi and the Assessors under section 302, Indian Penal Code, of the murder on 3rd August last of Chiranjit Singh, a boy of four, the son of Mathura Singh, a Sub-Inspector of Police at Hardoi. The accused was employed as a servant by Mathura Singh. Three days before this occurrence Mathura Singh had beaten the accused in connection with a loss of a bunch of keys of which the Sub-Inspector had made a formal report at the Police Station. On the day of the occurrence Mathura Singh was absent on an enquiry. About 7 o'clock in the morning the accused was sent out with a perambulator to take the deceased child for an airing and also, it is said, to buy some *pan* in the bazar. Accused was seen by two witnesses somewhere about 11 A. M. wheeling the child on the road named the Circular Road. Shortly afterwards, another witness, Thakuri Singh, whose field is near the Sandi Road, saw the accused making off through the fields alone. The witness asked him where he was going and accused said, he was going on business. The Sub-Inspector returned from his enquiry between 10 and 11 A. M. and found that neither the accused nor the boy had

returned. He instituted a search and not having found any trace of the boy by 2 o'clock he made a formal report at the Police Station. In the course of the afternoon a Constable named Imdad Ali and a student named Nazim Hussain, who were among the persons who had been sent in search of the child, found the boy's dead body in the ditch at the side of the Circular Road in about a foot of water. The perambulator was standing at the edge of the road. A gold *tawiz* which the boy had been wearing was still round the child's neck. This excludes the hypothesis of a murder for the sake of the child's ornaments. The body was sent for *post mortem* examination, which was carried out by the Civil Surgeon on the following morning.

The accused was arrested at Bareilly Railway Station on the morning of August 5th. He was about to leave Bareilly by the narrow gauge train when he was discovered. The Constable who arrested him took him to the Railway Police Station. From there he was sent to the Prosecuting Inspector for the purposes of being brought before a Magistrate, and on the same day was placed before Mr. R. O. Douglas, a Magistrate of the First Class, at Bareilly. He then made a confession in which he admitted throttling the boy and then thrusting him into the water in the drain at the side of the road. He says that the boy was not quite dead and that he ducked him under the water once or twice and then left him and took to his heels. The reason he gave for killing the boy was that Mathura Singh owed him a year's wages and when he demanded it Mathura Singh had beaten him and broken two canes over him. This confession, as will be seen, the accused afterwards retracted.

The learned Counsel for the accused has argued, and it has been his main argument in the case, that the confession is not admissible in evidence. This argument is not based on there being anything whatever in the evidence to suggest that the confession was not voluntarily made, but solely on the fact that the only question and answer recorded by the Magistrate before he commenced to record the confession was—

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Q.—Do you wish to make your statement voluntarily? Has any one threatened or induced you?

A.—I wish to make my statement voluntarily. No one has threatened or induced me.

Q.—What do you wish to say?

Counsel has argued that, in order to render the confession admissible, the record must show that the accused was told that he would not be remanded to Police custody and warned that whatever he said would be used in evidence against him. We do not say that these things may not usefully be done, but we decline to add anything to the plain provisions of the law. The sole ground on which, under section 24 of the Evidence Act, a confession may be rejected as irrelevant, is that it appears to the Court to have been caused by an inducement, threat or promise proceeding from a person in authority. Section 164 of the Code of Criminal Procedure forbids a Magistrate to record a confession under that section unless "upon questioning the person making it he has reason to believe that it was made voluntarily" and requires him to append to the confession, if made, a certificate that he has satisfied himself that it was made voluntarily. The Magistrate in this case has recorded that certificate, and the certificate is, under section 35 of the Evidence Act, good *prima facie* evidence of the fact which it records. Formal questions and answers appearing on the record are not the only means by which a Magistrate can judge whether the accused before him is speaking of his own free will. It is true that the certificate is not conclusive. Facts may be proved which may lead the Court to think that the confession was not really voluntary and in such a case the Court will reject it. The case of *Kandhai v. Emperor* (1) relied on by the appellant's Counsel is of this nature. Here there are no such facts. The accused was altogether outside the jurisdiction of the Hardoi Police when he was arrested. He was taken before a Railway Sub-Inspector who was in no way concerned in the investigation, and from there sent to the Bareilly Prose-

cuting Inspector who placed him before the Magistrate. The man who took him to the Court was the Constable who had traced and arrested him but the Magistrate in recording the confession drew the accused's attention to the fact that no policeman was present in the Court while it was recorded. Even when the accused retracted his confession before the Committing Magistrate he did not say that it had been induced by any threat or promise. He admitted making half the statement and suggested that the other half was recorded by the Magistrate without his ever having made it. He denied that he had said anything before Mr. Douglas about the killing of the boy. It was only when the case reached the Sessions Court that he concocted a story about the Constable having given him *julebis* to eat and told him that nothing would happen to him and thereby induced him to say before the Joint Magistrate anything which the Constable wished him to say.

The story told by the accused before the Committing Magistrate was that, as he had been out with the boy for a long time and it was getting late he wheeled the perambulator at a rapid pace in order to get home quickly as a result of which the perambulator collided with a piece of *kankar* and the boy fell out. The *kankar* pierced the boy below the ear. The child began to move his hands and feet but did not speak. The accused got frightened, left the perambulator and the child, and ran away. In the Sessions Court he said that he could not remember what statement he had made to the Committing Magistrate. When asked by the Judge to show how the boy fell out of the perambulator he said that he, the accused, had sat down at the side of the road to make water. Meanwhile, the boy leaned out of the perambulator and fell on the ground on his nose which bled profusely. Accused put him back into the perambulator and left him sleeping there. As the boy had been injured he ran away through fear of Mathura Singh. These stories are inconsistent with each other and neither of them is at all probable. If it was the accused's case that the child

(1) 25 Ind. Cas. 833; 1 O. L. J. 407; 15 Cr. L. J. 633.

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had been killed by the fall from the perambulator one could understand his getting frightened and running away, but in each case, though the versions are different, he says that the boy was injured but alive. If the child was alive even if it had hurt itself seriously it would be most unnatural conduct for accused to run off and take the train to Bareilly leaving the child unattended on the road.

The Medical evidence is consistent with the accused's confession and inconsistent with the stories which he afterwards put forward. The Civil Surgeon found the brain and both lungs slightly congested and both chambers of the heart empty. He says that the *post mortem* signs did not warrant any positive expression of opinion as to the cause of death. He found no signs of violence on the deceased's throat but he says that any redness caused by the pressure of fingers or anything soft on the throat might have disappeared after death, and that from the history of the case he considered suffocation to be the most probable cause of death. He also says that if the child was suffocated by closing the mouth and nostrils with cloth or with the hand this might have occurred without leaving any sign of injury noticeable on a *post mortem* examination. Death was not due to drowning. He found a tiny abrasion in front of the right ear which, in his opinion, might have been caused by a finger nail. He considers that it was too tiny to be likely to have been caused by the child falling from the perambulator and knocking against a stone, though it is possible that it might have been caused by coming in contact with a small bit of *kankar*. He is of opinion that a fall from a perambulator sufficient to cause the death of the child would probably have left distinct signs of injuries which would have been detected at the *post mortem*. Accused's Counsel has asked us to reject the Medical evidence on the ground that Medical Text Books speak of the possibility of death occurring from shock without external injuries. Such cases no doubt have occurred but that is no reason for discrediting the Civil Surgeon's evidence as to the particular case which came under his own observation. We note, moreover, that the Civil Surgeon's opinion as to the possibility of a child being strangled or

suffocated without there being any marks visible after death is confirmed by Lyon's Medical Jurisprudence.

As regards motive, the Sub-Inspector does not admit that he owed the accused any pay or that he had broken two canes over him. He does admit that he punished him in connection with the loss of the bunch of keys, though his version is that he only gave him two or three slaps. In view, however, of his admission that, after the beating, Nar Singh declared that he would not serve the Sub-Inspector any longer and asked the latter to settle his account, we think that the beating was in all probability much more severe than the Sub-Inspector is willing to admit.

We are satisfied that the accused's confession was a genuine confession and, reading it along with the circumstantial evidence and the Medical evidence, we have no doubt left on our minds that the accused committed the murder of which he has been convicted. The only possible reason for reducing the sentence is the accused's age which is stated by the Civil Surgeon to be eighteen years. On the other hand, to murder an innocent child for the purpose of satisfying a grudge against the child's father is a peculiarly atrocious act and sitting as a Court of Justice we do not feel that we should be justified in interfering with the sentence of death passed by the learned Sessions Judge.

We accordingly dismiss the appeal and, affirming the conviction and sentence, direct that the latter be carried into effect in accordance with law.

W. C. A.

Appeal dismissed.

LACHHI RAM v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 990 OF 1922.

January 13, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice.
LACHHI RAM AND AN OTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 363—Kidnapping—Minor voluntarily leaving home—Criminal Procedure Code (Act V of 1898), s. 164—Confession, recording of—Failure to make enquiry, effect of.

If a minor girl leaves her husband's home without any persuasion, inducement or blandishment held out to her, so that she gets fairly away from home and then goes to a man, the latter cannot be deemed to have infringed the law even if he does not restore her to her lawful guardian.

The failure of a Magistrate, before recording a confession, to question the person making the confession as to whether he is making it voluntarily, is a fatal defect which renders the confession inadmissible in evidence.

Farid v. Emperor, 65 Ind. Cas. 613; 2 L. 325; 5 P. W. R. 1922 Cr.; 23 Cr. L. J. 149; 4 U. P. L. R. (L) 33; (1922) A. I. R. (L) 237, followed.

Criminal appeal from an order of the Sub-Divisional Magistrate, Kulu, District Kangra, dated the 14th of October 1922.

Bakhshi Tek Chand and Mr. Moti Lal Kayastha, for the Appellants.

Sheikh Niaz Ali, for the Respondent.

JUDGMENT.—Two boys, namely, Lachhi and Datt, who lived at Manikaran in the sub-division of Kulu, have been convicted under section 363, Indian Penal Code, of having, on the 27th April 1922, kidnapped a minor girl named *Musammât* Nardu from her lawful guardianship. There can be no doubt that *Musammât* Nardu was living with her husband, Dhani Ram, at Bhuntar, and that, on the 27th April 1922, she disappeared from his house during his temporary absence and has not since been found in spite of the husband having searched for her in the whole of the valley. The question for determination, however, is whether the girl was kidnapped by the prisoners.

The Sub-Divisional Magistrate who tried the case, has written a long judgment which does not discriminate between the evidence which is legally admissible against the prisoners and that which either is inadmissible or has not been proved in accordance with the rules contained in the Indian Evidence Act. For instance, he relies upon

two letters (Exhibits P. A. and P. B.) which were found by the husband on the 6th May 1922, in an old waist-coat of his wife lying in the house. Now, it is true that both these documents are amorous epistles, but there is not a scintilla of evidence to show that they were written or sent by either of the prisoners. The learned Magistrate also relies upon a confession of the accused, Lachhi, made by him during the Police investigation. This confession was recorded by the Tahsildar on the 12th May but neither the memorandum written by him before recording the confession nor his evidence before the Court shows that before recording the confession he questioned Lachhi as to whether he was making the confession voluntarily, and as pointed out in *Farid v. Emperor* (1) this defect is a fatal one and renders the confession inadmissible in evidence. Nor do I think the oral confession said to have been made on that very day by Lachhi to Dhani Ram in the presence of the Police can be taken into consideration against him.

Excluding, therefore, the documentary evidence discussed above and also some irrelevant evidence relating to the subsequent conduct of Lachhi's father and the discovery of the girl's garments on the night of the 30th April outside the house of her relative Kohan at Manikaran, neither of which circumstance can be used against Lachhi or his associate, we are reduced to the oral evidence of a few witnesses, which is neither convincing nor conclusive. Two of these witnesses, Bahadur and Mani Ram, simply state that on the evening of the 27th April they saw both the prisoners at Bhuntar, but their presence near the house of the girl's husband does not necessarily lead to the inference that they took or enticed her out of the keeping of the lawful guardian. The remaining three witnesses, Beli Ram, Jethu and Hatu, depose to the fact that the prisoners and the girl were seen on that night travelling together on the road leading from Bhuntar to Manikaran. Now, apart from the fact

(1) 65 Ind. Cas. 613; 2 L. 325; 5 P. W. R. 1922 Cr.; 23 Cr. L. J. 149; 4 U. P. L. R. (L) 33; (1922) A. I. R. (L) 237.

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that the witnesses are men of low status and give evidence which is not easily reconcilable as to the time when the prisoners and the girl were seen going together at different places on the road, I am not prepared to hold that their testimony even if taken at its face value, brings the case within the purview of the definition of kidnapping as contained in section 361, Indian Penal Code. It appears from the evidence of the husband that he had wholly failed in the discharge of his conjugal duty towards his wife and there, is, therefore, nothing improbable in the theory that the girl dissatisfied as she was, took advantage of his absence from the house and left it of her own accord in order to go to her parental home at Manikaran. Now, it is an established principle of law that if a minor girl leaves her husband's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, he cannot be deemed to have infringed the law, even if he does not restore her to her lawful guardian. On the evidence before me I cannot even go so far as to hold that the girl went to the two prisoners, and the only fact which has been established, is that she was a fellow traveller with them, all of whom were going to the same place.

I have bestowed my careful consideration upon the entire material upon the record and reached the conclusion that no "taking" or "enticing," such as is contemplated by law, has been established. Before concluding I must point out that the sentences imposed by the Magistrate are much too severe and would not have been confirmed if the prisoners had been found guilty of the offence. I must, however, hold that their guilt has not been established, and accepting the appeal I set aside the conviction and the sentences and direct that the appellants be released forthwith.

Z. K.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 132 OF 1922.

December 5, 1922.

Present:—Mr. Daniels, A. J. C.

SHAKUR—ACCUSED

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 110, proceedings under, resulting in discharge of accused—Fresh proceedings started after short interval—Court, duty of—Definite offence alleged—Procedure.

Where proceedings against an accused person under section 110 of the Criminal Procedure Code result in his discharge, and within a very short time thereafter fresh proceedings are started against him, it is the duty of the Court to see that there is sufficient evidence of his conduct after the conclusion of the previous proceedings to justify the fresh proceedings. If the allegation against him is of a definite offence, he ought to be prosecuted for that offence, without having resort to second-hand evidence of that offence to prejudice the case against him under section 110, Criminal Procedure Code.

Application against an order of the District Magistrate, Bara Banki, dated the 27th July 1922, confirming an order, dated the 27th May 1922, of the Magistrate, First Class, Bara Banki.

Mr. Bahadurji, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision on behalf of one Shakur who has been bound over under section 110, Criminal Procedure Code. The accused was run in under the same section last year and was discharged on a finding that the prosecution had entirely broken down, on 5th September 1921. The present proceedings were started against him only seven months afterwards. Under these circumstances, it was obviously the duty of the Courts to be very careful to see that there was sufficient evidence of accused's conduct after the conclusion of the previous proceedings to justify fresh proceedings being started against him after so short an interval. On looking at the evidence and the orders of the Courts below I am not satisfied that this is the case. The order of the Trying Magistrate shows that he was influenced to a very considerable extent by inadmissible evidence, such as allegations of definite crimes which could not be proved against the accused and he admitted a great deal of evidence as to events which happened

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prior to the previous proceedings. The learned District Magistrate was alive to the necessity of excluding these previous events but in dealing with witnesses it is very difficult to decide how far their evidence is based on the alleged previous events and how far it is based on the accused's conduct and reputation during the past six months. The learned District Magistrate has accepted, as a principal event which has happened since the accused's discharge, the evidence of P. W. No. 5, Sant Bakshi Singh, who says that a message was sent to him by Shakur demanding, under threats, a sum of Rs. 1,000. It is obvious that if this evidence is true and the fact could be proved against the accused, he was guilty of a very serious criminal offence, and he ought to have been prosecuted for that offence instead of second-hand evidence being brought in to prejudice the case against him under section 110, Criminal Procedure Code. The accused appears to be a substantial cultivator and the only witness of his own neighbourhood who deposes against him has admitted enmity with him. In view of the previous proceedings against the accused which resulted in his discharge, and the short interval which elapsed between that order and the institution of the present proceedings, I find on the record that the order now passed was not justified.

I accordingly allow the revision and direct that the accused be discharged.

W. C. A.

Revision allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 121 OF 1922,
August 31, 1922.

Present:—Mr. Batten, J. C. and
Mr. Halifax, A. J. C.

KASHIRAM APPELLANT.

J. S. S.

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V. of 1898),
ss. 328, 337, 338—Pardon tendered by Sessions*

Judge—Examination of approver as witness by him, whether legal—Approver, whether must be one charged with offence triable exclusively by Session's Court—Evidence Act (I of 1872), s. 14—Previous conduct, admissibility of—Accomplice, evidence of—Corroboration.

If under section 328 of the Criminal Procedure Code a Sessions Judge himself tenders pardon to an accused who accepts it, he can at once examine him as a witness and it is not necessary that such accused should be sent to the Committing Magistrate for his statement to be recorded on oath. [p. 247, col. 1.]

Under sections 337, 338 of the Criminal Procedure Code it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session, all that is required is that the person to whom pardon is tendered, who need not even be an accused, should be supposed to have been directly or indirectly concerned in or privy to an offence triable exclusively by the Court of Session with which another person is charged. [p. 247, col. 1.]

Before the evidence of an accomplice can be accepted it is necessary to be satisfied that the accomplice himself took part in the crime to the extent that he says and that he is in a position to give true evidence as to what occurred. It is also necessary that the accomplice's evidence should be corroborated to prove that it was the accused person and no one else who committed the crime. [p. 248, col. 2.]

Appeal from the judgment and finding of the Sessions Judge, Nimar, dated the 26th June 1922, in Sessions Trial No. 2 of 1921.

Mr. N. G. Sarkar, R. B., for the Appellant.
Mr. G. P. Dick, for the Crown.

JUDGMENT.—The appellant Kashiram Kalar has been sentenced to death for the murder of Motia Gaoli, a boy about 15 years old. The age of the appellant Kashiram is given by the Sessions Judge as 25, but the Police estimated it to be 28, while the Committing Magistrate recorded his age as 23.

Mullu Kalar was a co-accused with the appellant, and the Committing Magistrate charged Kashiram with murder and robbery under sections 302 and 392, and Mullu with robbery under section 392, Indian Penal Code. When examined in the Court of the Committing Magistrate, Kashiram denied all knowledge of the crime, but Mullu stated that he was present when Kashiram robbed Motia of his silver *kadas* and murdered him. The learned Sessions Judge added a charge

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of murder against Mullu, tendered him a pardon, and examined him as a prosecution witness (P.W.No.21). The procedure adopted by the learned Sessions Judge was unnecessarily complicated. After Mullu had accepted the pardon and had stated that he would tell the whole truth, the Sessions Judge sent him to the Committing Magistrate for his statement to be recorded. Mullu's statement was recorded by the District Magistrate (owing to the absence of the Committing Magistrate) and he was then sent back to the Sessions Court and his evidence taken. Under section 328, Criminal Procedure Code, the Sessions Judge, having himself tendered a pardon to one of the accused and the pardon having been accepted, could at once have examined him as a witness.

We will deal first with the contention raised by the learned Pleader who appears for the appellant in this Court, namely, that Mullu was illegally made a witness. The argument is that Mullu was charged under section 392, Indian Penal Code, with an offence not exclusively triable by the Court of Session that, therefore, sections 337 and 338, Criminal Procedure Code, did not apply and that the charge of murder was illegally added as there was no evidence to show that Mullu had been a party to the murder. We are of opinion that the learned Sessions Judge had good grounds for charging Mullu with murder, and he has recorded his reasons, in the order-sheet. Apart from this, the argument that Mullu could not be tendered a pardon because he had not been charged with an offence triable exclusively by the Court of Session is fallacious, being based upon a misapprehension of the law. Under sections 337 and 338, Criminal Procedure Code, it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session; all that is requisite is that the person to whom pardon is tendered, who need not even be an accused in the case, should be supposed to have been directly or indirectly concerned in, or privy to an offence, triable exclusively by the Court of Session, with which another person is charged. There were ample grounds for supposing that Mullu was privy

to the offence with which Kashiram was charged, and the tender of pardon to Mullu and his examination as a witness were perfectly legal.

The learned Sessions Judge has given a most careful and detailed account of the circumstances in which the boy Motia was missed, of the discovery of the body with the *kadas* gone, of the progress of the investigation and of the nature of the evidence against the appellant, and he has most carefully weighed and analysed the evidence. Some supplementary information may be noted, namely, that the village of Bir where Mullu lived and where the appellant Kashiram was, staying adjoining, the village of Mohad where the murdered boy lived, and that the appellant who comes from the Nasik District in the Bombay Presidency had been living next door to Mullu for about two months before the murder and is a relative by marriage of Mullu. The learned Sessions Judge has also indicated, rather than described, what is the evidence of Mullu. Mullu says that he used to accompany Kashiram, and they frequented the grazing grounds together; on the Sunday of the murder Kashiram, he says, came running to him and took him to the place, where the body was afterwards discovered, where Mullu found Motia in a senseless condition with his legs tied together; Kashiram then removed the *kadas* from the boy's wrists in the manner described by the Sessions Judge in the course of which operation the boy's wrists were wounded; Kashiram then placed his bare foot on the boy's neck and throttled him to death and went off with the *kadas*. In his evidence Mullu professes to have no knowledge of the administration of the *dhatura* or the possession of *dhatura* by himself or Kashiram.

The learned Sessions Judge has taken into consideration the evidence of Mullu, and of certain boys that Kashiram had previously offered sweets to boys and that one of the boys was afterwards robbed of his jewellery when affected with the symptom of *dhatura* poisoning. This evidence has been admitted for the purpose of proving the probability of Kashiram having administered *dhatura* to the deceased Motia. The learned Pleader for the appellant complains that this evidence should not have been

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admitted and with this contention we must agree. Section 14 of the Evidence Act, as explained in Illustration (c), shows that the fact that the accused offered sweetmeats to other boys and poisoned one of them with *dhatura* is not evidence that he administered poisoned sweetmeats to Motia. Under section 15 of the Evidence Act, if it was otherwise proved that Kashiram had administered sweetmeats poisoned with *dhatura* to Motia, the evidence above referred might be admitted to show that the administration was intentional and not accidental. But in this case as there is no possibility of accidental administration it is unnecessary to prove intention, and we must hold that the evidence referred to above is inadmissible and it must be left out of consideration. The evidence of the boys Dewa (P. W. No. 13) and Pannalal (P. W. No. 14) is, however, relevant to prove another point, namely, that Kashiram and Mullu were in the habit of frequenting the grazing grounds in company, which corroborates Mullu's story to the same effect.

Apart from the evidence of Mullu the most important circumstance proved against the appellant is that the murdered boy's *kadas* were found on the search of his person in the circumstances described by the Sessions Judge. The learned Pleader for the appellant strongly contends that the *kadas* were "planted" on the appellant by the Police or others and that the identification of the *kadas* is unsatisfactory. As regards the discovery of the *kadas* from the person of Kashiram we agree with the Sessions Judge in holding that there is no possible doubt of the truth of the prosecution evidence in spite of the petty discrepancies in the evidence, which are unimportant. It is impossible to suppose that the Police should have procured another pair of *kadas* and have prepared them by cutting them in halves so as to fit in with the story of Mullu which had not yet been obtained. We have seen the *kadas* and are quite satisfied with the evidence proving them to be the ones habitually worn by Motia which he was wearing when he was last seen alive. There is only one discrepancy as to the description of Motia's *kadas*, namely, that one of his relatives says that they used to overlap at the ends while another says they

did not. We do not consider that this point to be of any importance. They probably did overlap as they are large sized *kadas*, too big for a boy, and could have been removed from his wrists without being cut if they had not been bent so as to overlap at the ends.

The Medical evidence shows that the boy's death was due to strangulation and the report of the Chemical Analysis proves that *dhatura* was detected in his viscera. We agree with the Sessions Judge's reasons for holding that the death was probably due to strangulation and not immediately to the effect of the *dhatura* poisoning. The Medical evidence corroborates Mullu's story that before he was strangled Motia was unconscious and showing the usual symptoms of *dhatura* poisoning.

Even without the evidence of Mullu there is a very strong case against the appellant, Kashiram. The murdered boy's ornaments were found in his possession and there is evidence mentioned by the Sessions Judge to show that on the morning of the murder he was leading a boy who corresponded to the description of Motia in the direction of the spot where the boy's corpse was found. But the evidence of Mullu makes the case against the appellant conclusive. Before the evidence of an accomplice can be accepted, it is necessary to be satisfied that the accomplice himself took part in the crime to the extent that he says and that he is in a position to give true evidence as to what occurred. In this case there is ample corroboration of Mullu's story that he was present at the crime and saw exactly what happened. His story does not read like a concoction but like a description of something that really happened. Stones bearing traces of silver were found on the spot, which corroborates his account of how the *kadas* were removed. Rope was also found on the spot, which corroborates his story that the boy's legs had been tied together and that a rope was used in pulling apart the *kadas* that had been partially cut through with the head of an axe. There is also evidence in corroboration of his story that he went with Kashiram to the scene of the offence. It is also, of course necessary that the accomplice's evidence should be corroborated to prove that it was the accused person and no one else

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who committed the crime. As to this there is the very vital piece of evidence that the murdered boy's *kadas* were found in the possession of the appellant which is not only direct evidence against Kashiram but strong corroboration of Mulla's evidence. We may mention that the findings of the *dhatara* seeds on the roof of the Mulla's house cannot be taken into consideration as any evidence against Kashiram.

The learned Counsel for the appellants lays stress on the improbability of Kashiram having kept the ornaments on his person when he might have hidden them. There is evidence that after the discovery of the boy Kashiram was closely watched and would have been unable to find an opportunity for disposing of the ornaments. It is true that he might have concealed them before the body was discovered, and he alone knows why he did not do so. It may be that his intention was to go off to Nasik and he wanted to keep the ornaments on his person for that purpose. However that may be, we are satisfied that he kept them on his person, where they were found.

In this petition of appeal to this Court Kashiram states that the whole of the evidence has been concocted by the *mal-guzar* of the Bir, Mukhtyar Ahmad (P. W. No. 24). We agree with the Sessions Judge that no personal animosity on the part of the Mukhtyar Ahmad has been proved and we consider that all he did was in the interests of justice. The appellant also says that he had no need to rob any one as he was capable of earning his own livelihood, but the evidence is to the effect that while at Bir he did nothing to earn his living.

After careful consideration of the evidence we are of opinion that the Sessions Judge was fully justified by the evidence in convicting the appellant of the murder of Motia, and we must say that, in our opinion, it is a perfectly clear case, the evidence against the appellant is overwhelming. For a murder of this type death is the only suitable penalty. We, therefore, maintain the conviction and sentence and dismiss the appeal.

G. R. D.

N. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 672 OF 1922.

November 21, 1922.

Present:—Mr. Justice Newbould and
Mr. Justice Suhrawardy.

Syed SADEK REZA—PETITIONER

versus

SACHINDRA NATH ROY AND OTHERS—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 350—Proceeding under s. 145—Change of Magistrates—Accused, right of, to re-summon witnesses.

In a proceeding under section 145 of the Criminal Procedure Code where the Magistrate is succeeded by another, the succeeding Magistrate is not compelled under the proviso to section 350 of the Code to start the enquiry *de novo*, if an application to that effect is made on behalf of the accused. [p. 266, col. 1.]

The intention of the Legislature was to limit the application of proviso (a) to section 350 of the Criminal Procedure Code to criminal trials and not to extend that proviso to enquiries which are also covered by the first portion of the section. [p. 266, cols. 1 & 2.]

Criminal revision against an order of the Deputy Magistrate, Malda, dated the 13th July 1922.

Babus Manmatha Nath Mukerjee and Hemendra Kumar Das, for the Petitioner.

Babus Narendra Kumar Bose and Anilendra Nath Roy Chowdhury, for the Opposite Party No. 14.

Babus Dasarathi Sanyal and Priya Nath Dutt, for the Opposite Parties Nos. 94, 98, 115.

JUDGMENT.

Newbould, J.—This Rule is directed against an order passed under section 145, Criminal Procedure Code, declaring the first party to be in possession of certain land. The petitioner in this case is a member of the second party. It is strongly contested on his behalf that the Magistrate had no jurisdiction to go behind the orders passed in his favour both under the Survey Act and under the Bengal Tenancy Act. We are unable to hold that in deciding as he has done the Magistrate acted either without jurisdiction or with such irregularity as would justify our setting aside his order in the exercise of our powers under the Government of India Act.

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The main contention is that these orders in the petitioner's favour were binding on the Magistrate and he was bound to hold that after the decision in the proceeding under the Survey Act the second party were in possession. It is said that there was no finding that there has been any change of relationship at that time. But the finding that the first party are now in possession is in itself a finding of change of relationship since the decision under the Survey Act. As regards the entry in the Record of Rights on which great reliance is placed it appears that this entry was based entirely on the Survey proceedings. The Magistrate's order cannot be said to have been made without jurisdiction because he has not expressly stated that the presumption arising from this entry has been rebutted. His finding is in fact a finding that the presumption has been rebutted. It is not for us to say whether the Magistrate's decision on the evidence before him was right or wrong. There can be no doubt that such evidence as there was before him was fully considered and he has come to a definite finding and he had jurisdiction to come to that finding.

One other point was taken with regard to the Magistrate's jurisdiction and this is based on section 350 of the Code of Criminal Procedure. The Magistrate who passed the order did not himself record the whole of the evidence. He based his decision partly on the evidence recorded by another Magistrate before whom the proceedings were commenced. We hold that, though the main portion of section 350 is sufficient to give the Second Magistrate jurisdiction to proceed with the case, the proviso to that section did not compel him to start the enquiry *de novo* when an application to that effect was made on behalf of the second party. The wording of the principal clause of section 350 is very different from that in proviso (a). In the main body reference is made to an enquiry or trial: proviso (a) is limited to trial and also makes reference to an accused, a word which does not appear in the preceding part of the section. We have no doubt that the intention of the Legislature was to limit the application of proviso (a) to criminal trials and not to extend that proviso to enquiries

which are also covered by the first portion of the section.

I hold, therefore, that the contentions raised on behalf of the petitioner fail and I accordingly discharge this Rule.

Suhrawardy, J.—I agree. I desire to rest my judgment on the observation made by the Trying Magistrate in his explanation submitted to this Court which finds some support from his judgment, *viz.*, "that according to the map prepared by the Pleader Commissioner the Revenue Survey line which is shown in full red passes by the west of the eastern boundary line of the disputed land; so the claim by the second party in the disputed land on the decision of the case under section 41 of the Survey and Settlement Act has not been established." Were it otherwise, I would have, in the circumstances of this case, had considerable hesitation in upholding the Magistrate's order under section 145, Criminal Procedure Code.

N. H.

Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 127 OF 1922.

August 21, 1922.

Present:—Mr. Batten, J. C. and

Mr. Hallifax, A. J. C.

MANJOO—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 154—First information report consisting of confession, admissibility of—Conviction for murder on plea of guilty, legality of.

A First Information Report is not admissible in evidence if it is a confession by the accused to the Police of his guilt. [p. 268, col. 1.]

A conviction merely on a plea of guilty in a murder case is not illegal though in each case the circumstances must be examined to see whether the plea of guilty is one which should be acted on, [p. 268, col. 2.]

MANJOO L. EMPEROR.

Appeal from the judgment of the Additional Sessions Judge, Saugor, in Sessions Trial No. 9 of 1922, dated the 3rd July 1922.

Mr. S. R. Mangruikar, for the Appellant.
Mr. G. P. Dick, for the Crown.

JUDGMENT.—The appellant Manjoo, aged about 30, has been sentenced to death for the murder of *Musammāt Phundo* on the 15th April last at Chartoria in the Saugor Tahsil. Manjoo is by caste a Lodhi, and Phundo was a Barethan or Dhobin, and, therefore, of a lower caste, aged something between 20 and 25. The appellant has been convicted by the Additional Sessions Judge on his own plea of guilty.

The learned Pleader who appeared for the appellant in this Court, urges that the conviction is illegal, since the appellant did not in the Sessions Court intend to plead and did not plead guilty to the charge of murder, and that his statement in the Sessions Court as a whole amounted to a plea that he killed *Musammāt Phundo* on grave and sudden provocation.

The charge drawn up was that the appellant at Chartoria on or about the 15th April did commit murder by intentionally causing the death of *Musammāt Phundo* Barethan. The order sheet of the Additional Sessions Judge, under date 3rd July 1922, runs as follows:—

"The accused brought from Jail. The Public Prosecutor for the Crown and Mr. S. C. Mukherjee appears for him. The charge is read over and explained to the accused. He pleads guilty. His statement is recorded *in extenso*. In view of that statement, I do not think there is any necessity of recording any evidence. I find him guilty and deliver the judgment. Finding recorded. The witnesses and the assessors summoned are discharged.

"The First Information Report, the statement of the accused, the Medical evidence and the report of the Imperial Serologist have been transferred from the record of the Committing Magistrate to the record of this Court. The accused is explained that he should appeal within 7 days.

The statement of the prisoner recorded *in extenso* in the form of question and answer may be translated as follows:—

1. Q. Did you kill *Musammāt Phundo* Barethan of Chartoria?

A. Yes Sir, I killed her with an axe because she had said before the *Panchayat* that she was pregnant by me and I was dishonoured and I felt this very much.

2. Q. Was Kasia present there?

A. Yes Sir. She was present when I killed *Musammāt Phundo*.

3. Q. Did you go to the *Thana* after her death taking the axe with you?

A. Yes Sir. When she was dead, I went to the *Thana* to make a report; I made over my axe to the Police.

4. Q. Did *Musammāt Phundo* belong to a caste lower than yours?

A. Yes Sir. I belong to a higher caste than hers, the *Panchayat* said that if the accusation proved true I would be out-casted and shut off from 'drink and smoke.'

5. Q. Where did you meet *Musammāt Phundo*?

A. I was taking bullocks to my field for grazing and the two sisters were going back home after bathing.

6. Q. Did you take this axe with you?

A. I always take my axe with me to the fields.

7. Q. What did you say to *Musammāt Phundo* when you met her?

A. I just happened to meet *Musammāt Phundo*. I said to her 'why did you mention my name?' and she replied: 'it was what the *Panchas* told me to do.'

8. Q. What did you do then?

A. I became enraged and struck her. The axe (Art. A) is mine.

9. Q. Did you get this axe sharpened and did you wash it?

A. I did not get an edge put on it. I washed my axe in the river on my way to the Jaisinagar *Thana*.

10. Q. Why did you go to make a report?

A. I thought 'why should I suffer at the hands of the *Panchas*? With the Sarkar what is to happen, let it happen.' Therefore, I went and made a report.

Musammāt Kasia, mentioned in the examination and admitted by the appellant to have been present when he killed Phundo, is Phundo's sister who had been examined as a witness by the Committing Magistrate. We interpret *Musammāt Phundo's* words as given in the latter part of the answer to

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the seventh question as meaning that the *Panchas* had insisted on her naming the father of her unborn child, not that they suggested or insisted that she should name the appellant as the father. The words recorded in the vernacular are : "*Une-kahi thi ke Panchon ne aisi kahi thi*" and the equivocal translation given above is certainly more correct than that given by the learned Judge, which is : "She replied that the *Panchas* wanted her to accuse me." We observe that, according to the order sheet, the learned Additional Sessions Judge transferred to his record the Medical evidence, the First Information Report made by the accused and the record of his examination before the Committing Magistrate, after he had delivered the judgment, though he has alluded to these records, as well as to the Inquest Report in his judgment. The First Information Report was not admissible in evidence at all, being a confession to the Police. We are satisfied however, that the Additional Sessions Judge did not use these papers in any way adversely to the accused, but rather in his favour, as far as possible, when considering the question of sentence. For instance, the fact that the appellant's wife had complained to him that his aunt treated her as an outcast, by refusing to let her draw water first, appears to be derived from the First Information Report. This allegation is repeated in the appellant's grounds of appeal, which, rendered into English, are as follows :—

"The deceased put a false accusation on me, on which the caste people put me and my wife out of caste without any enquiry. My aunt did not allow my wife to draw water from the well nor to touch the water. On this great pain came to my heart and anger, so that I could not bear it, and in that state of anger I killed the deceased. This crime came about from my having a great shock and pain in my heart and from the caste people putting me out of the caste. The matter may be considered."

As the Additional Sessions Judge acted only on the plea of guilty and the accompanying statement, he was bound to confine himself, as against the accused, to the terms of that statement, and to accept the assertion that when Manjoo killed Musammal

Phundu he had met her accidentally. Though he does mention a version less favourable to the accused, the learned Judge appears to have decided the case on the assumption that the meeting was accidental.

Our attention has been called to various reported cases in which it has been held that the plea of guilty in a case of murder should not have been accepted. For instance, in *Netai Luskar v. Queen-Empress* (1) it was held that the accused's statement read as a whole did not amount to a plea of guilty to a charge of murder since it was coupled with an explanatory statement that the accused had killed his wife under grave sudden provocation; a full trial was ordered. It has also been observed in more than one case that as a matter of practice in Sessions trials many Judges very properly prefer not to act on a plea of guilty but proceed to take the evidence as if the plea had been one of not guilty, in order to ascertain the accused's state of mind and whether or not he acted under provocation, whether sufficient to reduce the offence of one of culpable homicide or only sufficient to effect the sentence. In sub-section (2) of section 271 of the Criminal Procedure Code it is enacted: "If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon." It has certainly never been laid down that it is illegal to convict in a murder case on a plea of guilty, and in each case the circumstances must be examined to see whether the plea of guilty is one which should have been acted on. Sub-section (1) of section 271 insists that the charge shall be read out to the accused and explained to him and that he shall be asked whether he is guilty of the offence charged or claims to be tried. This procedure was adopted in this case. The accused was represented in the Sessions Court by a Pleader. In Criminal Appeal No. 169 of 1921 a Bench of this Court observed : "The appellant was, in the Sessions Court, represented by a senior member of the Bar, and he would have at once corrected the mistake and claimed a trial, had the plea not been one of guilty to the charge of murder." This observation applies to the present case, though we have no information as to whether the Pleader who appeared for

(1) 11 C. 410; 5 Ind. Dec. (N. S.) 1033.

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the appellant in the Sessions Court was or was not a senior member of the Bar.

The only defence available, and the only one now put forward, is that the appellant killed Phundo under grave and sudden provocation. The appellant's answer to the seventh question shows that when he accosted *Musammam* Phundo and questioned her he was already aware that she had accused him at the *Panchayat* (at which he was not present) of being the father of her unborn child. This accusation would no doubt amount to grave provocation especially if it was untrue, and we must assume in favour of the accused that it was a baseless accusation since no evidence has been recorded to the contrary. But the accused knew the charge had already been made by Phundo, and what he did, according to his own statement, was to challenge her to repeat it; she did so, and he at once struck her down with his axe, intending to kill her. In our opinion, the repetition by Phundo of an accusation which the appellant knew she had already made, on a challenge by him to do so, cannot be called sudden provocation, and provocation must be sudden as well as grave to reduce the intentional killing of another from murder to mere culpable homicide. It follows, therefore, that the statement of the accused made in the Sessions Court in answer to the charge read out to him amounts to a valid plea of "guilty" of the offence of murder since the admitted facts constitute murder and show that there was no sudden provocation. For these reasons we are of opinion that the Additional Sessions Judge was justified in accepting the plea of guilty and that the appellant has rightly been convicted of murder on that plea.

There remains the question of sentence. It is strongly urged that the appellant's conduct in making a clean breast of his crime from the beginning and giving himself up to the Police shows that he is not depraved, that the murder was not premeditated and that he repented of it. At first sight, such conduct might appear in the light of some mitigation of guilt, but on examination we do not find this really to be the case. There is no particular merit in confessing a crime committed openly in broad day light, of which there was at least one eye witness; confession may

indicate repentance, but that can only effect a reduction of that part of the sentence that is purely reformatory, and that factor has disappeared from the capital sentence, leaving only the exemplary factor. It is urged that the accusation made by Phundo against the appellant was particularly cruel and exasperating in that she had first named more than one other man as the father of her child, as appears from the evidence given before the Committing Magistrate by *Ajudhia*, the man who told the appellant what had happened at the *Panchayat*. Upon consideration, we are unable to see any reason why the normal sentence for the offence of murder should not be imposed. The appellant constituted himself a Tribunal which decided that the making of a charge of paternity against him was an offence punishable with death, he appointed himself the executioner and carried out the sentence. We are of opinion that the lesser penalty provided for the offence of murder would not be proper in the circumstances, and, therefore, maintain the conviction and sentence and dismiss the appeal.

G. R. D.

*Appeal dismissed.***LAHORE HIGH COURT.**

CRIMINAL REVISION NO. 1202 OF 1922.

December 9, 1922.

Present:—Mr. Justice Campbell.

EMPEROR—PETITIONER

versus

FAZAL DAD—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 89, 438, 439—Proceedings against absconder—Sale—Application for restoration allowed, effect of—Property, whether can be restored—Revision—District Magistrate, whether can make reference against order of Sessions Judge—Procedure.

Where an application under section 89 of the Criminal Procedure Code is allowed after the property has been sold, the successful applicant is not entitled to restoration of the property but only to the nett proceeds of the sale of the property. [p. 271, col. 1.]

EMPEROR v. FAZAL DAD.

It is not the practice of the High Courts in India to take action under section 439 of the Code of Criminal Procedure on a report by a District Magistrate which has for its object interference with a decision by a Court of Session. [p. 270, col. 2.]

Queen-Empress v. Karamdi, 23 C. 250; 12 Ind. Dec. (N. S.) 167; *Emperor v. Jamna Bai*, 28 A. 91; 2 A. L. J. 589; A. W. N. (1905) 198; 2 Cr. L. J. 515; *Emperor v. John Francis Lobo*, 36 Ind. Cas. 577; 41 B. 47; 18 Bom. L. R. 796; 17 Cr. L. J. 529; *In re Angamuthu Vanathrian*, 16 Ind. Cas. 522; 12 M. L. T. 170; (1912) M. W. N. 812; 23 M. L. J. 732; 13 Cr. L. J. 714, relied on.

The proper procedure for a District Magistrate, who considers an order of the Sessions Judge illegal, is to move the Public Prosecutor to bring the matter before the High Court. [p. 270, col. 2.]

In re Angamuthu Vanathrian, 16 Ind. Cas. 522; 12 M. L. T. 170; (1912) M. W. N. 812; 23 M. L. J. 732; 13 Cr. L. J. 714, relied on.

Case reported by the District Magistrate, Gujrat, with his Memo, dated the 17th August 1922.

FACTS.—Fazal Dad, son of Allah Bakhsh, of Chakrian, was one of the accused in a case under sections 304/147, Indian Penal Code, of the year 1912. He was alleged to be absconding at that time and proceedings were taken against him under sections 87/88, Criminal Procedure Code. All his property was accordingly attached and sold. The auction of 216 *kanals* and a few *marlas* of land belonging to Fazal Dad was sanctioned in favour of Sardar Karam Singh, one of the vendees, for Rs. 2,000 by Sheikh Ali Muhammad, Magistrate First Class, Gujrat, *vide* his order dated 10th April 1919. Before the recovery of the sale-proceeds Sardar Karam Singh, however, died and his widow put in an application to the effect that she was too poor to pay up the sum. At the application of Sardar Deva Singh, Pleader, the sale was sanctioned in his name, *vide* order dated 25th July 1919, Sardar Deva Singh paid up the price in the Treasury on the 15th August 1919 and he was granted a regular sale certificate from the Court on the 27th October 1919. Fazal Dad was arrested subsequent to that and acquitted from the Sessions Court on the 7th February 1920. He then applied for the restoration of his property. His application was rejected by Sheikh Ali Muhammad, Magistrate First Class, but was accepted on appeal and the

property was restored to him, *vide* Sessions Court's order dated 1st March 1922.

GROUND.—(1) The application given by Fazal Dad to the Sessions Judge of Gujranwala on 13th March 1920, praying for the restoration of his property attached and sold under section 89 of the Criminal Procedure Code, is clearly time-barred, having been made two years after the attachment.

(2) If the attachment was invalid, as is alleged by the applicant, no application under section 89 of the Code, for the restoration of the property, can be entertained by a Criminal Court. See *Mala Singh v. Emperor* (1).

(3) The order passed by the learned Sessions Judge dated 1st March 1922 is not according to law. An order directing the restoration of property to Fazal Dad could not legally have been passed.

(4) It is prayed that the order of the learned Sessions Judge be reversed and an order proper and according to law be passed.

Mr. Zafrullah Khan, for the Respondent.

ORDER.—It is not the practice of the High Courts in India to take action under section 439 of the Code of Criminal Procedure on a report by a District Magistrate which has for its object interference with a decision by a Court of Session, *vide Queen-Empress v. Karamdi* (2), *Emperor v. Jamna Bai* (3), *Emperor v. John Francis Lobo* (4) and *In re Angamuthu Vanathrian* (5). (Madras High Court). In the last named ruling it was stated that a District Magistrate, if he considers a Sessions Judge's order illegal, should move the Public Prosecutor to bring it before this Court. In the present instance the learned District Magistrate has not even arranged that his recommendation should be supported by Counsel, I must

(1) 35 Ind. Cas. 974; 6 P. R. 1917 Cr. 40 P. W. R. 1916 Cr. 45 P. L. R. 1917; 17 Cr. L. J. 414.

(2) 23 C. 250; 12 Ind. Dec. (N. S.) 167.

(3) 28 A. 91; 2 A. L. J. 589; A. W. N. (1905) 198; 2 Cr. L. J. 515.

(4) 36 Ind. Cas. 577; 41 B. 47; 18 Bom. L. R. 796; 17 Cr. L. J. 529.

(5) 16 Ind. Cas. 522; 12 M. L. T. 170; (1912) M. W. N. 812; 23 M. L. J. 732; 13 Cr. L. J. 714.

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decline, therefore, on the present reference to examine the correctness of the learned Sessions Judge's decision that Fazal Dad is entitled to restitution.

Since, however, the case has been brought to my notice, I take the opportunity of correcting an error which is evidently due to an oversight and which, if allowed to stand, may give further trouble in the future. The learned Sessions Judge has purported to act under section 89 of the Code of Criminal Procedure and that section provides that if the property has been sold, the person from whom it has been taken under section 88 shall be entitled to recover not the property but only the nett proceeds of the sale. Fazal Dad in his original application prayed that he might be given either the property or the sale proceeds. The detailed order in the case by which it was referred to this Court for action on the revision side was written by one Sessions Judge, and the final order after return by this Court with a direction that the Sessions Judge should himself dispose of the appeal preferred to him, was written by another Sessions Judge. The latter appears to have overlooked the precise terms of section 89.

Accordingly, I alter the learned Sessions Judge's order of the 1st of March 1922 to the extent of substituting for the words "the property in question" the words "the nett proceeds of the sale of the property in question."

Z. K.

*Order accordingly.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION NO. 616 OF 1922.
November 22, 1922.

Present:—Mr. Justice Newbould and
Mr. Justice Suhrawardy.

KANAI LAL, AND OTHERS—PETITIONERS
versus

HYDER ALI KHAN PANI—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898),

s. 146—*Order as to possession—Brevity—Revision.*

It is impossible to lay down a hard and fast rule when a High Court should interfere on the ground of the brevity of an order passed in a proceeding under section 146 of the Criminal Procedure Code.

Where a Magistrate passes an order under section 146 of the Criminal Procedure Code but omits to write at length the reasons for such order, it may be good ground for remand. But a High Court will not interfere if the Magistrate passed the order after giving full consideration to the evidence in the case.

Criminal revision against the order of the Sub-Deputy Magistrate, Serajganj, dated the 16th May 1922.

Babus *Bir Bhusan Dutt* for Babu *Profulla Chandra Chakravarty* and Babu *Nripendra Chandra Das*, for the Petitioners.

Babu *Surendra Nath Guha* and *Charu Chandra Biswas*, for the Opposite Party.

JUDGMENT.—In this case the learned Magistrate has passed an order under section 146 of the Code of Criminal Procedure after recording a very short order in which he states that he is unable to satisfy himself as to which of the parties is in possession of the land. Several rulings have been brought to our notice in which it has been held by this Court that the omission to write at length the reasons for coming to such a conclusion may be a ground for remanding a case. It is impossible to lay down a hard and fast rule when this Court should interfere on the ground of the brevity of the order passed in a proceeding of this kind. In the present case it is sufficient for us to say that we see no reason to think that the learned Magistrate did not give full judicial consideration to the evidence before he came to the conclusion at which he arrived. This being so, there is no reason for our interference. The Rule is discharged.

B. N.

Rule discharged.

MAULA BAKHSH V. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 23 OF 1923.

February 26, 1923.

Present:—Mr. Justice Zafar Ali.

MAULA BAKHSH AND OTHERS—CONVICTS

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 331—Causing grievous hurt to extort confession—Promise to restore abducted woman—"Demand," meaning of.

The accused compelled the complainant by causing grievous hurt to him to execute an agreement to restore a woman whom he was alleged to have abducted;

Held, that the accused could not be said to have committed an offence under section 331 of the Penal Code, inasmuch as the extortion of the promise for the restoration of the woman did not amount to the extortion of a confession or information which might lead to the detection of an offence within the meaning of the section.

The "demand" referred to in section 331 of the Penal Code must be with respect to property.

Queen-Empress v. Ella Boyan, 11 M. 257; 1 Weir 336; 4 Ind. Dec. (N. S.) 179, relied on.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Sialkot, dated the 2nd December 1922, affirming that of the Magistrate, First Class, Sialkot, dated the 31st October, 1922.

Dr. Nand Lal, for the Petitioners.

Mr. Zafarullah Khan, for the Government Advocate, for the Respondent.

JUDGMENT.—The four petitioners have been convicted under section 331, Indian Penal Code, of voluntarily causing grievous hurt to the complainant to extort a promise from him to restore the woman that he was alleged to have abducted. The prosecution theory was that the petitioners compelled him by beating him to execute an agreement to restore the woman. It was contended in the Courts below, and is again urged in this Court, that, even if the petitioners did all that was attributed to them, their act does not fall within the purview of section 331, Indian Penal Code. The learned Sessions Judge dealt with this objection in the following way:—

"It is argued that no offence under section 331 has been made out but it is clear from the evidence on the record that the appellant voluntarily caused grievous

hurt to the complainant for the purpose of extorting from him a statement that the woman, *Musammal Resham Bibi*, who was said to have been abducted was in his possession and also extorting from him a promise that he would return her. The fact, moreover, that a number of persons were asked to stand surety for the return of the woman would show that the object of the appellants was to create evidence in the case under section 494, Indian Penal Code, and the promise to return the woman was clearly a promise to satisfy a demand."

But in *Queen-Empress v. Ella Boyan* (1) it was held, that under this section, the demand must be with respect to property. The learned Counsel who appeared for the Crown conceded this, but argued that the extortion of the said promise amounted to an extortion of confession. But a promise is quite different from a confession especially when it was not extorted with the object of proving an offence. I am, therefore, of opinion, that the petitioner's offence does not fall under section 331, Indian Penal Code, and accordingly I alter the conviction to that under section 325, Indian Penal Code. The evidence relied upon by the Courts below proves that all the four accused beat the complainant and caused severe injuries to him including a fracture of a rib. All four are, therefore, responsible for the grievous hurt, but, as there was only one grievous hurt, I reduce the sentence of each to rigorous imprisonment for two years. The sentences of fine shall stand as well as the sentence under section 342, Indian Penal Code.

Z. K.

Sentence reduced.

(1) 11 M. 257; 1 Weir 336; 4 Ind. Dec. (N. S.) 179.

MAKHAN SINGH V. KISHEN SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 297 OF 1922.

February 14, 1923.

Present :—Mr. Justice Abdul Raoof.

MAKHAN SINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

KISHEN SINGH—DEFENDANT—

RESPONDENT.

Custom—Alienation by female—Consent of reversioner, effect of—Sons of reversioners, whether bound.

The assent of a reversioner to an alienation by a female in possession if made *bona fide*, without collusion or intention to injure the other reversioner, is binding upon his sons and debars them from challenging the alienation. [p. 274, col. 1.]

Habib Khan v. Muhammad Khan, 16 Ind. Cas. 463; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912, followed.

Second appeal from a decree of the Additional District Judge, Lahore, dated the 5th December 1921, modifying that of the Munsif, First Class, Kasur, District Lahore, dated the 20th June 1921.

Mr. Tara Singh Narula and Diwan Mehr Chand, for the Appellants.

Lala Amar Nath Monga, for the Respondent.

JUDGMENT.—These are two connected appeals which have arisen under the following circumstances. From the pedigree-table given in the judgment of the lower Appellate Court it appears that Jawala Singh and Kharak Singh were two brothers. The latter died leaving a widow Musammat Jindi. Jowala Singh had two sons Wasawa Singh who died leaving Musammat Malan, plaintiff No. 3 in this suit, as his widow and Wadhawa Singh whose sons are plaintiffs Nos. 1 and 2. The two brothers Jowala Singh and Kharak Singh owned and possessed jointly certain landed property and a house. On the death of Kharak Singh Musammat Jindi succeeded to a half share in the properties. The land appertaining to the half share of Musammat Jindi was 151 *kanals* and 9 *marlas*. Out of this she gifted 80 *kanals* in favour of Kishen Singh, her daughter's son, by a deed dated the 1st of May 1914. Wadhawa Singh gave his consent to the gift and attested the deed. On the same day, that is, on the 1st of May 1914, Musammat Jindi and Wadhawa Singh made a gift of the house

in favour of Kishen Singh the reason probably being as found by the Appellate Court that the donee Kishen Singh from the time of his infancy had been brought up by Wadhawa Singh and Musammat Jindi. The other half of the property belonged to Wasawa Singh and Wadhawa Singh, the two sons of Jawala Singh, out of which 14th had come by succession to Musammat Malan, plaintiff No. 3. The present suit was instituted by the sons of Wadhawa Singh and Musammat Malan for possession of the gifted land and of the house on the allegation that Musammat Jindi had no power under the custom to make the gift. The suit was resisted on the ground that plaintiffs Nos. 1 and 2, being the sons of Wadhawa Singh, with whose consent the gift in respect of the land had been made, were not entitled to question the alienation, and that Musammat Malan, plaintiff No. 3, being a widow had no right to challenge an alienation made by Musammat Jindi with the consent of the male reversioner Wadhawa Singh.

The Trial Court, relying on *Lahori v. Radho* (1), held that Musammat Malan having succeeded collaterally had a right to challenge the alienations and that plaintiff's Nos. 1 and 2 were also entitled to question the alienation as the consent given by their father, Wadhawa Singh, was not proved to be *bona fide*. The suit was accordingly decreed by that Court.

On appeal, the learned Judge of the Court below agreed with the Trial Court in respect of the finding that Musammat Malan had a right to challenge the alienation. As regards the suit of plaintiffs Nos. 1 and 2 the lower Appellate Court has taken a different view, and has found that the consent given by Wadhawa Singh is proved to have been *bona fide* and that it was not established that it was collusive. Relying on *Habib Khan v. Muhammad* (2) the learned Judge has set aside the decree in favour of plaintiffs Nos. 1 and 2. The result is that the claim of Musammat Malan has been decreed and that of plaintiffs Nos. 1 and 2 has been dismissed.

(1) 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906.

(2) 16 Ind. Cas. 463; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912.

MAKHAN SINGH v. KISHEN SINGH.

Two second appeals have been preferred to this Court: one by Makhan Singh and Ujagar Singh, sons of Wadhawa Singh, against the dismissal of their claim and the other by the donee, Kishen Singh, challenging the decree in favour of *Musammāt* Malan. The appeal on behalf of plaintiffs Nos. 1 and 2 has been argued on their behalf by Dewan Mehr Chand and it has been very strongly contended by him that, having regard to the custom stated in Rattigan's Digest of Customary Law, paragraphs 64 and 68, the gift made in favour of Kishen Singh cannot stand. The question to be decided, however, is whether, having regard to the ruling in *Habib Khan v. Muhammad* (2), the plaintiffs in spite of the consent given by their father can challenge the gift. The rule is stated in the head-note attached to the ruling in the following words:—

"That the assent of the plaintiff's father to the alienation by a female in possession, if made *bona fide*, without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights."

Now, in this case the learned Judge of the Court below has found upon the evidence that the consent was given *bona fide* the reason being that the donee had been brought up by Wadhawa Singh and *Musammāt* Jindi from his infancy. The reversioners in the present case were the sons of Wadhawa Singh himself and it is difficult to believe that Wadhawa Singh should have colluded with *Musammāt* Jindi and should have given his consent with the intention of injuring his own sons. Over and above this, there is the circumstance that out of 151 *kanals* and 9 *marlas* only 80 *kanals* have been gifted and the rest of the land has been left intact for the reversioners. In my opinion the view taken by the learned Judge of the Court below is fully supported by the authority relied upon by him and the gift in respect of the land cannot be challenged by the plaintiffs Nos. 1 and 2. It was, however, contended by Mr. Mehr Chand that, as regards the gifted house, the alienation by Wadhawa Singh in respect of his share was challenged by plaintiffs Nos. 1 and 2 as the reversioners of their father and that by an oversight the lower Appellate Court had not taken this phase of the claim

of the plaintiffs into consideration. It was open to the plaintiffs to have supported in appeal the decree of the Trial Court upon this ground. From the judgment of the lower Appellate Court it does not appear that this question was ever raised before it. It is too late now for the appellants to urge this question in second appeal. The appeal of the plaintiffs-appellants, therefore, must fail.

As regards the appeal of Kishen Singh, it has been contended by Mr. Amar Nath Monga that it has not been established by custom that *Musammāt* Malan had a right to succeed collaterally and that, in any case, even if she had a right of collateral succession she had no right to challenge the alienation as a widow. As found by the learned Judge of the Court below, in the District of Lahore the widows among all tribes do possess the right of succeeding collaterally. It is quite manifest from the answer to question No. 53 in Bolster's Customary Law of the Lahore District that it is so. It is admitted that, when *Musammāt* Jindi died the balance of the landed property in her possession was mutated half and half in the names of Wadhawa Singh's sons and *Musammāt* Malan respectively. This fact strongly corroborates the custom as stated in Bolster's Customary Law. The evidence produced to prove a contrary custom is wholly inadequate and has rightly been disregarded by the lower Appellate Court. As regards the widow's right to challenge the alienation, it was rightly held by the learned Munsif that the rule laid down in *Lahori v. Radho* (1) should apply. Some authorities were quoted before me by the learned Vakīl showing that a widow's right to challenge an alienation by a male was not recognised.

Those cases are altogether irrelevant in the present case, as in this case the alienation challenged has been made by a widow. This appeal also must fail.

The result is that both the appeals are dismissed with costs.

Z. K.

Appeals dismissed.

MEETHALE CHALIL, PARKUM THIRUMANGALATH V. KANDIYIL PARKUM PONGOT RAMAN NAIR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2121 OF 1920.

November 21, 1922.

Present:—Mr. Justice Spencer and
Mr. Justice Venkatasubba Rao.MEETHALE CHALIL PARKUM THIRU-
MANGALATH KELU KURUP.—

PLAINTIFF—APPELLANT

versus

KANDIYIL PARKUM PONGOT RAMAN
NAIR AND OTHERS—DEFENDANTS

NOS. 1 TO 4, 6 AND 7—RESPONDENTS.

Malabar Law—Stanom—Grant by stanomdar—
Benefit of institution—Burden of proof—Recitals
in deed, value of.

If a Malabar stanomdar, who is also the manager of the family for the time being, grants a lease or makes an alienation to enure beyond his lifetime which is for the benefit of the family, it will be upheld; as, on the other hand, any such transaction if prejudicial to the family will be set aside. [p. 276, col. 1.]

Kaithal Kuttiyan v. Kuzhatte Puthen Veetil Thirumangalath Kunharatan Ummama, 62 Ind. Cas. 62; 44 M. 509 at p. 512; 13 L. W. 208; 29 M. L. T. 172; (1921) M. W. N. 169; 41 M. L. J. 202, followed.

Ordinarily, the recitals in a document upon which such a grant depends would not by themselves be sufficient without reference to other evidence, to prove that the grant was made for the benefit of the institution or the family represented by the grantor even though the document is more than 70 years old. The grant must be supported by proof *aliunde* that it was made for an unavoidable necessity or for the benefit or preservation of the institution of the estate. [p. 277, col. 1.]

Hari Kishen Bhagat v. Kashi Pershad Singh, 27 Ind. Cas. 674; 42 C. 876; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 84 (P. C.), followed.

Magniram Sitarum v. Kasturbhai Manibhai, 66 Ind. Cas. 162; 49 I. A. 54; 26 C. W. N. 473; 42 M. L. J. 501; 30 M. L. T. 268; 20 A. L. J. 371; 35 C. L. J. 421; 24 Bom. L. R. 584; (1922) M. W. N. 319; 46 B. 481; (1922) A. I. R. (P. C.) 163 (P. C.), *Chockalingam Pillai v. Mayandi Chettiar*, 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043 on appeal *Mayandi Chettiar v. Chockalingam Pillai*, 27 M. 291; 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.), distinguished.

Second appeal against a decree of the District Court, North Malabar, in Appeal No. 519 of 1919, preferred against a decree of the Court of the District Munsif, Payyoli, in Original Suit No. 403 of 1918.

This second appeal coming on for hearing on the 24th of March 1922 the Court (Ayling and Odgers, JJ.) delivered the following

JUDGMENT.—The District Judge has held that the Marupat, Exhibit A, executed by the mother of defendants Nos. 1 to 6 on the strength of which the present suit is brought is not binding on the Tavazhi of the executant because it purports to supersede a *saswatham* demise, Exhibit I, executed in favour of first to sixth defendants' father by the *jenmi*. It is clearly in the interests of the Tavazhi to hold the property on a *saswatham* demise rather than on an ordinary *kancm* for a term of years and if the *saswatham* demise, Exhibit I, is genuine and binding on the successors of the *stani* who granted it, the District Judge is, in our opinion, right in holding that the action of the defendants' father in executing Exhibit A was contrary to the interests of the Tavazhi and does not bind the Tavazhi. The learned Vakil for the appellant points out, however, that the District Judge, while holding, contrary to the decision of the District Munsif that Exhibit I is a genuine document, has not considered whether it is binding on the successor of the *stani* who granted it. This is so. In the plaint, the plaintiff (the present appellant) distinctly took the ground that the *stani* had no right to grant irredeemable demises. The same position was taken up by the seventh defendant, the present *stani* in office, in paragraph 3 of his written statement; but in the course of the hearing of the litigation, the parties appear to have gone off on another question as to whether Exhibit I was genuine or not and the question of its validity after the lifetime of its grantor appears to have been overlooked.

Issue No. 1, which was the main issue framed in the original suit, is clothed in such general terms that it is impossible to say by whose fault this point came to be overlooked. Whether the *saswatham* lease is binding or not is a mixed question of law and fact. It is thus put by Innes and Muthuswami Aiyar, JJ., in a passage quoted with approval in *Kaithal Kuttiyan v. Kuzhatte Puthen Veetil Thirumangalath Kunharatan Ummama* (1): "But he (the Stanomdar) is also manager of the family for the

(1) 62 Ind. Cas. 62; 44 M. 509 at p. 512; 13 L. W. 208; 29 M. L. T. 172; (1921) M. W. N. 169; 41 M. L. J. 202.

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time being; if he grants a lease or makes an alienation to enure beyond his lifetime which is for the benefit of the family, it will be upheld, as, on the other hand, any such transaction, if prejudicial to the family will be set aside." In other words, the validity of the *saswatham* demise, Exhibit I, after the lifetime of the grantor will depend on whether it was for the benefit of the *stanom* or not. We feel considerable doubt as to whether we should allow this point to be raised in second appeal especially as it will necessitate a finding being called for from the lower Appellate Court, but, in view of the definite objection taken in the plaint, we think on the whole that it is better in the interests of justice to have the point cleared up. The District Judge has held that Exhibit A is invalid solely by reason of the existence of Exhibit I and we think it right that the validity as well as the genuineness of the latter should be determined before Exhibit A is declared to have no effect.

We must, therefore, call for a finding from the lower Appellate Court on the following issue:—

"Was the *saswatham* demise, Exhibit I, binding on the *stanom* after the death of its grantor?"

Evidence may be adduced by either side. The finding to be returned within a month after the re-opening of the Court. Seven days for objections.

The remaining arguments advanced on behalf of the appellant do not commend themselves to us. The question whether any allowance should be made in respect of costs owing to the late stage at which this point is pressed on the Court will be considered if necessary when the second appeal is finally disposed of.

In compliance with the order contained in the above judgment, the District Judge of North Malabar submitted the following

FINDING.—The High Court has called a finding from me on the following issue, "was the *saswatham* demise, Exhibit I, binding on the *stanom* after the death of its grantor? and allowed both parties to adduce evidence.

* * * * *

I am convinced that the *saswatham* demise was granted as a return for important services rendered to the *stanom* by the grantee as stated in the demise itself and that it was, therefore, for the undoubted benefit of the *stanom*. I would even say that I am of opinion that the grant of the *saswatham* demise was necessary for the purposes of protesting and safeguarding the estate, for otherwise several items of *stanom* property would have been irretrievably lost to the *stanom*. My finding on the issue remitted by the High Court is, therefore, in the affirmative, viz., that the *saswatham* demise, Exhibit I, was binding on the *stanom* after the death of its grantor.

This second appeal came on for final hearing on the 1st November 1922 after the return of the finding of the lower Court upon the issue referred by this Court for trial.

Mr. P. S. Narayanaswami Aiyar, for the Appellant.

Mr. C. Madhavan Nair, for the Respondent.

JUDGMENT.

Spencer, J.—This suit was brought by a *melchartidar*, holding under a *melchart* granted by the 7th defendant, who is the *stani* of a *stanom* in Malabar, to redeem a *kanom*, Exhibit A of 1882. The defence to the suit raised by the defendants Nos. 1 to 6 at the trial was that the properties in suit were not held under the *kanom*, Exhibit A, but under a *saswatham* grant, Exhibit I, of 1852. The District Munsif held that this *saswatham* document was a forgery and he gave the plaintiff a decree for the redemption of the *kanom*. On appeal, the District Judge held that the *saswatham* deed, Exhibit I, was genuine, and that the *kanom*, Exhibit A, was void, as it was not for the benefit of the Tavazhi on behalf of whom Chiruthayi, the mother of defendants Nos. 1 to 6, executed it.

In second appeal the question was raised whether the *saswatham* demise, assuming it to be a genuine document, was binding on the *stanom* after the lifetime of the donor. This question has been raised in the pleadings but has been lost sight of in the course

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of the trial. A finding was, therefore, called for from the District Judge on the issue, "was the *saswatham* demise, Exhibit I, binding on the *stanom* after the death of its grantor?" The District Judge has now found this issue in the affirmative. But for his finding he has been obliged to rely entirely on the recital in the *saswatham* deed to the effect that the grantee had saved 18 items of property from lapsing to the tenants of the *stanom* which held the *jenmi* right. Ordinarily, the recitals in a document upon which the grant depends would not be sufficient evidence that the grant was made for the benefit of the religious institution represented by the donor. In *Hari Kishen Bhagat v. Kashi Parshad Singh* (2) the Privy Council observe that alienations to be valid against reversioners, required to be supported by proof *aliunde* that they were made for valid and legal necessity. The same rule applies in the case of *shebait*s and other persons who have no authority to alienate property except for the benefit or preservation of the estate which they represent. Unavoidable necessity must be established in order to justify absolute alienations or grants of perpetual leases of endowed property [*vide Palaniappa Chetty v. Sreemath Deivasikamony Pandara Sannadhi* (3)]. The District Judge after referring to the recitals in Exhibit I, has applied the test of time for assuming that the grant was lawfully made. He says that the recitals in the *kanom* deed, Exhibit A, indicate that the *saswatham* right was regarded as valid, because the then *stani* took a surrender of it from Chiruthayi.

I am of opinion that the District Judge was not justified in assuming the correctness of the recitals in Exhibit I from the mere fact that that document is more than 70 years old without considering other circumstances. He quotes in his finding the decision of the Privy Council in *Magniram*

Sitaram v. Kasturbhai Manibhai (4). That was a case where a permanent lease had been left unchallenge for a period of nearly a hundred years and it was held that the Court might assume that the grant was made for necessity so as to be valid beyond the life of the grantor. Their Lordships refer in their judgment with approval to *Chockalingam Pallai v. Mayandi Chettiar* (5), the appeal from which is reported as *Mayandi Chettiyar v. Chockalingam Pillay* (6). That was a case in which certain lessees had remained in possession under a grant made by the manager of a temple for 79 years. They claimed, to have had 200 years of possession but it was found that the lease was granted in 1813 which was 79 years before the suit of 1892. Now, we must see how far the facts of the present case support an inference that the *saswatham* grant remained undisputed for a long period after the death of the donor. We know that the donor died in 1862. This appears from the statement of the witness examined after the remand. He was succeeded by a bad manager who relinquished his office in 1875 under Exhibit C. From 1875 to 1882 the *stanomdar* was the same person who granted the *kanom* demise, Exhibit A. He died about 1904 and was succeeded by the 7th defendant.

Exhibit I itself refers to the existence of a prior *kanom* demise. The grantee, Kunkan Nair, in 1876 by Exhibit II, sold this property Kandiyl Parambar to Chiruthayi, thus converting it into *putravakasam* property. Exhibit II speaks of this item as being held under *kanom* and *saswatham* right. Then, in 1882, under Exhibit A, Chiruthayi purports to surrender the *saswatham* right given previously and to take a renewal of the *kanom* right for 24 years, the surrender being made a consideration for the fresh grant.

As observed by the District Munsif the recital in Exhibit II that the property was

(2) 27 Ind. Cas. 674; 42 C. 876; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 84 (P. C.).
(3) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(4) 65 Ind. Cas. 162; 49 I. A. 54; 26 C. W. N. 473; 42 M. L. J. 501; 30 M. L. T. 268; 20 A. L. J. 371; 35 C. L. J. 421; 24 Bom. L. R. 584; (1922) M. W. N. 319; 46 B. 481; (1922) A. I. R. (P. C.) 163 (P. C.).
(5) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.
(6) 27 M. 271; 8 C. W. N. 54; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.).

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held on *kanom* and *saswatham* rights indicated that the members of the defendants' family regarded the *kanom* as requiring to be renewed from time to time upon reasonable terms.

The defendants who claim to derive rights from Kunkan Nair, in whose favour Exhibit I was executed, cannot now question Chiruthayi's power to deal with the property which Kunkan Nair had conveyed to her to be held as *putravakasam* property under Exhibit II in 1876. The District Munsif has treated Chiruthayi's act in taking a renewal of the *kanom* grant under Exhibit A as a settlement of a doubtful title to hold under the permanent grant. If the conduct of the parties is any indication of the binding and permanent character of the *saswatham* demise, we find that it remained unchallenged only for 20 years from 1862, when the donor died, to 1882, when the right was surrendered. The defendants made no attempt to put forward the right of the *Tavazhi* to hold the property under a permanent grant until the present suit for redemption was brought; in other words, although the *saswatham* grant was allowed to remain unchallenged for 20 years after the death of the donor, it has been treated as no longer in existence for the last 36 years preceding this suit. I am, therefore, unable to accept the District Judge's conclusion as maintainable on the facts found by him.

We allow the appeal and, setting aside the lower Appellate Court's decree, we restore the decree of the District Munsif. Each side will bear their own costs here and in the lower Appellate Court as the point on which the appeal succeeds was not taken earlier. Time for redemption, six months from this date.

Venkatasubba Rao, J.—I entirely agree.

As my learned brother has set out the facts, I shall not recapitulate them. The District Judge, in coming to the conclusion that the *saswatham* demise was binding on the successors of the *stanom* who granted it, purported to rely upon the decision of the Judicial Committee of the Privy Council in *Magniram Sitaram v. Kasturbhai Manibhai* (4). But it seems to me that the learned District Judge has wrongly applied the rule of evidence laid down by

their Lordships to the facts of the present case. If the *saswatham* demise had remained unchallenged from 1852 to 1918, it would, no doubt, have been proper to presume that the grant was made in exercise of a power possessed by the donee and that the demise was lawfully, and not unlawfully, made.

Let us look at the facts proved in the case. The *saswatham* demise was made in 1852. The donor died in 1862. The successor could then have challenged the alienation, but it conceded that he was a bad manager and did positive harm to the *stanom*, and it could not, therefore, be expected from such a man that he would do anything to protect the interests of the *stanom*. The learned District Judge very properly observes that no inference could be drawn from the omission of this *stanom* to impugn the grant. The latter relinquished the *stanom* in 1875 after the institution of a suit for his removal. His successor obtained from the mother of defendants Nos. 1 to 6 the *kanom* deed sued on.

Their Lordships of the Judicial Committee, in the case quoted above, observed that a long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of a valid power. The lapse of time in the present case is not as, the District Judge remarks, seventy years "which almost coincides with the allotted span of human life, three score years and ten" but just thirty years, the interval of time between the *saswatham* grant of 1852 and the *kanom* demise of 1882.

The learned Judges by whom the finding was called for, held in effect that if the *saswatham* grant was binding on the successors of the donor, the defendants' mother was incompetent to surrender it and accept a *kanom* demise in lieu of it; if, on the contrary, the *saswatham* was not binding, then the action of the defendants' mother in executing the *kanom* was in the interests of, and binds the *Tavazhi*. They further held that the validity of the *saswatham* after the lifetime of the grantor would depend upon whether it was for the benefit of the *stanom* or not.

Having regard to the judgment delivered on the previous occasion, we are concerned

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merely with the question of the validity of the *saswatham* demise, and I may state that no other question has been argued before us. No evidence was forthcoming to show that the grant was made for the benefit of the *stanom*. The defendants rely solely upon the recitals in the deed. I may refer to a passage in the judgment in *Magniram Sitaram v. Kasturbhai Manibhai* (4):—

“At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate to assume that the grant was lawfully and not unlawfully made.”

When the *kanom* demise of 1882 was executed, the donee, that is, the father of the defendants Nos. 1 to 6, was alive. He had knowledge of the circumstances in which the original grant was made. Why then, if the *saswatham* was valid and unimpeachable, did he permit it to be surrendered? Then, again, the first defendant was forty-eight years old at the time of the trial of the suit and it is stated that several other members of his family had also long ago become majors. The *kanom* was not impeached from 1882 to 1918. If they believed that their mother had needlessly sacrificed their interests, there was nothing to prevent them from having questioned her act earlier. The legitimate inference to be drawn from these facts is that they acquiesced in the *kanom*, because they were aware that the *saswatham* demise was of doubtful validity and that the act of their mother in executing the *kanom* was in the interests of the Tavažhi.

The position of affairs is, therefore, this. On the one hand, there is the *saswatham* demise which was made in 1852 and which, in any event, was good during the lifetime of the grantor and was attacked after his death, within seven years of a prudent manager succeeding to the office. On the other hand, we have the *kanom* demise made in 1882 when an apparently valuable right was surrendered by the senior-most member of the family, that is, the mother of defendants Nos. 1 to

6, without demur on the part of their father who was the original donee and was aware of the circumstances in which the *saswatham* grant was made. We have the further fact that the *kanom* demise was not impugned by defendants Nos. 1 to 6 till a very recent date. In these circumstances, no presumption can arise in favour of the truth of the recitals in the *saswatham* grant. There has not been the lapse of time sufficient to raise a presumption that the *saswatham* grant was made under circumstances which justified the grant. There is no evidence to show that the original grant of 1852 was for the benefit of the *stanom* and that it is binding on the successors of the *stant* who made the grant. It follows that if the *saswatham* demise is not valid the mother of defendants Nos. 1 to 6 was acting in the interests of the Tavažhi in giving up the invalid *saswatham* right for a valuable *kanom* demise.

In the result, I agree with the order proposed by my learned brother.

V. N. V.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 41 OF 1921.

January 29, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

BAPUJI NARSO KULKARNI—

PLAINTIFF—APPELLANT

versus

DATTU ANTAJI KULKARNI AND

OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance, exclusion from—Insanity.

Insanity to cause exclusion from inheritance under the Hindu Law need not be congenital. [p. 281, col. 1.]

First appeal from the decision of First Class Subordinate Judge at Belgaum, in Civil Suit No. 154 of 1918.

Mr. Nadkarni, (with him Mr. K. H. Kelkar), for the Appellant.

Mr. H. C. Coyajee, (with him Mr. D. R. Mamerkar), for Respondents Nos. 1 to 4.

B. PUJI NARSO V. DATTO ANTAJI.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession as owner of the suit lands from the defendants. The lands originally belonged to one Bhimaji, who was the only brother of the first defendant Dattu. He was adopted into the other branch of the family, whose pedigree appears at page 4 of the print, by Appaji. He died in 1905 leaving a son Baburao, who admittedly at that time was a lunatic. Bhimaji before his death, executed a *malkipatra* in favour of the first defendant and I gather from the record that Bhimaji, who must have been aware of his son's lunacy, executed the document in favour of the first defendant on the understanding that he should undertake to look after Baburao.

In 1906, plaintiff filed a suit in the Athni Court against Dattu, claiming as the person entitled to succeed to the property of Bhimaji after the death of Baburao, who he alleged had recently become a lunatic, to obtain a declaration that the *malkipatra* alleged to have been executed by Bhimaji in favour of defendant No. 1 on July 10, 1905, was a forgery. The defendant contended that the plaintiff could not maintain the suit as he was not the heir of Bhimaji. The first issue was—Is the plaintiff entitled to maintain the suit? Now, as in the plaint it was alleged that Baburao was the son of Bhimaji, he would be the only heir under Hindu law, and it was not alleged by the plaintiff that Baburao was incapable of succeeding on account of insanity. It is obvious, therefore, on the face of the plaint, that the plaintiff could not possibly succeed, as he had no interest whatever in the property except as a possible reversioner after Baburao died without leaving an heir. The defendant in his written statement pleaded that, according to law, the plaintiff could never become the nearest heir of the deceased Bhimaji under Hindu religion and *Sastras*. He could not become the nearer heir than the defendant himself. In paragraph 7 he pleaded that the plaintiff's suit could not go on unless plaintiff's brother Ramkishna Narso, and deceased Bhimaji's son Baburao and daughter's son Bhimaji *alias* Sarjerao and Balaji Datto Kulkarni were made parties. That was perfectly correct as an answer to the plaintiff's suit, because,

according to the plaintiff himself, Baburao would certainly be concerned in disputing the document set up by the defendant.

Baburao died in 1917, and plaintiff brought this suit on April 10, 1918. His main point was that Baburao, unless he was a congenital idiot, was not debarred from succession on the death of Bhimaji, and, therefore, Baburao succeeded to Bhimaji's property, and succession opened only on Baburao's death.

On the question whether insanity to be a cause for exclusion from inheritance must be congenital, in the 9th Edition of Mayne's Hindu Law, page 872, it is stated:—

"There is a difference of opinion as to whether insanity also need be congenital. The texts and cases are all collected and discussed in a judgment of the High Court of Bombay. The question for decision was only as to blindness, but the Court expressed a strong opinion that madness, as well as blindness, must be shown to have existed from birth. It may, however, be doubted whether the texts which go to this extent do not refer to the case of idiocy, which is always congenital, while madness, as distinguished from idiocy, is rather a disease than an incapacity of the mind. Cases of disability from lunacy have come at least twice before the Privy Council. In one, *Baboo Bodhnarain Singh v. Baboo Omrao Singh* (1), it was admitted that the lunacy was not congenital, and it was assumed that the only question was whether the insanity had existed at the time the succession opened. In the second *Kooer Goolab Sing v. Rao Kurun Sing* (2), no question was raised as to the date of the lunacy. From the fact that the lunatic was a married man and a father, it is most probable that he had not been born so. On the other hand, in Bengal, Allahabad and Madras, it has been expressly held that insanity at the time the inheritance falls in is sufficient to exclude; and, in the second of the cases cited below, it was further held that the insanity itself need not be incurable. If it was sufficient to prevent the claimant from offering the

(1) 13 M. I. A. 519; 6 B. L. R. (P. C.) 509; 15 W. R. P. C. 1; 2 Sar. P. C. J. 607; 2 Suth P. C. J. 371; 20 E. R. 645.

(2) 14 M. I. A. 176; 2 Suth P. C. J. 474; 10 B. L. R. P. C. 1; 2 Sar. P. C. J. 722; 20 E. R. 753.

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proper funeral oblations he was an unfit person to succeed."

The question was first considered in *Brāja Bhukan Lal Ahusti v. Bichan Dobe* (3) reported in a note to the case of *Dwarkanath Bysak v. Mohendranath Bysak* (4). It was decided in those cases that in order to exclude a person on the ground of insanity it was sufficient to show that when the succession opened he was mad and not in a position to perform funeral oblations.

In *Deo Kishen v. Budh Prakash* (5) and in *Ram Singh v. Musammal Bhani* (6) the same view was taken.

The latest decision is in *Muthusami Gurukkal v. Meenammal* (7). Mr. Justice Sheshagiri Ayyar considered all the texts on the subject and the authorities, and came to the conclusion that insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital. One apparent error appears in the judgment at page 467* where the case of *Murari Gokuldas v. Parvatibai* (8) is cited as an authority for the same conclusion. But it would appear from the judgment of Sir Michael Westropp in that case, that although the learned Judge was only considering the question whether blindness to cause exclusion from inheritance must be congenital, after examination of the text he expressed the opinion that madness as well as blindness, to disqualify a person from inheritance must be congenital. That opinion, although entitled to the very greatest respect, still cannot be regarded as anything else but *obiter*. When we find that from 1870 up to the present time the High Courts of Bengal, Allahabad and Madras have consistently been of opinion, that insanity to cause exclusion from inheritance need not be congenital, I am not prepared to express a contrary opinion. I think, therefore, that the Judge of the Court below was right in holding that Baburao was incapable of inheriting to Bhimaji.

- (3) 9 B. L. R. 202; 14 W. R. 329.
 (4) 9 B. L. R. 198; 18 W. R. 305.
 (5) 5 A. 509; A. W. N. (1883) 105; 3 Ind. Dec. (N. S.) 442 (F. B.).
 (6) 32 Ind. Cas. 127; 38 A. 117; 14 A. L. J. 11.

- (7) 55 Ind. Cas. 576; 43 M. 464; 38 M. L. J. 291; (1920) M. W. N. 253; 27 M. L. T. 329.

- (8) 1 B. 177; 1 Ind. Dec. (N. S.) 118.

*Page of 43 M.—[Ed.],

The only other question is, whether the defendant is estopped from pleading that Baburao was incapable of inheriting to Bhimaji by virtue of the decision in Suit No. 8 of 1906. If it could be shown that he represented to the plaintiff at that time that Baburao was the heir, and that there was no ground for his exclusion from the inheritance, that on account of that representation the plaintiff refrained from filing the suit until the death of Baburao, then, possibly, it might be said that the defendant is now estopped from raising his present contention. But all the proceedings in Suit No. 8 of 1906 clearly show that the plaintiff was out of Court on the representation made by him in his plaint; therefore, the plaintiff cannot be said to have refrained from taking proceedings to establish his right to succeed after Baburao on account of any representation made by the defendant. The appeal, in my opinion, fails and must be dismissed with costs.

Crump, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 961
OF 1918.

February 8, 1923.

Present:—Mr. Justice Abdul Raoof.
 BASHESHA NATH GOELA,
 OFFICIAL RECEIVER, AND OTHERS
 —CREDITORS—PETITIONERS

versus

GANGA RAM, MINOR, THROUGH

Musammal PURNI OBJECTOR AND

OTHERS—INSOLVENTS—RESPONDENTS.

Hindu Law—Joint family—Separation of one member, effect of—Presumption—Insolvency of some members—Shares of others, whether affected.

There is no presumption that where one coparcener in a joint Hindu family separates from the others, the others remain united. It must be decided upon the evidence in each case whether the rest of the members had agreed to continue to remain united. [p. 283, col. 2; p. 284, col. 1.]

Balabux v. Ruhmabai, 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sat. P. C. J. 470 (P. C.), followed.

It is not open to an Insolvency Court to direct the Receiver in Insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. [p. 284, col. 1.]

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Sanyasi Charan Mandal v. Asutosh Ghosh, 26 Ind. Cas. 836; 42 C. 225, relied on.

Where some members of a joint Hindu family are adjudicated insolvents the shares only of those upon whom the debts of the insolvents are binding vest in the Receiver. Consequently, the insolvency of some members of a joint Hindu family does not affect the shares of the other co-parceners except those who happen to be the sons of the insolvent or insolvents. [p. 283, col. 2; p. 284, col. 1.]

Sanyasi Charan Mandal v. Asutosh Ghosh, 26 Ind. Cas. 836; 42 C. 225, *Rangayya Chetti v. Thanikachalla Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757, *Fakirchand Motichand v. Motichand Hurrukchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, relied on.

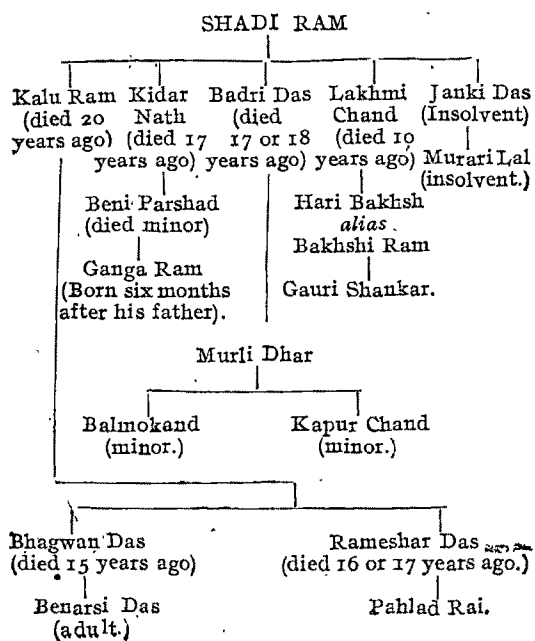
Bihari Lal v. Sat Narain, 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L.) 1, distinguished.

Petition, under section 44, Act VI of 1918, and section 46 (1) of Act III of 1907, for revision of the order of the District Judge, Delhi, dated the 11th of August 1918, affirming that of the Judge, Insolvency Court, Delhi, dated the 23rd May 1918.

Mr. M. S. Bhagat, for the Petitioners.

Mr. Manohar Lal and Pandit Shiv Narain, R. B., for the Respondents.

JUDGMENT.—The facts giving rise to this petition for revision are few and simple. In order to understand the nature of the question to be decided, the following pedigree-table may be looked at:—



The family was a joint Hindu family. The branch of Kalu Ram separated in Sambat 1971, corresponding to the year 1914. After the separation of Kalu Ram's branch, Janki Das, his son Murari Lal and Lakhmi Chand's son Hari Bakhsh alias Bakhshi Ram were adjudicated insolvents. An application for the adjudication of Murli Dhar as an insolvent was made, but he died before any adjudication could be made. The creditors' application to have Ganga Ram, minor, declared insolvent was dismissed on the 1st of December 1917. The property of the insolvents vested in the Receiver who proceeded to deal with the property of Ganga Ram, minor, also. The minor admittedly is the owner of one-fourth share in the property. The Receiver claimed that, as the manager and the other adult members of the family had been adjudicated insolvents, the property of the minor Ganga Ram, who was a member of the joint family, also vested in him (the Receiver). Mr. Topan Ram, Judge, Insolvency Court, allowed the objection of the minor and held that his property, according to the ruling in *Sanyasi Charan Mandal v. Asutosh Ghosh* (1), did not vest in the Receiver. His decision was upheld in appeal by Major E. Knollys, District Judge. Against the decision of the Appellate Court no appeal lay under the Insolvency Act. Hence this petition for revision was presented to this Court.

In Civil Appeal No. 2134 of 1915 [*Bihari Lal v. Sat Narain* (2)] the correctness of the decision in *Sanyasi Charan Mandal v. Asutosh Ghosh* (1) was questioned. Consequently, at the request of Mr. Moti Sagar, the Counsel for the petitioner, this petition for revision was referred to a Division Bench to be decided along with the Division Bench case above referred to. The question to be decided in the above mentioned Division Bench case was whether on the adjudication of the father, the property of his son also had vested in the Receiver. This question was referred to a Full Bench and was decided in the affirmative. The Full Bench decision is reported as *Bihari Lal v. Sat Narain* (2). This petition for revision came up for decision

(1) 26 Ind. Cas. 836; 42 C. 225.

(2) 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L.) 1 (F. B.).

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before a Division Bench constituted by Scott-Smith and Zafar Ali, JJ., on the 5th of December 1922. The learned Judges recorded the following order:—

"This revision was referred to a Division Bench and the Judge in Chambers directed that it should be heard with Civil Appeal No. 2134 of 1915 [*Bihari Lal v. Sat Narayan* (2) but by a mistake of the office it was not put up along with the latter. There is no reason why this case should be heard by a Division Bench and we direct that it be heard by a Single Judge."

In consequence of this order the petition came up for decision before me. I had considerable doubt as to whether, under the rules, the Division Bench could have referred the case back to a Single Judge, but, after consulting the learned Chief Justice, I proceeded to hear the arguments in the case.

Mr. M. S. Bhagat on behalf of the petitioners contended, in the first place, that the point raised in this case was covered by the decision of the Full Bench referred to above and that the property of the minor must be held to have vested in the Receiver.

In the second place, he argued that as on the findings of the Courts below after the separation of Kalu Ram's grandsons the rest of the family had continued to remain joint, the minor being a member of it at the date of the adjudication of the manager and the other members as insolvents his property also must vest in the Receiver.

As regards the first contention, it may be observed that the Full Bench has distinguished the case of *Sanyasi Charan Mandal v. Asutosh Ghosh* (1) for the reasons set forth at page 341* of the report.

After quoting a passage from the judgment in the Calcutta case the learned Chief Justice made the following observations:—

"The passage quoted above enunciates only the general proposition that the insolvency of one partner does not directly affect the shares of the other partners in the assets of the firm, but the question how far that general rule is modified in the case of the insolvency of a Hindu father was neither raised before the learned Judges nor determined by them. It will be observed that they made no reference to the

Bombay and Madras cases cited above, and I do not think that, if they had intended to dissent from those decisions, they would not have even mentioned them in their judgment. There can be no doubt that they were not called upon to define the peculiar position occupied by an Official Receiver appointed in the insolvency of a Hindu father, and their judgment is, therefore, distinguishable from the present case."

It is clear from the above observations of the learned Chief Justice that in the Full Bench case the question to be decided was a much narrower one and that, therefore, the Full Bench decision cannot be said to cover the precise question raised in this petition for revision.

Mr. Manohar Lal, Counsel for the respondents, on the other hand, has contended that the ruling in *Sanyasi Charan Mandal v. Asutosh Ghosh* (1) fully applies to this case and the decision of the Courts below is right. In the alternative he has contended that the property of the minor is said to have vested in the Receiver on the hypothesis that the family continued to be joint even after the separation of Kalu Ram's branch; but that having regard to the ruling of their Lordships of the Privy Council in the case of *Balabux v. Rukhmabai* (3), there can be no presumption when one co-parcener separates from the others that the latter remain united and that unless it is shown that the rest of the members of the family agreed to remain joint it cannot be held that the minor was a member of the joint family to which the insolvents belonged. The following passage in the judgment of their Lordships is relied upon by the learned Counsel:—

"It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all."

The finding of the Courts below on this point seems to be based on an erroneous legal inference drawn from the fact that

(3) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

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after the separation of Kalu Ram's branch the rest of the members of the family had continued to live jointly as before. It must be decided upon evidence whether the rest of the members had agreed to continue to remain united. To be able to decide this question I shall have to allow the parties to give further evidence in the case. It is, however, not necessary to do this, for I am clearly of opinion, that this case is fully covered by the decision of the Calcutta High Court in the case of *Sanyasi Charan Mandal v. Asutosh Ghoseh* (1). The case of a son of an insolvent father stands altogether upon a different footing and the rule laid down in the Full Bench decision of this Court cannot be applied to the case of other co-parceners. As laid down in the Calcutta case, it is not open to the Court to direct the Receiver in Insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents.

A similar view was expressed in the case of *Rangayya Chetti v. Thanikachalla Mudali* (4) by the Madras High Court. This case was cited in the Full Bench case and the learned Chief Justice at page 339* made the following observation in respect of it:—

"In *Rangayya Chetti v. Thanikachalla Mudali* (4) the family consisted of the insolvent, who was the manager there, and his brother and sons. In pursuance of a vesting order made against the manager, the Official Assignee conveyed a house forming part of the family property to the plaintiff who then sued for possession. The suit was resisted by the brother and the sons. The learned Judge, following the judgment in *Fakirchand Motichand v. Motichand Hurruckchand* (5) held that the Official Assignee could convey only the shares of those persons upon whom the debts of the insolvent were binding and consequently the Court maintained the sale with respect to the sons' interests, but set it aside so far as the brother's share was concerned."

In this decision a clear distinction is made between the case of a son and that of other co-parceners. Following the Calcutta and

(4) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(5) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

* Page of 3 L.—[Ed.]

Madras rulings, I dismiss the application for revision with costs.

Z. K.

Application dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 35 OF 1922.

November 14, 1922.

Present.—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

POTHUKUCHI RAJAGOPALAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

VALIVETY RAMAMOORTHY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Decree against limited heir—Reversioners, when bound.

A decree obtained against a limited female heir will operate as *res judicata* in a subsequent suit by the reversioners after her lifetime, if it is shown that the claim in the prior suit against the limited heir was not against her personally but against the inheritance she represented and that the trial was fairly and honestly conducted.

To ascertain whether a claim was against a limited heir personally or against the estate, the averments, the issues and the findings in the previous suit must be examined and if the contentions raised are those connected with the inheritance and the trial was with reference to them, the limited heir must be deemed to be representing the estate; if not, the litigation must be deemed personal to her and not binding on the reversioners. [p. 290. col. 2.]

POTHUKUCHI RAJAGOPALAN v. VALIVETY RAMAMOORTHY.

Khunni Lal v. Gobind Krishna Narain, 10 Ind. Cas. 477; 38 I. A. 87; 33 A. 356; 15 C. W. N. 545; 8 A.L.J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432 (P. C.); *Ramsurran Prasad v. Shyam Kumari*, 69 Ind. Cas. 71; 49 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751 (P. C.); *Risal Singh v. Balwant Singh*, 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.); *Katama Natchier v. Rajah of Shivagunga*, 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth P. C. J. 520; 2 Sar P. C. J. 305; 19 E. R. 843; *Prosunno Kumari Debya v. Golab Chand Baboo*, 2 I. A. 145; 14 B. L. R. 450; 3 Sar P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102, relied on.

Subbi Ganpatibhai v. Ramkrishnabhatta, 43 Ind. Cas. 233; 42 B. 69 at p. 76; 19 Bom. L. R. 919; *Runchoardas Vandravandas v. Parvatibai*, 26 I. A. 71; 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.); *Braja Lal Sen v. Jiban Krishna Roy*, 26 C. 285; 13 Ind. Dec. (N. S.) 787, *Nalla Tirupatiraju v. Nandikolla Venkayya*, 67 Ind. Cas. 479; 45 M. 504; 15 L. W. 395; 30 M. L. T. 181; 42 M. L. J. 392; (1922) M. W. N. 207; (1922) A. I. R. (M.) 131, distinguished.

Certain disputes between the daughters and nephew of a deceased Hindu were settled by a compromise by which the nephew was given certain lands. In a suit by the nephew for possession of those lands the daughters pleaded that their father was divided and that there was no consideration for the compromise which had been obtained by fraud. The Court, finding against fraud and divided status, held that the plaintiff's claim was *prima facie bona fide* and that the settlement amounted to a compromise of a doubtful claim and decreed the suit. In a later suit by the reversioners against the heirs of the nephew, after the death of the daughters, for possession on the ground that the properties belonged absolutely to the last male holder:

Held, that the suit was barred by *res judicata* by virtue of the decision in the prior suit in which the daughters represented the estate of their father.

Appeal against an order of the District Court, Kistna, at Mausulipatam, in Appeal Suit No. 135 of 1920, preferred against a decree of the Court of the Subordinate Judge of Kistna, at Ellore, in Original Suit No. 50 of 1918.

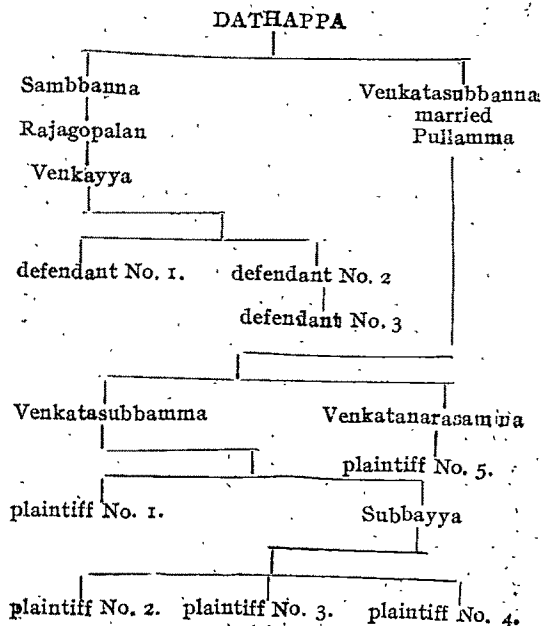
Mr. A. Krishnaswami Aiyar, for the Appellant.

Mr. P. Narayanamorty, for the Respondent.

JUDGMENT.

Venkatasubba Rao, J.—The question to be decided in this appeal is, whether a

decree obtained against the daughter of the last male holder operates as a bar to the present suit filed by the plaintiffs after the death of the surviving daughter, as reversioners to the estate. The following pedigree will elucidate the facts:—



After Venkatasubbanna's death Pullamma was in possession of the property. She died about the year 1866 and there were disputes in regard to the right to the estate of Venkatasubbanna between Rajagopalan on the one hand and Venkatasubbamma and Venkatanarasamma on the other. The disputes were settled by the intervention of mediators in 1872 and Exhibit A called *Farrikkat* bearing the date 5th June 1875 was executed embodying the terms of the settlement. According to Exhibit A each of the daughters was to take 14 acres of land and Rajagopalan 38 acres and odd. Notwithstanding this arrangement, Pullamma's daughters obtained an entry in their names in the Revenue Register. Rajah Gopalan instituted Original Suit No. 87 of 1885 on the file of the District Munsif's Court of Ellore for possession of the 38 acres and odd. Venkatasubbamma was impleaded as the first defendant and Venkatanarasamma having died, her son,

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the present fifth plaintiff, was made the second defendant. As he was a minor his father was appointed his guardian *ad litem*. Venkatasubhamma contested the suit. The District Munsif dismissed it. Rajagopalan appealed. The Appellate Court allowed the appeal and passed a decree in his favour. Venkatasubhamma preferred a second appeal and the High Court confirmed the decree of the first Appellate Court.

In 1890 the father of plaintiffs Nos. 2 to 4 instituted Original Suit No. 107 of 1890 on the file of the District Munsif's Court of Ellore against Rajagopalan's son Venkayya against Venkatasubhamma and the present plaintiff Nos. 1 and 5 for a declaration that the alienation of the aforesaid 38 acres and odd by the daughters of Venkatasubhamma in favour of Rajagopalan was invalid after the death of the daughters. The District Munsif found that the *Farrikkat* was supported by consideration, that it was a fair compromise, but dismissed the suit on the ground that the suit was barred by limitation. The Appellate Court upheld the dismissal on the ground of limitation but gave no finding on the question whether the *Farrikkat* was binding upon the plaintiff in that suit and the other reversioners. A second appeal was preferred and the High Court also dismissed the suit on the ground of limitation.

The present suit was filed by the plaintiffs for the establishment of their right to the same property for a declaration that it belonged absolutely to Venkatasubhamma and that the alienation of the same in favour of Rajagopalan on 5th June 1875 by the daughters of Venkatasubhamma is illegal and not binding on the plaintiffs and for other reliefs. The defendants contended *inter alia* that the transaction evidenced by Exhibit A was a *bona fide* settlement of family disputes and that the suit was barred by *res judicata* by reason of the decisions in the previous suits. Several issues were framed, but the Subordinate Judge heard the case only with reference to the preliminary issue of *res judicata* and, holding that the previous suits operated as a bar, dismissed the action. The District Judge reversed the Sub-Judge's decision and remanded the suit for disposal on the other issues.

I may state at the outset that the whole of the argument before us was directed only in regard to the effect of the decision in the earlier of the two suits, namely, Original Suit No. 87 of 1885. It was argued for the appellant that the plaintiffs are bound by the result of that suit whereas for the latter (respondents) it was contended that the decision is not binding on them. I may also state that it has not been argued before us that the decree in that suit is binding in any event on the fifth plaintiff who was impleaded as the second defendant in Original Suit No. 87 of 1885. The only question that has, therefore, to be considered is whether all the plaintiffs as a body are bound by the result of Original Suit No. 87 of 1885.

To decide this question it will be necessary to examine with some care the contentions of the parties in that suit and the judgments of the Court of the first instance and the other Courts.

As already observed, the plaintiff in Original Suit No. 87 of 1885 sued Venkatasubhamma and the present fifth plaintiff for possession of the 38 acres and odd referred to above. The defence of the first defendant was that the *Farrikkat* was obtained by misrepresentation and fraud, and that it was unenforceable for want of consideration. The District Munsif in a long judgment found that no fraud was proved but that the document was not supported by consideration. In arriving at the latter conclusion he discussed the question as to whether Sambanna and Venkatasubhamma had or had not been divided. He apparently was of the opinion that in fact the brothers had been divided and there was no justification for the compromise and a large portion of his judgment was devoted to the consideration of the probabilities in favour of or against partition. There was no oral evidence on this point and his conclusion was based on the recitals in the *Farrikkat* and the inference drawn from them. He observed in his judgment that there was no distinct issue raised as to division but that the determination of the point was necessary for deciding whether the document was supported by consideration. I may observe, however, that the issue whether the partition was valid and binding on the parties was wide enough to

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cover the point whether the deed was supported or not by consideration and this in turn involved the consideration of the question whether the two branches of the family were or were not divided. The Munsif in the result dismissed the plaintiff's action.

Rajagopal filed an appeal. The Sub-Judge concurred with the District Munsif that the deed was not obtained by fraud, and he further held that there was consideration for the *Farrikhat*. On the question of division, he observed that the presumption was that the parties were undivided, and that the circumstances relied on by the District Munsif did not establish that there was a partition and that though he was inclined to the view that the two branches were joint, he considered it sufficient to hold that the claim put forward by Rajagopal was *prima facie* valid and the compromise entered into amounted to a settlement of a doubtful claim. On this footing he reversed the District Munsif's judgment and passed a decree in favour of Rajagopal.

Venkatasubbamma filed a second appeal and the High Court confirmed the judgment of the Sub-Judge on the ground that Venkatasubbamma failed to show that the compromise was invalid by reason of misrepresentation and fraud. From the judgment of the Munsif it is clear that the only misrepresentation in regard to which parties went to trial had reference to the state of the family, whether it was divided or undivided. If Rajagopal for the purpose of inducing consent to the arrangement had stated to the daughters that the family was undivided, while, in fact, it was divided, the statement would amount to a misrepresentation. The judgment of the High Court was very short and the effect of it is that the findings of the Sub-Judge were accepted.

I must add that the father of the second defendant (the present fifth plaintiff) supported the plaintiff's claim throughout.

On perusing the judgments to which I have referred, I have come to the conclusion that the defences raised by the daughter, while to a certain extent personal to her, were in a large measure inseparable from the estate which she represented. The claim that was put forward was a claim against the estate and if the claimant succeeded in making out that the family

was undivided, the daughters would get nothing. It has been repeatedly held, that female heirs can validly compromise claims of this nature. I need only refer to *Khunni Lal v. Gobind Krishna Narain* (1) and *Ramsurran Prasad v. Shyam Kumari* (2). In the litigation which followed the compromise the widow was quite competent to represent the estate and from the nature of the defence put forward and the question tried, it is abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted.

I am of the opinion that the District Judge was wrong in holding that the result of this litigation was not binding on the present plaintiffs.

The decision of the Privy Council in *Risal Singh v. Balwant Singh* (3) is directly applicable. After adopting a son to her deceased husband a Hindu widow in a suit by an alleged reversioner against her to set aside the adoption on the ground that she had no authority from her husband to make the adoption, alleged in her written statement and stated in Court through her Pleader, that she had authority to make this adoption and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner. The widow then brought a suit against the adopted son to set the adoption aside pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit and the Courts in India dismissed it, the ground of decision being that the widow was estopped from maintaining the suit. On appeal, however, the Privy Council raised an issue as to her authority to adopt and held on the evidence on the issue that the adoption was valid. In a suit, on the

(1) 10 Ind. Cas. 477; 38 I. A. 87; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432 (P. C.)

(2) 69 Ind. Cas. 71; 49 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751 (P. C.)

(3) 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

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death of the widow, by an alleged reversioner to the estate of her husband, against the adopted son for a declaration that the adoption was invalid and for possession of the estate, it was held by the Privy Council that, notwithstanding the personal estoppel which bound her, the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted, and that she represented it within the meaning of the rule laid down in *Katama Natchier v. Rajah of Shinagunga* (4) and under the circumstances the decree against her would bind the reversioners. It seems to me that I may casually refer to one very important circumstance in connection with the case. It was contended before the Privy Council that the decision of the Board in the previous litigation did not operate as a bar to the maintenance of the later suit on the ground that the evidence to show that the widow had no authority to adopt had been excluded in her suit and that there were no materials before the Board which justified a finding that the adoption had been validly made.

Their Lordships of the Judicial Committee dealt with the contention thus: "It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken, but it does not appear that she ever applied to have witnesses summoned or tendered any evidence which was rejected. It is difficult to conceive what oral evidence Rani Dharam Kunwar could have produced, except her own personal evidence to prove that she had received from Raja Raghu Bir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption such evidence, having regard to her own acts and documentary evidence on record, could not have been accepted as true."

Then their Lordships continue: "the Board in 1912 were satisfied, and rightly satisfied, that no further evidence as to the authority or absence of authority to adopt could be expected to be produced by anybody beyond the evidence then already taken."

I refer to the above, because it follows from this, that if the Court is satisfied that the former trial was fair and honest, the mere fact that the reversioner considers that the evidence adduced by the widow in the previous action is insufficient or that he would have in similar circumstances produced more or better evidence, does not in the least affect the question.

It was further contended before their Lordships that the widow laboured under a personal estoppel and, therefore, she could not have represented the estate on the question of fact as to whether the adoption was or was not valid. This argument is dealt with in the following passage: "In the absence of all authority their Lordships cannot decide that a Hindu lady otherwise qualified to represent an estate in litigation ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest."

The learned District Judge has relied upon *Subbi Ganpatibhatta v. Ramkrishna-bhatta* (5) in support of his view. The facts are entirely dissimilar and the case does not seem to have much bearing. A widow consented to a gift, and 24 years later filed a suit to recover the property gifted alleging that she had consented to and approved of the gift upon certain conditions which were not complied with by the donees. The defendants resisted the suit on the ground that they held the property adversely to any estate which she represented. The suit was dismissed as barred by limitation.

It was held that on her death a suit by her daughter as heir and reversioner of her father was not barred by the previous action. The learned Judges held that a special Article like 141 of the Limitation Act must be taken to override the more general Articles such as Arts. 142 and 144 and that the limitation could not begin to run against the reversioners during the widow's life.

The act of gift was an act personal in its nature and had no relation to the inheritance which the widow represented. The claim in the suit by the widow was based on the

(4) 9 M. L. A. 539; 2 W. R. P. C. 31; 1 Suth P. C. J. 520; 2 Sar P. C. J. 305; 19 B. R. 843 (P. C.).

(5) 43 Ind. Cas. 233; 42 B. 69 at p. 76; 19 Bom. L. R. 919.

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ground that certain conditions had not been complied with by the donees. It is difficult to imagine how the widow can be said to have represented the estate either in making the alienation or in instituting the suit. The ground alleged the suit was one personal to the female heir. Having regard to the facts stated, the decision cannot be said to be an authority for the wider proposition that the widow in the enjoyment of a life-estate can never fully represent the estate in any litigation arising out of acts of her own. There are no doubt some passages in this judgment which state the principle in wide and general terms. At page 79 * the learned Judges say: "nor will litigation by the widow in the enjoyment of such a life-estate, whether she be plaintiff or defendant, represent the estate fully so as to give rise to a bar of *res judicata* against the reversioners if such litigation is qualified and personal to the widow or has arisen out of acts of her own affecting the estate during her own life-estate therein." The latter part of the proposition that the widow cannot represent the estate in any case when the litigation has arisen out of her own acts seems to be directly opposed to the principle laid down in *Risal Singh v. Balwant Singh* (3) already referred to. In this case the act of adoption was the act of the widow and she had challenged the adoption in the previous litigation. The reversioners were bound by the result of the suit to which the widow was a party.

I may also refer to another decision of the Judicial Committee *Prosunno Kumari Debya v. Golab Chand Baboo* (6) which relates to a case of a *shebait* of an idol. The principle laid down, however, is equally applicable to the case of a Hindu widow. The appellants as *shebait*s sued to set aside decrees obtained by the respondent against their immediate predecessor the *shebait* Rajah Baboo. The latter had borrowed monies from the respondent to defray the expenses of the idol and of repairing the temple. Suits were brought by the respondent and issues were raised and evidence gone into upon the question of fact whether the monies were *bona fide* borrowed and

expended for the service of the idol. The issues were found in favour of the respondents and it was decided that the debt should be realised from the profits of *davattar mahal*. Were these decrees binding upon the succeeding *shebait*s, the appellants? It will be noticed that the litigation arose out of the acts of the Raja Baboo himself and that he as *shebait* had defended the suits brought upon bonds executed by him in favour of the respondent. Nevertheless, their Lordships held that the decrees were binding upon Raja Baboo's successors and they observe: "Judgments obtained against the former *shebait*s in respect of debts so incurred should be binding upon the succeeding *shebait*s who in fact form a continuing representation of the idol's property."

They lay down that, before applying the principle of *res judicata* to judgments of this character, the Court should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that necessary and proper issues were raised, tried, and decided in the suits which led to them.

The learned Judges of the Bombay High Court place reliance upon *Runchordas Vandravandas v. Parvatibai* (7) and *Braja Lal Sen v. Jiban Krishna Roy* (8). In *Runchordas Vandravandas v. Parvatibai* (7) a testator died in 1869 leaving two widows one of whom died in 1871 and the other in 1888 and devised the whole residue of his estate to trustees for a charity and, shortly after the death of the surviving widow, the heir-at-law sued to declare the devise to charity void and for administration. It was held that Art. 141 applied, that the suit was not barred, and that Art. 144 did not apply. There is no reference in the judgment to the principle in support of which this case was cited as an authority in the decision of the learned Judges of the Bombay High Court.

In *Braja Lal Sen v. Jiban Krishna Roy* (8) it was held that the dismissal of a pre-

(6) 2 I. A. 145; 14 B. L. R. 450; 3 Sar P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.).

* Page of 42 B.—[Ed.]

(7) 26 I. A. 71; 23 B. 725; 1 Bom. L. R. 6071; 3 C. W. N. 621; 7 Sar P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.).

(8) 26 C. 285; 13 Ind. Dec. (N. S.) 789.

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vious suit filed by a female heir which was for recovery only of her limited estate would not be a bar to a subsequent suit by the reversioner which was for the recovery of the absolute estate which vested in him. In the course of the judgment at page 297, it was observed:—"But if a suit, though concerning the absolute estate, is determined upon a ground personal to the female heir, for instance, if a suit brought by a Hindu widow to recover possession of immoveable property appertaining to her husband's estate is dismissed on the ground of its having been alienated by her in favour of the defendant, in the absence of legal necessity being shown, the decree in such a case ought not to bind the reversioner." This passage, far from being an authority for the very wide rule enunciated in *Subbi Ganpatibhai v. Ramkrishnabhatta* (5), expressly states the qualification "in the absence of legal necessity being shown." The inference is that if the legal necessity had been shown the decree might be binding upon the reversioner.

I am, therefore, clearly of opinion that *Subbi Ganpatibhai v. Ramkrishnabhatta* (5) is distinguishable on the facts and that the present case falls within the principle given effect to in *Risal Singh v. Batwant Singh* (3). The learned Vakil for the respondent has relied upon *Nalla Tirupatiragu v. Nandikolla Venkayya* (9) in support of the proposition that where the transaction arises out of the act of the widow she can in no circumstances be said to represent the estate in any litigation connected with that act. In the first place, I must observe that the learned Judges were dealing with merely a question of onus and not with the binding character of the transaction. Secondly, the case arose with reference to a compromise of a suit and not to a decree passed after contest. A Hindu widow first mortgaged her husband's estate for a debt contracted by her, then she was sued by the mortgagee, and she compromised the suit by selling to him the mortgaged properties. The question to be decided was, on whom was the burden of proof that the compromise, in other words, the sale, was valid and binding upon the reversioners?

It was held that the onus was upon the mortgagee purchaser. It was conceded that the burden of proof would be upon the mortgagee if he sought to enforce his mortgage. Did the circumstance that, subsequent to the mortgage, she entered into a compromise and made an out and out alienation of the property, dispense with the necessity on the part of the alienee to prove in the first instance that the alienation was binding on the estate? The learned Judges held that it did not. I am unable to regard the decision as containing any pronouncement on the question at issue.

Whether the widow represented the inheritance may be gathered from the nature of the defence put forward and the issues raised, tried, and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in a previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions you must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow must be held to be representing the estate, if not the litigation must be deemed personal to her and not binding upon the reversioners, I conceive this to be the effect of *Katama Natchier v. Rajah of Shrivagunda* (4), *Risal Singh v. Batwant Singh* (3). I pointed out already that in Original Suit No. 87 of 1885 the defence put forward by the daughter, that the *Fayikkat* was not supported by consideration, necessitated the determination of the question whether there had been a partition or not between the two branches of the family. I further pointed out that there was a fair and honest trial of this question. The contention referred to was not personal to the widow but was intimately connected with the estate which she represented.

Applying the principles of law which I have set forth above to the facts of the present case, I have no hesitation in holding that the decision in Original Suit No. 87

(9) 67 Ind. Cas. 479; 45 M. 504; 15 L. W. 395; 30 M. L. T. 181; 42 M. L. J. 392; (1922) M. W. N. 2071 (1922) A. I. R. (M) 131.

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of 1885 does operate as a bar to the suit and I would, therefore, allow the appeal with costs.

Spencer, J.—I entirely agree that the decision in Original Suit No. 87 of 1985 binds the reversioners as there was a *bona fide* contest and a final decision by a competent Court. The appeal is allowed with costs and the decree of the Sub-Judge is restored.

V. N. V.

Appeal allowed.

CALCUTTA HIGH COURT

APPEAL FROM APPELLATE DECREE

No. 1654 OF 1920.

June 9, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

BHAGU SINGH—DEFENDANT—APPELLANT

versus

MOHESWAR BARIK AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Agreement to settle land—Payment of salami—Failure to execute kabuliyat, effect of.

Plaintiff, who was in occupation of certain land belonging to the second defendant, obtained a settlement of the land from the latter subject to the payment of a certain sum as *salami* and the execution of a *kabuliyat* within fifteen days. He paid the *salami* and although he continued in possession of the land, did not execute the *kabuliyat* till several months after. In the meantime, the landlord cancelled the arrangement with the plaintiff and settled the land with first defendant;

Held, that the plaintiff had acquired the rights of a tenant on the date on which the land was settled with him, and that the delay in the execution of the *kabuliyat* could not affect the tenancy which had already been granted to the plaintiff, and the landlord was not competent to cancel the arrangement with the plaintiff so as to enable him to make a new settlement.

Appeal against the decree of the Subordinate Judge, Second Court, Midnapore, dated the 22nd of March 1920, affirming that of the Munsif Fourth Court at that place, dated the 16th of December 1918.

Babus *Ram Chandra Mazumdar* (with him *Jyotimohan Bhattacharjee*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit

for declaration of title and possession. First Court decreed the suit. On appeal the decree was affirmed. The appellant is the transferee from the landlord. The decree was passed without consideration of the settlement with the defendant by the landlord. The defendant is the *zamin-dar*. The plaintiff applied for settlement which was accepted. The plaintiff paid Rs. 90 as *salami*. The *kabuliyat* was to have been executed within 15 days which was not done. Sometime after, he filed the registered *kabuliyat* which was rejected. I then got settlement after there had been a fresh notification for settlement. I submit my settlement under the circumstances ought to prevail.

Babu *Santimoy Mazumdar*, for the Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land on declaration of title. The second defendant is admittedly the landlord of the disputed property. A notification was issued by him inviting applications for acceptance of settlement of the land. The plaintiff, it is found, applied on the 6th May 1917; thereupon the following order was recorded: "Let the land be settled with the plaintiff at a rental of Rs. 1 per *bigha* on taking *kabuliyat* from him on his paying Rs. 90 as *salami* and that the *kabuliyat* be given within 15 days." The plaintiff paid the *salami*; but the *kabuliyat* was not executed within 15 days; the plaintiff who had been in possession from before, however, continued in occupation. On the 14th September 1917 the plaintiff executed a *kabuliyat* according to the draft supplied to him by the officers of the landlord. Meanwhile, on the 27th August 1917, the landlord had cancelled what he considered to be a void agreement and directed a fresh notification to issue. The consequence was that the first defendant applied for settlement and an order was made in his favour. This took place after the *kabuliyat* had been executed by the plaintiff. In these circumstances, the Courts below have held that the plaintiff acquired the status of a tenant and that he was entitled to succeed as against the subsequent grantee. We are of opinion that this view is manifestly correct.

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It has been argued before us that the Courts below should not have made a decree in favour of the plaintiff without an investigation of the question whether the first defendant was or was not aware of the arrangement with the plaintiff. There is no force in this contention. The plaintiff, in our judgment, acquired the right of a tenant on the 6th May 1917, and no question arises as to competition between two persons. The delay in execution of the *habuliyat* could not affect the tenancy which had already been granted to the plaintiff and the landlord was not competent to cancel the arrangement with the plaintiff so as to enable him to make a new settlement.

The result is that the decree of the Sub-ordinate Judge is affirmed and this appeal dismissed with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1952 OF 1921.
November 11, 1922.

Present.—Mr. Justice. Scott-Smith.

THE MUNICIPAL COMMITTEE OF
MULTAN—DEFENDANT—APPELLANT
versus

TAHLIA RAM AND ANOTHER—PLAINTIFFS
LACHMI NARAIN AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Punjab Municipal Act (Punjab I I I of 1911), ss. 169, 170, 173—Public street—Lease of portion—Municipality, right of.

When a street has vested in a Municipal Committee, it only has the power to exercise rights over it in order to maintain it as a street and for purposes of public use as such. It has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose. [p. 293, col. 2.]

Sundaram Ayyar v. Municipal Council of Madurai, 25 M. 635; 12 M. L. J. 37, relied on.

Second appeal from the decree of the District Judge, Multan, dated the 30th May 1921, affirming that of the Munsif, First Class, Multan, dated the 20th December 1920.

Lala Hari Chand, for the Appellant.

Mr. M. L. Puri, for the Respondents.

JUDGMENT.—The facts of the suit out of which the present second appeal arises are given fully in the judgments of the lower Courts and are briefly as follows:—The Municipal Committee of Multan has leased a plot of land 4 ft. by 5 ft. in a public street in front of the plaintiff's shop to one Ranjit Ram who has made it over to Mehnga, defendant No. 2, who has set up a stall where he cooks and sells meat to the passers by. Plaintiff sued for an injunction to issue to the Municipal Committee that it should remove the obstruction and should not in future let out the plot of land to any one. The Courts below have decreed the plaintiff's claim and the Municipal Committee appeals.

The First Court found that plaintiff suffered special damage from the erection of the meat stall in front of his shop and this finding was not contested in the grounds of appeal to the learned District Judge. The latter held that the Punjab Municipal Act gave the Municipality no right to lease out a portion of a public street which had been vested in it under section 56 of the Act. Lala Hari Chand, the appellant's Vakil, has referred me to the following sections of the Municipal Act:—

Sections 169 and 170. These sections allow the Committee to close a public street for a public purpose; to divert, discontinue or close permanently a public street or to sell the land forming such street or a part thereof and to permit temporary occupation of streets, etc., for certain purposes. These sections do not give any authority to a Committee to lease any portion of a street for any specified term.

Section 173 (1) (c). It lays down that whoever without the permission of the Committee deposits building materials, goods for sale or other articles of merchandise on any street shall be punishable with a fine which may extend to Rs. 50.

On this it is argued that a person may deposit goods for sale with the permission of the Committee, or, in other words, that the Committee may give any person permission to deposit goods for sale on any public street. In my opinion, however, this section does not give the Committee any such power. It no doubt may have power to allow goods for sale to be deposited

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on certain streets which are not public streets or which belonged absolutely to it. The section in question only imposes a penalty upon persons who do certain things without permission. It does not grant powers of any sort to a Municipal Committee.

Lala Hari Chand further referred to section 240 (o) and to a Notification of the Government in virtue of which the Committee can only lease property which has vested in it for a period not exceeding ten years except with the sanction of higher authority. It cannot, however, be inferred from this that the Committee can lease any portion of a public street. The contention on behalf of the appellant is that as the public street in question has vested in the Municipality, it has full powers to use it in any way it likes. Mr. Mukand Lal Puri for the respondents argued that the street in question is not the property of the Municipality but only has vested in it, and for the meaning of the word "vest" refers to *Sundaram Ayyar v. Municipal Council of Madurai* (1) the head-note of this is as follows:— "When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil... but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street."

Numerous English authorities are referred to in this ruling at page 646 of the report it is stated that:—

"The conclusion to be drawn from the English case-law is that what is vested in urban authorities under Statutes similar to the District Municipalities Act, is not the land over which the street is formed, but the street *qua* street and that the property in the street thus vested in a Municipal Council is not general property or a species of property known to the Common Law, but a special property created by Statute and vested in a corporate body for public purposes."

At page 645 of the report there is a quotation from the judgment of Lord Herschell in which his Lordship says:—

"It seems to me that the vesting of the streets vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use."

In accordance with this authority it appears to me that the street in question has vested in the Municipal Committee of Multan and it only has power to exercise rights over it in order to maintain it as a street and for the purposes of public use as such.

The learned District Judge has referred to certain pages of Peacock's Law of Easement in British India which appear to me to be in point. The passage quoted from page 234 of the Second Edition seems particularly to be in point and it is as follows:—

"In the case of an ordinary highway, although it may be of a varying and unequal width running between fences, one on each side, the right of passage or way, *prima facie*, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers."

I fully agree with the learned District Judge in his view that the Municipal Committee cannot use a public street otherwise than as a public street, and that it has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose. The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

BISHUN PRASHAD v. SASHI BHUSAN.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 5
OF 1922.

January 2, 1923.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Kulwant Sahay.BISHUN PRASHAD PATHAK AND
OTHERS—OBJECTORS—APPELLANTS

versus

SASHI BHUSAN MISRA AND OTHERS—
PETITIONERS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), O.
XXXIX, r. 1—Temporary injunction, grant of.
An ad interim injunction ought not to be given
when permanent relief is not obtainable.**Jital Singh v. Raja Kamaleswari Prosad,*
15 Ind. Cas. 614; 16 C. L. J. 555; 18 C. W. N. 12,
referred to.Appeal from an order of the Sub-
ordinate Judge, Manbhum, dated the 28th
November 1921.Messrs. S. M. Mullick and N. N. Sen, for
the Appellants.Messrs. A. B. Mukher and B. B.
Mukherji, for the Respondents.

JUDGMENT.

Mullick, J.—The plaintiffs brought a suit out of which this appeal arises for a declaration of their *paini taluk* right to certain jungle alleging that the defendant No. 6 with a large number of men was ready to cut the trees in the jungle. The defendants pleaded that the plaintiffs had no right in the jungle and that they had no possession for 12 years. While the suit was pending the plaintiffs applied for an *ad interim* injunction to restrain the defendant from cutting any trees, and on the 28th November 1921 the Subordinate Judge passed an order restraining the defendants from disposing of such trees as they might cut in reclaiming the land till the disposal of the suit. The Subordinate Judge's view was that the defendants were apparently entitled to cut trees for the purpose of reclamation and that, while it was not proper and reasonable to restrain them from cutting any trees at all, it would be right and proper to restrain them from disposing of the trees that they might cut.

The present appeal was lodged by the defendants on the ground that this is not a case in which there can be any *interim* injunction. Now, the general principle ap-

plicable to cases of this kind is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. The learned Vakil for the respondents urges that it is necessary that the *status quo* should be preserved and that the trees should not be allowed to go out of the hands of the defendants in the event of the plaintiffs succeeding in their present suit, but he forgets that the present suit is only for declaration and that it will not give the plaintiffs any consequential relief so far as the trees are concerned. Upon the frame of the plaint it may be contended that the present suit does not lie; that is another matter which will be decided at the trial; but, so far as the justice of the case goes, I see no reason why the defendants who deny the plaintiffs' title and claim to be in possession, should be restrained from disposing of what they claim to be their own property. The learned Vakil for the respondents attempted to distinguish the case of *Jital Singh v. Raja Kamaleswari Prosad* (1); in that case the *interim* prayer was to restrain a person who had obtained a decree from executing such decree while a suit was pending for a declaration that the decree had been obtained without jurisdiction, and the principle that an *ad interim* injunction ought not to be given when permanent relief is not obtainable was affirmed; this principle is consistent with reason and in the present case, therefore, we should comply with it.

The result is that the appeal is allowed with costs.

Kulwant Sahay, J.—I agree.

N. K.

Appeal allowed.

(1) 15 Ind. Cas. 614; 16 C. L. J. 555; 18 C. W. N. 12.

RAM BHAROSE V. CHANDRA SHEKHAR DAT.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 302 OF 1921.

December 15, 1922.

Present:—Mr. Justice Rafique and Mr.
Justice Piggott.RAM BHAROSE TIWARI—PLAINTIFF—
APPELLANT

VERSUS

Pandit CHANDRA SHEKHAR DAT PAN-
DEY—DEFENDANT—RESPONDENT.

Contract—Breach of promise—Cause of action.

If there is a contract binding upon the co-sharers of a village, by the terms of which one of them is not to sell any share in the village to a stranger without offering the other co-sharers an opportunity of purchasing at the same price and a co-sharer does in fact sell a share in the village to a stranger in contravention of the terms of that contract, the circumstance that the period for which the contract was to run, came to an end before another co-sharer could institute a suit to enforce his right, will not deprive the latter of his right to maintain the suit upon the cause of action which had already arisen. [p. 295, col. 2.]

Second appeal against a decree of the Subordinate Judge, Basti, dated the 27th October 1920.

Mr. N. C. Vaish, for the Appellant.

Mr. Gulzari Lal, for the Respondent.

JUDGMENT.—This was a suit for pre-emption on the basis of a deed, bearing date the 12th April 1919, by which the defendants, second party, conveyed a share in village Ambahari to the first defendant, who is a relation of theirs by marriage. The deed, on the face of it, is a *shankalap*, or gift in favour of a Brahman, made from motives of gratitude and piety. The plaintiff, however, who is a co-sharer in the same village, came into Court alleging that the deed of gift was a mere cover for a contract of sale, which had really been carried out by the payment of consideration amounting to Rs. 200 on the part of the first defendant to the defendants, second party. In reply, this allegation was denied and both sets of defendants contended that the transaction was a transfer by way of gift, as it purports to be in the document by which it was effected. They also denied that the plaintiff had any right of pre-emption. The First Court found on the evidence that there had really been a sale for a sum of Rs. 200 and held that the plaintiff was

entitled to pre-empt. Both points were raised in appeal; but the lower Appellate Court contented itself with recording a finding that it was not proved that the plaintiff had a right of pre-emption under any custom prevailing in the village. The second appeal before us is by the plaintiff and his main contention, the only one which has been pressed upon us in argument, is that he has a right of pre-emption under the terms of the *wajib-ul-arz* of 1885, independently altogether of the question whether this is a record of contract or of custom. The suit as brought purported to be based on the conditions of the *wajib-ul-arz* and the custom of the village. We think it was open to the plaintiff to rely on the *wajib-ul-arz*, and we find that this argument was pressed in the lower Appellate Court. The learned District Judge remarks that it was admitted before him that the deed of transfer in suit was executed during the pendency of the Settlement at which the *wajib-ul-arz* was prepared, on the strength of which the plaintiff claims a right to pre-empt. He thinks, however, that the fact that the suit was instituted after the period of the Settlement had expired would prevent the plaintiff from claiming any right based upon the contract, if it be a contract recorded in this document. Obviously, if there was a contract binding on the plaintiff and on the vendor defendants by the terms of which the latter were not to sell any share in the village to a stranger without offering the plaintiff an opportunity of purchasing at the same price, and they did in fact sell a share in the village to a stranger in contravention of the terms of that contract, the circumstance that the period for which the contract was to run, came to an end before the plaintiff could institute a suit to enforce his right, would not deprive the plaintiff of his right to maintain a suit upon a cause of action which had already arisen. We should not have been prepared to affirm the decision of the lower Appellate Court on the grounds on which it proceeds. On a perusal of the judgments of the Courts below, however, we were greatly impressed with the contention in favour of the defendant that the transfer in question was a gift pure and simple. As the lower Appellate Court has not seen fit to examine the evidence on this point, and as we think it expe-

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lient that a suit of this nature should be concluded as soon as possible, we have ourselves looked into the very scanty evidence on the point. We think it sufficient to say that we are wholly dissatisfied with the manner in which the learned Munsif criticised and appraised that evidence. The deed upon which the suit is based is, on the face of it, a deed of gift pure and simple and the motive for making such a gift was not lacking. The learned Munsif thinks it practically impossible that the defendants, second party, should have made such a gift, because their witnesses said that the property gifted was worth a thousand rupees or more. He has, however, practically accepted the evidence of the witnesses for the plaintiff, who say that the property was only worth Rs. 200. The plaintiff cannot have it both ways. He is not entitled to contend that the property involved in this transfer is so valuable as to make it grossly improbable that the defendants, second party, should have made a gift of it, and, at the same time, to claim that it is worth only Rs. 200 and was in fact transferred for its full market-value. In our opinion the transaction should have been upheld, upon the finding that the transfer in question was a gift pure and simple not subject to any right of pre-emption. For these reasons we dismiss this appeal.

N. K.

*Appeal dismissed.***BOMBAY HIGH COURT.**ORIGINAL CIVIL JURISDICTION SUIT
No. 4810 OF 1921.

November 13, 1922.

Present.—Mr. Justice Shah.**TIRTHDAS GHANSHAMDAS BAJAJ**

—PLAINTIFFS

*versus***SADHUSINGH UDHASINGH**

—DEFENDANT.

Registration Act (XVI of 1908), s. 17 (2) (b)—
Agreement to effect mortgage—Agreement creating
charge—Registration.

An agreement to merely effect a mortgage is admissible in evidence without registration, but if it is relied on as justifying a declaration to a charge as distinguished from a mortgage, it ceases to be a document, *merely* creating a right to obtain another document but becomes in effect a document operating to create a charge in future, when the declaration sought is made, and requires registration to render it admissible in evidence.

Bengal Banking Corporation v. Mackertich, 10 C. 315; 8 Ind. Jur. 436; 5 Ind. Dec. (N. S.) 211; followed.

Mr. Setalvad, for the Plaintiffs.

JUDGMENT.—This suit has been heard *ex parte* as a short cause.

As I felt some difficulty in granting reliefs (b) and (c) claimed in the plaint, I heard further arguments both on the question of jurisdiction and as to the effect of the agreement of December 10, 1918, to execute a mortgage.

As regards the question of jurisdiction, I do not feel any difficulty now. I have dealt with this question in the judgment delivered in *Jasraj v. Akubai*, Original Civil Jurisdiction Suit No. 2839 of 1922, decided by Shah, J., on November 13, 1922.

As regards the agreement, I am satisfied that it cannot be used for the purpose of holding that there is a charge on the property mentioned therein. As an agreement to effect a mortgage it would be admissible in evidence; but if it is relied upon as justifying a declaration as to charge as distinguished from a mortgage, it seems to me that it ceases to be a document *merely* creating a right to obtain another document, but becomes in effect a document operating to create a charge in future 'when the declaration sought is made.'

I have considered the argument urged by Mr. Setalvad that the document does not operate to create a charge; but that the charge is the result of such an agreement by operation of law. I am unable to accept the contention. If that is the effect of the document it operates to create such an interest, and would require to be registered. I need not deal with this question at any length. The *ratio decidendi* in *Bengal Banking Corporation v. Mackertich* (1) appears to me to afford a complete

(1) 10 C. 315; 8 Ind. Jur. 436; 5 Ind. Dec. (N. S.) 211.

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answer to the plaintiffs' contention on this point.

I am, therefore, unable to allow any relief to the plaintiffs except the personal relief claimed in prayer (a) interest on judgment at 6 per cent. per annum.

There will be a decree in the plaintiffs' favour in terms of prayer (a) in the plaint: the plaintiffs will not get the costs of the further hearing on November 9.

W. C. A.

Order accordingly.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEALS Nos. 29, 30, 33
AND 34 OF 1921.

January 10, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

P. BABA SAH AND ANOTHER—DEFENDANT
No. 4—APPELLANT

versus

Hajee MOHAMED AKBAR SAHIB
AND OTHERS PLAINTIFFS AND DEFEND-
ANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27—Specific performance—Constructive notice, doctrine of, applicability of—Third person in possession—Duty of purchaser to make enquiry.

Defendant purchased a piece of land knowing that the superstructure on the land belonged to another person than his vendor. He made no inquiry as to the nature of that person's possession or that of his sub-tenants who were actually in occupation under him, and it ultimately appeared that there was a prior contract to sell in favour of that person. In a suit by the latter for specific performance of the agreement to sell in his favour:

Held, that defendant must be taken in law to have had constructive notice of the prior agreement to sell and of all the equities in favour of the plaintiff, since he had wilfully abstained from or grossly neglected to make an inquiry which would have informed him of the prior agreement and he was, therefore, not entitled to resist plaintiff's suit for specific performance. [p. 299, col. 1.]

The general principle of constructive notice in such cases as the above is that notice of the occupation of the properties purchased by a person other than the vendor which indicates that the vendor is not entitled to present possession, at once puts the purchaser on inquiry as to the interest that occupier holds in the property. Where nothing more is known to the purchaser, or would be known to him, on reasonable enquiry, than the fact that certain tenants are in occupation under a tenant

right, he is not affected with notice of more than the facts as to those tenants' rights. [p. 298, col. 2.]

But when, beyond this, the purchaser is directly informed and, therefore, knows of the occupation of the property by another whether by himself or by his sub-tenants he is equally put upon notice to inquire into the interest of that other. The absence of such inquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor. [p. 298, col. 2; p. 299, col. 1.]

Daniels v. Davison, (1809) 16 Ves. (Jun.) 249; 33 E. R. 978; 10 R. R. 171, *Hunt v. Luck*, (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479; 49 S. R. 155; 17 T. L. R. 3 and *Faki Ibrahim v. Faki Gulam Mohidin*, 60 Ind. Cas. 986; 45 B. 910; 23 Bom. L. R. 335, followed.

Appeals against the decrees of the Court of the City Civil Judge, Madras, in O. S. Nos. 132, 285, 132 and 284 of 1920.

Mr. S. T. Srinivasa Gopalachariar, for the Appellant (Defendant No. 4).—The plaintiff is not entitled to specific performance against the 4th defendant who is *bona fide* purchaser for value.

Section 27 of the Specific Relief Act lays down the law as to the persons against whom alone specific performance can be granted. The 4th defendant comes within the exception in clause (b) to section 27, namely, that in favour of a person who had paid money in good faith without notice of the original contract. There is no suggestion or finding that the 4th defendant had actual notice. The only question, therefore, is whether he had in law constructive notice.

Notice is defined in section 3 of the Transfer of Property Act. There is no question of wilful abstention from enquiry which ought to have been made or gross negligence. Admittedly, the actual occupation was with tenants, and that was a fact within the appellant's knowledge. The inquiry would have served no purpose. The tenants could not be expected to give information regarding their landlord's contract.

The case in *Daniels v. Davison* (1) relied on by the lower Court is an extreme view of the law.

That cannot be extended to cases of this kind, where the person who claims the benefit of the original contract is not the

(1) (1809) 16 Ves. (Jun.) 249; 33 E. R. 978; 10 R. R. 171.

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person in actual occupation. *Vide Barnhart v. Greenshields* (2), *Hunt v. Luck* (3), affirmed *Hunt v. Luck* (4).

If *Daniels v. Davison* (1) is to be applied to India it must be so applied as interpreted and circumscribed by *Barnhart v. Greenshields* (2). See also Dart's *Vendors and Purchasers*, 14th Edition, pages 548, 762; Sudgen's *Vendors and Purchasers*, Sixth Edition, Vol. II, p. 975.

Messrs. T. Ethiraja Mudaliar, Muhammad Ibrahim Sahib and C. Venkatasubbaramiah, for the Plaintiff-Respondent.—I submit the appellant must be held to have had constructive notice. The position is rendered clear by Illustration (3) to section 27 of the Specific Relief Act and Illustration (h) to section 3 of the Transfer of Property Act. The cases in *Knight v. Bowyer* (5) and *Bailey v. Richardson* (6) and *Faki Ibrahim v. Faki Gulam Mohidin* (7) support my contention fully.

JUDGMENT.—The substantive point for decision in City Civil Court Appeal No. 29 of 1921 is, whether on the date of his purchase under Exhibit IV appellant (4th defendant) had notice of the prior agreement by first defendant to sell the same property to the plaintiff. Plaintiff owns the superstructure on the land bought by appellant under Exhibit IV from defendants Nos. 2 and 3, who in their turn had bought under Exhibit III from first defendant. It is not disputed that plaintiff held an agreement prior to both Exhibits III and IV from first defendant to sell the land to him.

2. Appellant admitted in evidence that at the time of his purchase, he learnt from Exhibit III that the superstructure belonged to plaintiff, and that he made no enquiry of plaintiff under what right he occupied the land. It appears that he made no enquiries whatever, either from

his vendors, (e.g., whether they were receiving the ground rent from anyone), or from first defendant their vendor, or from plaintiff, or from the sub-tenants actually in occupation of the superstructure under plaintiff. Such utter absence of reasonable enquiry is either wilful or grossly negligent.

3. The general principle of constructive notice in such a case is that notice of occupation (of the property purchased) by a person other than the vendor, which indicates that the vendor is not entitled to present possession, at once puts the purchaser on enquiry as to the interest that occupier holds in the property. The usual case is where the property is physically occupied by tenants, and then the purchaser is, by that occupation itself which puts him on enquiry, in law affected with notice of the interest which these tenants have in the property. He is by their occupation not affected with notice of more than the terms on which they hold, including any agreement collateral to their leases, but he is not bound to enquire, nor are they bound to answer to whom they pay rent, so that the purchaser is not in such a case affected with notice of the tenant's lessor's title or rights. This is the general principle laid down in a series of English cases from *Daniels v. Davison* (1) onwards, succinctly dealt with in *Hunt v. Luck* (3). The principle has been embodied in India in section 27 of the Specific Relief Act and section 3 of the Transfer of Property Act.

4. So that, where nothing more is known to the purchaser, or would be known to him on reasonable enquiry, than the fact that certain tenants are in occupation under a tenant right, he is not affected with notice of more than the facts as to those tenants' rights. But when, beyond this, the purchaser is directly informed and, therefore, knows of the occupation of the property by another whether by himself or by his sub-tenants, he is equally put upon notice to enquire into the interest of that other. This is no extension of the principle above-mentioned, but a mere application of it. It makes no difference in principle whether the occupation by another is brought to his notice by physical occupation or by direct information. Where, then, the pur-

(2) (1853) 9 Moo. P. C. 18; 14 E. R. 204; 105 R. R. 1.

(3) (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479; 49 W. R. 155; 17 T. L. R. 3.

(4) (1902) 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291; 18 T. L. R. 265.

(5) (1858) 2 De G. & J. 421; 27 L. J. Ch. 520; 4 Jur. (N. S.) 569; 6 W. R. 565; 31 L. T. (O. S.) 287; 119 R. R. 184; 44 E. R. 1052.

(6) (1852) 9 Hare 734; 68 E. R. 711; 89 R. R. 639.

(7) 60 Ind. Cas. 986; 45 B. 910; 23 Bom. L. R. 335.

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chaser is definitely informed that another is in occupation of the property whether himself directly or through sub-tenants does not matter, he is at once put on enquiry as to the nature of the interest of that other in the property. This application of the general principle is clearly set out in *Hunt v. Luck* (3) quoted above, and has been followed in India in the case reported as *Faki Ibrahim v. Faki Gulam Mohidin* (7). The absence of such enquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor.

5. Now, in the present case, appellant knew, and apparently knew nothing more than, that plaintiff was the owner of the superstructure, and appellant does not say whether he knew that plaintiff was not occupying it himself. With such knowledge it was incumbent on him to enquire into the nature of the interest held by plaintiff, and, if he wilfully abstained, as he did, from making any enquiry, or was grossly negligent, as he was, in making enquiry, he will be, in law, affected with notice of any fact which he would have come to know had he made such enquiry. Such an enquiry would have told him that plaintiff was a tenant under first defendant, and would also, as soon as he enquired the period of plaintiff's interest in the land, *i.e.*, the period of the tenancy, as he was also bound to do, have informed him that the tenancy was to come to an end as soon as first defendant executed and registered the deed of sale of the land which he had agreed to sell to plaintiff. We must, therefore, hold that appellant wilfully abstained from, or grossly neglected to make, an enquiry which would have informed him of the prior agreement by first defendant to sell the land to plaintiff which precluded first defendant from selling it to his (appellant's) vendors and that appellant had in law constructive notice of that fact. Plaintiff is entitled then and has an equity, to repel the claim of the appellant, who made no enquiry as to the nature of his possession. Where appellant made no enquiry at all, he is taken to have had constructive notice of all the equities in favour of plaintiff. The fact that his immediate vendor was not first defendant, but purchasers from

first defendant, does not affect this question of notice.

6. Appellant, then, though possibly a purchaser in good faith was a purchaser with notice of the contract to sell of which plaintiff now seeks specific performance and cannot, therefore, (*vide* section 27, Specific Relief Act) resist the plaintiff's suit.

7. We, therefore, agree with the lower Court's decision, though the reasons given by it are hardly adequate. It follows that this appeal must be dismissed and we dismiss it with costs to plaintiff and half costs to first defendant, payable by appellant. The defendants Nos. 1 to 4 will within one month from to-day execute the conveyance directed by the decree of the lower Court regarding the land in schedule A, and on execution thereof the Rs. 1,000 now in deposit in the lower Court will be paid out to 4th defendant.

C. C. A. Nos. 30, 33 AND 34 OF 1921.

C. C. C. App. No. 30 of 1921 follows No. 29 of 1921 and is dismissed with costs (excluding Vakil's fee). C. C. C. App. Nos. 33 and 34 of 1921 are not pressed before us and are dismissed with costs to 4th defendant and half costs to first defendant (in C. C. C. App. No. 33 of 1921) payable by appellant. (One Vakil's fee for both).

V. N. V.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1496 OF 1921.
November 14, 1922.

Present.—Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Lindsay.

JHABBU AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

Musammat BATUL AND OTHERS—
DEPENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 146, clauses first and second—Wrongful distraint—Damages, suit for—Cause of action.

JHABHU V. BATUL.

The cause of action for a suit for damages in respect of a wrongful restraint under the first clause of section 146 of the Agra Tenancy Act takes its origin from the day on which the distraint comes to an end and the suit may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. [p. 302, col. 1.]

Dalip Upadhia v. Gauridat Upadhia, 2 Leg. Rem. 61, relied on.

Obiter.—Where the cause of action for a suit for damages under the second clause of section 146 of the Agra Tenancy Act is the loss, damage or destruction to property, it is to the date of such loss, damage or destruction that the Court must look when computing the prescribed period of limitation. [p. 301, col. 2.]

Dambar Singh v. Balwant Singh, 10 Ind. Cas. 502; 8 A. L. J. 503, relied on.

Second appeal from a decision of the District Judge, Moradabad, dated the 30th May 1921.

Mr. P. L. Banerji, for the Appellants.

Mr. Raza Ali, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was under section 146 of the U. P. Tenancy Act, II. of 1901. As it has been disposed of upon a question of limitation and this is the only question before us to-day for determination, we have to look narrowly at the frame of the plaint in order to see whether, on the allegations therein made, the plaintiffs were or were not seeking their remedy within the period prescribed by law. What the plaintiffs say is that they were lessees of one village and the defendants lessees of another, and there was bad blood between them because the plaintiffs had succeeded in securing a lease which the defendant were coveting. The plaintiffs had cut and stacked, from the land within the purview of their lease, a large quantity of thatching grass which they hoped to sell at a substantial profit. The defendants, it is alleged, wrongfully and maliciously levied a distraint under colour of the provision of Chapter IX, of the Tenancy Act, upon this grass of the plaintiffs. The immediate result of this was that the plaintiffs missed their market and were unable to sell their grass, while the defendants were disposing of theirs. In the meantime, the rainy season began and the land upon which the plaintiffs' stacks were standing was flooded. The plaintiffs brought a suit to contest the distraint and finally succeeded in obtaining an order from the Court setting the dis-

traint aside. When, however, they became entitled to re-enter into possession of their own grass the stacks had been so damaged by rain and flood as to be utterly worthless. Therefore, the plaintiffs claimed the full value of the stacks, as the correct measure of damages for the wrong done to them by the defendants in wrongfully distraining the same. As regards dates, we may note that the distraint was levied on the 15th of May 1919. The suit under section 142 of the Tenancy Act, to contest the distraint, was promptly instituted, but was not terminated by the Court's order releasing the grass until the 16th of September 1919. The present suit for damages was instituted on the 12th of December 1919. The Assistant Collector examined the parties and fixed various issues, the first of which was an issue of limitation. He took evidence tendered by both parties. We have thought it worth while to look at the statements of the parties and the evidence produced by them, and, having examined the record in order to make it perfectly clear to our minds what the parties were really fighting about in the Trial Court, it seems to us even clearer than it would have been upon a mere examination of the plaint, that the essential cause of action put forward and relied upon by the plaintiffs was the wrongful nature of the distraint. The Assistant Collector, however, treated the suit as one falling wholly and solely within the purview of the second clause to section 146 of the Tenancy Act. Following the decision of this Court in the case of *Dambar Singh v. Balwant Singh* (1) he held that it was barred by limitation. The plaintiffs appealed to the District Court. In their Memorandum of Appeal they undoubtedly took the point that the finding against the plaintiffs on the question of limitation is contrary to law and, further, that their cause of action accrued to them on the 16th of September 1919, that is, on the date on which the distraint terminated under the orders of the Court, and not previously. They did not, however, take in plain terms the plea, which, in our opinion, they should have done, namely, that the suit as brought was in its essence one falling under the

(1) 10 Ind. Cas. 502; 8 A. L. J. 503.

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first, and not under the second, clause of section 146 aforesaid. The District Judge, dealing with the matter on the same lines which had been followed by the Court of first instance, affirmed the decision of that Court and dismissed the appeal. There was a second appeal to this Court and we may make the same comment regarding the drafting of the Memorandum of Appeal to this Court. We have before us, however, the referring order of the learned Judges before whom the appeal was first argued, and that order makes it clear enough that the case for the plaintiffs-appellants was presented to that Bench in a two-fold form.

First, it was contended that, treating the suit as one under the second clause of section 146 of the Tenancy Act, it was nevertheless within limitation under serial No. 6 of the 4th Schedule to the said Act, because the right to bring this suit did not accrue to the plaintiffs before the 16th of September 1919.

Secondly, it was contended that, even if this first plea be repelled by the Court, the suit being essentially based upon the allegation that the distraint levied by the defendants was a wrongful distraint, it was a suit upon a continuing wrong; within the meaning of section 23 of the Indian Limitation Act, IX of 1908. That wrong being the distraint maliciously levied by the defendants, had continued until the distraint was brought to an end under the orders of the Court. Therefore, from this point of view the plaintiffs' suit was rightly brought within three months of the 16th of September 1919 the date on which the distraint came to an end.

We now turn to examine the first two clauses of section 146 of Local Act No. II of 1901. In so far as these clauses are applicable to the facts of the present suit, the first clause gives a right to institute a suit for compensation against the distrainer, if any person under colour of this Act distrains any property otherwise than according to the provisions of this Act. The claim must be for compensation for any injury which the plaintiff has thereby sustained; that is to say, has sustained in consequence of this distraint wrongfully made under colour of the provisions of the Tenancy Act. The second clause gives the owner of distrained property a right of action

for damages, independent altogether of the question whether the distraint was or was not lawful and proper. The cause of action for a suit under this clause is the distrainer's not having taken proper precautions for the preservation of the distrained property and consequent loss, damage or destruction of the same. What was laid down in *Dambar Singh v. Balwant Singh* (1) was, in effect; that the cause of action for a suit under this clause is the loss, damage or destruction to the property and that, consequently, it is to the date of such loss, damage or destruction that the Court must look when computing the prescribed period of limitation which is three months from the date on which the right to sue accrued. The words above quoted from the Fourth Schedule to the Local Tenancy Act are purposely general in their effect because they have to cover the three different kinds of suits provided for by section 146 of the Act. As applied to the second clause, however, their effect seems to us to have been rightly stated in the case of *Dambar Singh v. Balwant Singh* (1). Here the plaintiffs, on their own admission, knew in the month of July that their stacks of grass had been practically ruined by rain and flood. They had a right to bring their suit on the basis of this destruction, independently altogether of the question whether the distraint levied upon them was lawful or the reverse; but they were bound to bring this suit within three months of the date of the destruction of their property in consequence of the negligence of the defendants. In so far, therefore, as the Courts below have acted upon this principle of law, we think their decisions were correct.

Coming, however, to what we have stated as the alternative argument put forward in support of this appeal, we feel satisfied that it is in substance sound and ought to prevail. We repeat that the suit was, in our opinion, essentially based upon the allegation that the distraint levied by the defendants was a wrongful and malicious act done under colour of the provisions of the Tenancy Act. The wrong inflicted by an unlawful distraint continues and is renewed every day that the distraint lasts, the lawful owner of the property being thereby restrained from making use of it or exercising any right of ownership over it. In effect, there-

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fore, as was suggested long ago in the decision of the Board of Revenue quoted in the referring order, *Dalip Upadhia v. Gauridat Upadhia* (2), the cause of action for a suit for damages in respect of a wrongful distraint, takes its origin from the day on which the distraint came to an end, and may be lawfully instituted within the prescribed limitation period of three months culculated from the said date. This suit was, therefore, in our opinion, within time. We have commented upon the imperfect nature of the pleadings set up by the plaintiff, but we do not wish to penalise them further than by directing the costs here and hitherto, including in this Court fees on the higher scale, to be costs in the cause. We set aside the decrees of both the Courts below and send the case back to the Court of first instance to be tried according to law, with reference to the finding which we have recorded on the limitation question.

N. K.

Case remanded.

(2) 11 Leg. Rem. 61.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2617 OF 1919.

March 8, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Harrison.

MURLI DHAR AND OTHERS—PLAINTIFFS
—APPELLANTS

VERSUS

SULTAN SINGH AND ANOTHER—DEFEND-
ANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—“Interest,” what is—Trust for benefit of widows and orphans of Khatri—Khatris, whether interested in trust.

It is wholly impossible to define with any degree of accuracy what exactly constitutes an “interest” as contemplated in section 92 of the Civil Procedure Code. There is no doubt, however, that the interest contemplated by that section need not be a direct interest, in the sense that only a beneficiary can institute a suit, but it must be a real, substantial and existing interest. [p. 303, col. 2.]

Ramachandra Iyer v. Parameswaran Mumbai, 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492 (1919) M. W. N. 370, relied on.

Ganapati Ayyan v. Savithri Ammal, 21 M. 10; 7 Ind. Dec. (N. S.) 364, *Manohar Ganesh Tambekar v. Lakhmiram Govindram*, 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650, *Garuda Sanyasayya v. Nevella Muthemma*, 48 Ind. Cas. 740; 35 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 86; *Gopala Krishnier v. Ganapathy Aiyar*, 58 Ind. Cas. 124; (1920) M. W. N. 478; 12 L. W. 772 and *Puran Atal v. Darshan Das*, 14 Ind. Cas. 698; 9 A. L. J. 709; 34 A. 468, referred to.

Where a trust is created for the benefit of the widows and orphans of the Khatris of a particular locality, the male members of the Khatri community of that locality have a sufficient interest in the trust to enable them to bring a suit under section 92 of the Civil Procedure Code for the enforcement of the trust. [p. 303, col. 2.]

First appeal from a decree of the District Judge, Delhi, dated the 18th November 1919.

Pandit Sheo Narain, R. B., and Lala Sardha Ram, for the Appellants.

Bakhshi Tek Chand and Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—One Balkishan Das died on the 21st January 1907. On the 18th January 1907 he had executed a Will, Baldeo Parshad of Bareilly and Lala Sultan Singh of Delhi being appointed executor's therein. Under the terms of the Will the executors were to invest a sum of Rs. 5,000 the income of which was to go to the testator's widow for whose benefit a house was also to be purchased at a maximum cost of Rs. 3,000. Certain other directions for the benefit of the said widow were also given. A certain specified house was to be used for purposes of the Inderprasth Hindu Kanya Sikhshala School for girls at Delhi and a bequest of Rs. 1,000 was also made to that institution. This school was to be housed in that particular building until such time as the funds of the institution enabled it to purchase suitable accommodation, when, on the happening of that event, the said house was to be made a *Dharamsala* to perpetuate the memory of the testator's father.

After the payment of debts the residue of the estate was to be utilised for the support and maintenance of orphans of the Khatri caste and Surat Brahmans.

On the demise of the testator's widow such property allotted to her as she had not alienated or appointed was to be sold by

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the executors in order to start a fund for the support of Khatri widows. Probate of this Will was duly taken out by the executors in 1907 and the testator's widow died a few years later. On the 30th April, 1919 Lala Murlī Dhar and six other persons living in Delhi, Khatri by caste, instituted a suit against Lala Sultan Singh and Baldeo Parshad as trustees, having obtained the necessary sanction under section 92 of the Civil Procedure Code. In the plaint it was alleged that the girl's school had long been able to acquire proper accommodation for itself and that the defendants, as trustees, were neglecting their duty and had failed either to establish a *Dharamsala* in the said house or under the later clauses of the Will to arrange for the support of Khatri orphans and widows. They, therefore, prayed that the trustees be removed, other trustees appointed in their place, and the trust property administered, a scheme for the management of the property being drawn up. The suit was contested on various grounds it being alleged that the sanction under section 92 of the Civil Procedure Code was bad in law; that no trust had been created by the Will, that the defendants were still executors and not trustees; and that the funds of the girl's school were not yet sufficient for the acquisition of the necessary buildings and that the debts of the testator had swamped the estate leaving no residue. It was alleged that the plaintiffs had no interest in any trust or trusts that may have been contemplated by the testator and that, therefore, the suit should be dismissed. The Trial Court framed various issues and at a preliminary hearing upon the legal issues dismissed the suit on the ground that the plaintiffs had not such an interest as is contemplated in section 92 of the Civil Procedure Code.

They have thereupon come up to this Court in appeal through Mr. Sheo Narain who has contended that, inasmuch as the plaintiffs were residents in the *mohalla* in which the house is situate, they have an interest such as is contemplated by section 92 of the Civil Procedure Code, and that they were entitled to represent the community, and that even if the strictest proof laid down in any authority be followed, their interests *qua* Hindus, Khatri and residents of the *mohalla* are substantial and

existing and not sentimental or remote. As against this it has been argued that, so far as the trust in favour of the widows and orphans is concerned, the persons having a direct interest are such widows and orphans and inasmuch as no such person has been impleaded, the present plaintiff's suit does not lie. We find, however, that the Khatri community of this *mohalla* are most certainly interested in the maintenance of their widows and orphans, and, even more so, in the establishment of the *Dharamsala* which is contemplated in the Will; for whether or no it is more usual to have a temple or a kitchen attached to a *Dharamsala*, it is beyond doubt that it is a resting place and as such is open, primarily no doubt, to pilgrims and travellers of the Hindu faith, but also to the residents of the *mohalla* though they naturally would not use it to the same extent and would ordinarily reside in their own houses. We have considered the following authorities:—*Ganapati Ayyan v. Savithri Ammal* (1), *Manohar Ganesh Tambekar v. Lakshmiram Govindram* (2), *Garuda Sanyasayya v. Narella Muthemma* (3), *Gopala Krishnier v. Ganapathy Aiyar* (4), *Varthnatha Aiyar v. Theyagaraja Aiyar* (5), *Puran Alal v. Darshan Das* (6), and *Ramachandra Iyer v. Parameswaran Munbu* (7).

We are entirely in accord with the views expressed by the majority of the Judges of the Madras High Court in *Ramachandra Iyer v. Parameswaran Munbu* (7), that it is wholly impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in section 92 of the Civil Procedure Code. There is no doubt that it need not be a direct interest in the sense that only a beneficiary can institute a suit, and that it must be a real, substantial and existing interest. Holding that the

- (1) 21 M. 10; 7 Ind. Dec. (N. S.) 364.
- (2) 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650.
- (3) 48 Ind. Cas. 740; 35 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 86.
- (4) 58 Ind. Cas. 124; (1920) M. W. N. 478; 12 L. W. 772.
- (5) 68 Ind. Cas. 631; 41 M. L. J. 20.
- (6) 14 Ind. Cas. 698; 9 A. L. J. 709; 34 A. 468.
- (7) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370.

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present plaintiffs *qua* the Khattris and Hindus and residents of the *mahalla* and neighbourhood have such an interest and are entitled to bring this suit with a view to enforcing the performance of the terms laid down in the Will, we accept the appeal and remand the case to the Trial Court for decision on the merits. Costs follow the event.

Z. K.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO.
1765 OF 1922.

January 16, 1923.

Present:—Mr. Justice Marten.

ROSE HILL

versus

LUKE C. HILL.

Divorce Act (I.V. of 1869) s. 15—Guilty party, whether can obtain relief—Desertion: What is—Cross petition by husband—Separate document, whether necessary—Foreigner named as co-respondent—Jurisdiction.

Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than it can obtain relief by way of divorce. [p. 305, col. 1.]

Otway v. Otway, (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153, followed.

The desertion required to be proved under the Divorce Act is a wilful abstention by the husband against the wish of the wife. [p. 304, col. 2.]

Bai Kanku v. Shiva Toya, 17 B. 624; 9 Ind. Dec. (N. S.) 499 (F. B.), relied on.

In a suit for divorce by a wife, the husband can, in answering his wife's petition, counter-petition for a divorce on the ground of his wife's adultery—a separate petition on a separate document is not necessary. [p. 305, col. 1.]

N. v. N. (1913) P. 75; 82 L. J. P. 56; 108 L. T. 271; 57 S. J. 343; 29 T. L. R. 321, followed.

Where a husband in a petition for divorce charges a foreigner with adultery, the Court has jurisdiction to add him as co-respondent. [p. 305, col. 2.]

Rayment v. Rayment, (1910) P. 271; 79 L. J. P. 115; 103 L. T. 430; 54 S. J. 721; 26 T. L. R. 634, followed.

Mr. Davar, for the Wife.

Mr. Campbell, for the Husband.

JUDGMENT.—This suit consists of a petition for divorce by the wife against her husband on the ground of his alleged adultery, cruelty and desertion, and a cross-

petition brought by the husband against the wife and a co-respondent named Nicola Kandelaft, asking for a divorce on the ground of the wife's adultery.

On the wife's petition being called on, and after I had read the two petitions, I asked Counsel for the wife whether he was in a position to put his client into the box to deny the accusations against her which had been made in the husband's petition. They included, in particular, an allegation that the wife had travelled with the co-respondent in the same cabin from Bombay to Marseilles by the steamer *Loyalty* in December 1919, and that the only other occupant of that cabin was a small boy aged eight or thereabouts. Mr. Davar admitted that his client had travelled on that steamer and, after consulting his client, he told the Court that he was not in a position to call his client to contest the husband's allegation against her in that respect.

There, then, remained the allegations which she made against the husband on the ground of his desertion and cruelty. As regards the question of desertion, Counsel for the husband took the point that the desertion required to be proved under the Act was desertion within the meaning of section 3, sub-section 9, *viz.*, an abandonment against the wish of the person charging it. He pointed out that here the wife left the petitioner of her own wish and not of her husband's wish. Moreover, it was clear from certain correspondence which took place almost immediately, between her Pleader and her husband, and from a letter written by the husband to the wife that it was in no way his wish that she should leave the house in this way. I should explain that the marriage took place on June 2 and that the wife left her husband on June 27. On putting this to Counsel for the wife asking him whether he wished for leave to amend, Counsel, after consulting his client, said that the real reason for leaving him was something different from what was stated in the pleadings, and that he had no objection to his client's petition being dismissed.

However, as the lady had charged cruelty I also considered whether there was any ground open to her there. This raised another point on the authorities, *viz.*, that

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speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of a divorce. The leading case on that point is *Otway v. Otway* (1). Similarly, as regards the point I have mentioned about the desertion, *viz.*, that it must be a wilful abstention by the husband against the wish of the wife, I may refer, so far as our own Courts are concerned, to *Bai Kanku v. Shiva Toya* (2).

However, at this stage of the argument Counsel for the wife intimated that he was not in a position to controvert the propositions which had been advanced by Counsel for the respondent and accordingly the petition could be dismissed. I accordingly directed the wife's petition to be dismissed, and made no order as to costs, the husband not asking me to make any order for costs, nor the wife's Counsel either.

That left me with the husband's petition for divorce. On that, Counsel appears for the wife but does not defend the suit. I may, however, say at once that I am satisfied there is no collusion or anything of that sort on the evidence before me. There is one technical point, and that is that the cross-petition has been brought not by a separate petition on a separate document, but by a further statement added to the original defence to the wife's petition. However, section 15 of the Indian Divorce Act assists the husband in this respect. There is also a decision of Sir Samuel Evans in *N. v. N* (3) in which the point raised was, whether a husband, who had objected successfully to his wife obtaining a divorce on the ground of want of jurisdiction having regard to the domicile of the parties, could afterwards in answering his wife's amended petition for a judicial separation put in an answer claiming damages. The English Registrar considered that a separate document was necessary, but the learned President ruled otherwise, and further held that there was a sufficient service of the cross-petition on the wife by the fact that the husband had given a copy of his answer to

the wife's Solicitors. As far as the question of service is concerned, as we have Counsel appearing for the wife, there is no difficulty on that point as regards her. And there is an affidavit proving service by registered post on the co-respondent in accordance with the practice of this Court.

I should mention one word as regards the co-respondent. What his precise nationality or domicile seems to be open to some doubt. He can hardly be a British subject, and at the date of this petition he was apparently living in Paris. A point has been raised as to whether there is jurisdiction in the Court to add a foreigner as co-respondent. That matter was considered by Sir Samuel Evans in *Rayment v. Rayment* (4), and he came to the conclusion that the Court had that jurisdiction. As a matter of common sense that decision must be right. It would seem absurd to hold that a wife can commit adultery with impunity, provided she is only careful enough to select a foreigner to consort with. When one remembers that, as far as the English Courts are concerned, Scotsmen and Irishmen are considered foreigners, such absurdity becomes all the more apparent.

I, therefore, consider that there is ample jurisdiction in this Court to add a foreigner as co-respondent. Of course, that point is entirely different from the question whether our High Court has jurisdiction to grant a divorce where the parties are domiciled in England or elsewhere abroad. But the facts here are perfectly clear that the petitioner was and is domiciled in India; he was born in India; he has lived all his life in India; and the marriage was in Bombay. The wife, moreover, is still living in Bombay according to her own petition. Therefore, the matrimonial domicile was and is clearly Indian, and so this Court is in no way affected by the recent decision in England on the jurisdiction of the Indian Courts.

I think I have now disposed of the several technical points that were raised on this petition, and it remains to consider whether the charge against the wife has been proved. Counsel for the wife admitted yesterday that she was on this boat with the co-respondent, and that they occupied the same

(1) (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153.

(2) 17 B. 624; 9 Ind. Dec. (N. S.) 409 (F. B.).

(3) (1913) P. 75; 82 L. J. P. 56; 108 L. T. 271; 57 S. J. 343; 29 T. L. R. 321.

(4) (1910) P. 271; 79 L. J. P. 115; 103 L. T. 430; 54 S. J. 721; 26 T. L. R. 634.

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cabin. But, quite apart from admissions of Counsel, an Official in the Steamship Company, who owned this particular steamer, has been called. He produced the original passenger tickets issued to the co-respondent and the respondent. He also produced a passenger register showing the passengers who eventually travelled by this boat. Having regard to the peculiar name of the co-respondent and the name of the wife and the fact that her son by her former marriage is named Jules, I think the identity of the persons named in these records is clearly established as being that of the wife and the co-respondent.

In my opinion, therefore, the charge of adultery against the wife is clearly proved. I think it unnecessary for Counsel to go into the other charges which are contained in paragraph 18 of the petition, and in respect of which there was a particular order dispensing with the co-respondent. Nor is there any point of delay, because the husband swears that it was not still after his wife had brought this petition that he knew that she had gone with the co-respondent on this particular voyage to Marseilles.

On the cross-petition of the husband, there will accordingly be a decree *nisi* for the dissolution of the marriage. There will be an order for costs against the co-respondent as asked in prayer (b). The usual minimum period of six months will be fixed in the decree *nisi*.

W. C. A'

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 2 OF 1922.

November 14, 1922.

Present:—Mr. Justice B. B. Ghose.

BASANTA KUMARI GUPTA AND OTHERS

—PETITIONERS

VERSUS

ABHOY SANKAR SEN AND OTHERS

—OPPOSITE PARTY.

Civil Procedure Code (Act V. of 1908), s. 151, O. XLVII, r. 7—Review, grant of—Grounds not sufficient—Order under s. 151—Appeal.

An appeal does not lie from an order granting an application for review of judgment, even although there were not sufficient reasons for entertaining the application, as the grounds on which such an appeal may be entertained are restricted by the provisions of O. XLVII, r. 7 of the Civil Procedure Code. [p. 307, cols. 1 & 2.]

An appeal does not lie from an order passed under section 151 of the Civil Procedure Code. [p. 307, col. 2.]

Rule against the decision of the District Judge, Dacca, dated the 23rd September, 1921, reversing that of the Munsif, Fifth Court, Dacca, dated the 7th February 1921.

Bibu Sures Chandra Talukdar, for the Petitioners.

Babu Nagendra Nath Ghose, for the Opposite Party.

JUDGMENT.—This Rule was obtained by the plaintiffs for revision of an order passed on appeal by the District Judge of Dacca, dated the 23rd September 1921, from an order of the Munsif of the same place, dated the 7th February 1921, by which he set aside the order of dismissal of a suit and restored it for hearing. What happened was that the suit had been proceeded with for a considerable time and, as the learned Munsif observes, was advanced to some extent and that the plaintiffs had spent a good deal of money for it. The suit related to establishment of the plaintiffs' title to a piece of land and if the plaintiffs' allegations in the plaint are true, the act of the defendants would affect their rights to a very great extent. On the last occasion when the suit came up for hearing before the Munsif it so happened that the two Pleaders engaged for the plaintiffs were both absent. The Munsif dismissed the suit for default. There was an application for restoration of the suit shortly afterwards under O. IX, r. 9, Civil Procedure Code. But a difficulty was found in proceeding with the application under that Rule as one of the plaintiffs happened to be present in person in Court when the order for dismissal was made. This difficulty felt by the Munsif was overcome by his allowing the plaintiffs to alter their application for restoration of the suit to one for review of his previous order and this, it appears, was not objected to by the defendants. Then the Munsif, treating that

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application as an application for review under O. XLVII, r. 1, Civil Procedure Code, set aside his previous order of dismissal of the suit. He states in his judgment, "I set aside the order of dismissal of the suit and restore the suit in the interest of justice and in the exercise of inherent jurisdiction of this Court as section 151 of the Code of Civil Procedure gives me based on the application under O. XLVII, r. 1, Civil Procedure Code." Then he imposed certain terms on the plaintiffs as regards payment of costs.

The defendants appealed to the District Judge and on appeal the learned Judge held that the plaintiffs had failed to show that they had any sufficient cause for applying for review of judgment and thereupon allowed the appeal and set aside the order of the Munsif, restoring the original suit. The question raised by the petitioners is that the appeal to the District Judge was incompetent; having regard to O. XLVII, r. 7 of the Code of Civil Procedure. It is contended by the opposite party that there was an appeal to the District Judge, because the order of the Munsif contravened the provisions of r. 4, sub-rule (1) of O. XLVII and, secondly, that the order of the Munsif restoring the suit having been passed without jurisdiction, I should not in any case restore the order of the Munsif. With regard to the last contention, I am of opinion that, assuming that the Munsif's order was not in strict accordance with the procedure laid down in the Civil Procedure Code, the result has been to remove a great hardship and it was as he himself has put it, "in furtherance of justice." If I were asked to set aside this order in revision I do not think I should have interfered with it in the exercise of my discretion. If, however, as the learned Vakil for the opposite party contends, the appeal to the District Judge was competent, this Court can not revise the order of the District Judge. It seems to me that there was no appeal from the order of the Munsif to the District Judge under the provisions of the Code of Civil Procedure. The learned Munsif took into consideration the facts under which he made his previous order and although, according to the provisions of the Code, there might not have been sufficient reasons for entertaining an application for review of

judgment, there was no appeal from that order, however erroneous it might be, as the grounds on which such an appeal may be entertained are restricted by the provisions of r. (7), O. XLVII. I do not think that the order of the Munsif contravenes any of the provisions of O. XLVII, r. 4. Moreover, the learned Munsif purported to have exercised the inherent jurisdiction of the Court under section 151 of the Code of Civil Procedure. There could not be any appeal to the District Judge against an order passed under section 151. I, therefore, hold that the appeal to the District Judge was incompetent and the order of the District Judge passed on appeal must, therefore, be set aside as without jurisdiction and that of the Munsif restored.

Under the circumstances, however, the petitioners must pay the costs of the appeal before the District Judge to the opposite party.

I make no order as to costs in this Court
N. K. *Rule made absolute.*

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 135 OF 1922.

November 29, 1922.

Present:—Mr. Daniels, A.J.C.

Pandit RAJENDRA NARAYAN—

PLAINTIFF—APPELLANT.

versus.

GHAFOR KHAN—

DEFENDANT—RESPONDENT.

Costs—Discretion—High Court, interference by.

The High Court will not interfere with the reasonable exercise of discretion by an Appellate Court in the matter of costs.

Second appeal against a decree of the First Subordinate Judge, Bahraich, dated the 3rd February 1922, modifying that of the Munsif, Bahraich, dated the 22nd November 1921.

Mr. Tara Shankar, for the Appellant.

Mr. M. A. Khan, for the Respondent.

JUDGMENT.—This appeal has been pressed solely on question of costs. The suit was

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One for a balance due to the plaintiff in respect of bricks which the defendants failed to supply. The claim was for Rs. 800. Rs. 541-4 were evidently decreed. The First Court allowed the plaintiff proportionate costs. The lower Appellate Court disallowed his costs altogether. Where a reasonable discretion has been exercised in the matter of costs this Court will be slow to interfere. I have to see, therefore, whether the Court below has given its consideration to the question and given reasonable grounds for the order passed. The question has been considered, and the grounds given are in the main two.

In the first place, the plaintiff produced in support of his case a letter purporting to come from the defendant which both the Courts below have found not to be genuine. This is certainly a very serious matter. In the second place, the lower Appellate Court finds that the plaintiff got a fictitious agreement executed by one Muhammad Ali in order to enable him to get damages to which he was not entitled. These were sufficient grounds for disallowing costs and I am not prepared to interfere.

The second point pressed is, that the deficient duty and penalty on a certain document which was levied from the appellant should have been included in the costs. It is pointed out by the appellant that if the duty had been levied under section 35 of the Stamp Act the liability should have been passed on to the defendant in accordance with section 44 of that Act. In this case, however, it is common ground that the duty and penalty were illegally levied. The document in question had been admitted by the lower Court without any question of stamp-duty being raised. In these circumstances, the power of the Appellate Court under sections 35 and 61 of the Stamp Act was confined to recording its opinion as to the duty and penalty payable, impounding the documents and sending them to the Collector for action. However, no one seems to have drawn the attention of the Court to the fact that it was acting *ultra vires* and the duty and penalty were levied not by the judgment but by a separate order. It seems difficult to hold that any legal liability can attach to the defendant in respect of a penalty illegally levied from the opposite party and section 44 certainly

does not apply to it. I am, therefore, unable to accept this plea also. It must be conceded that the conduct of the defendant in the case was very far from faultless. Not only did he not admit the amount which was due from him but in his written statement he claimed that a sum of Rs. 346-9 was actually due to him from the plaintiff. Under these circumstances, although I dismiss this appeal I do so without costs. The order is that the appeal is dismissed. The parties will bear their costs.

W. C. A.

*Appeal dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 826 OF 1922.

November 30, 1922.

Present :—Mr. Justice Harrison.**KADIR BAKHSH—PLAINTIFF—
APPELLANT***versus***ALLAH DITTA—DEFENDANT—
RESPONDENT.***Custom—Succession—Collaterals v. Sister—Lah. Jats of Muzaffargarh District.*

Among Lak Jats of the Muzaffargarh District a sister or sister's son excludes collaterals of the third degree.

Alam v. Nur, 62 P. R. 1905; 145 P. L. R. 1905; 76 P. W. R. 1905 and *Sawan v. Sahib Khatun*, 2 Ind. Cas. 71; 44 P. R. 1909; 67 P. L. R. 1909; 69 P. W. R. 1909, referred to.

In matters of succession under the Customary Law the position of females generally is very much stronger in the western Punjab than in other parts of the Province. [p. 309, col. 1.]

Second appeal from a decree of the District Judge, Multan, dated the 1st December 1921, affirming that of the Munsif, First Class, Muzaffargarh, dated the 11th July 1921.

Mr. B. A. Cooper, for the Appellant.
Lala Rama Nand, for the Respondent.

JUDGMENT.—Plaintiff in this case, who is the collateral in the third degree of one Piara, a childless proprietor, who died in 1918, brings this suit against his sister's son in whose name mutation has been effected, and contends that by custom

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he has a better right to succeed. The suit has been dismissed by both the lower Courts, and he now comes up on second appeal with a certificate; and the only point to be decided is whether, amongst Lak Jats of the Muzaffargarh District, collaterals in the third degree exclude sister's sons.

The plaintiff relies on one published decision of this Court, a decision of the District Judge of Muzaffargarh and one of the Munsif of Muzaffargarh. These refer to particular cases in which it was decided that, among Minwal Jats, Gorab Jats and Gurab Jats, collaterals exclude sisters. He also relies on the reply to question No. 10 in the *Riwaj-i-am* which shows that in some cases sisters have been excluded and in other cases collaterals have been excluded by them.

As against this evidence there is the Customary Law of the Muzaffargarh District, question No. 21, in which it is clearly laid down that sisters or their descendants succeed in preference to the grandfather or his descendants. In two reported decisions of the Chief Court, *Alam v. Nur* (1) and *Sawan v. Sahib Khatun* (2), which related to Mithu Jats and Panwar Jats of the Muzaffargarh District, it was held that sisters succeed as against collaterals. Similarly, in Exhibit D-I sisters and their sons have been preferred and in Exhibit D-II, a judgment of Wilberforce, J., (No. 151 of 1912) it was held that among Mouda Jats sisters excluded collaterals in the third degree. The position of the females generally, as has been clearly established in many rulings, is very much stronger in the western Punjab than elsewhere.

I find that it is fully established by the evidence on the record that a sister or sister's son excludes collaterals in the third degree among Lak Jats of the Muzaffargarh District. I, therefore, dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 62 P. R. 1905; 145 P. L. R. 1905; 76 P. W. R. 1905.

(2) 2 Ind. Cas. 71; 44 P. R. 1909; 67 P. L. R. 1909; 69 P. W. R. 1909.

SECOND CIVIL APPEAL NO. 30 OF 1923.

March 20, 1923.

Present:—Mr. Justice Kanhaiya Lal, J. C.

NARAYAN DAS—DEFENDANT—

APPELLANT

versus

MAHESHI LAL—PLAINTIFF—

RESPONDENT.

Wagering contract—Speculation—Intention.

The element of speculation is present in most transactions relating to the sale and delivery of goods at a certain rate at some future date owing to the possibility of fluctuations in the market-rate. But where it is accompanied by a real desire or intention on the part of the vendor to sell and the buyers to purchase the goods agreed to be sold at the contracted rate, the contract is not a wagering contract and can be enforced.

Kong Yee Lone & Co. v. Lowjee Manjee, 29 C. 461; 28 I. A. 239; 5 C. W. N. 714; 3 Bom. L. R. 476; 8 Sar. P. C. J. 101 (P. C.) and *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji*, 44 Ind. Cas. 284; 42 B. 373; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29 (P. C.), referred to.

Second appeal against a decree of the District Judge, Gonda, dated the 2nd December 1922, upholding a decree of the Sub-Judge, Bahraich, dated the 20th June 1921.

Messrs. *Ram Chandra and Hardhian Chandra*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The suits, which have given rise to these appeals, were brought by the plaintiff-respondent for the recovery of damages. Both the parties are shopkeepers carrying on cloth business at Bahraich. On the 8th September 1919 the plaintiff and the defendant were talking about the possible decline or rise of the market rate, and in the course of that conversation, the plaintiff said that the market rate would not fall while the defendant said that it would. Eventually, the plaintiff agreed to purchase 100 pieces of muslin at Rs. 7 per piece and 25 pieces of long-cloth at Rs. 20 per piece within a year and the defendant agreed to supply the same at those rates. The market-rates for those goods, however, rose and the defendant failed to supply the said goods. The plaintiff consequently sued for damages

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calculating the same on the difference between the rates settled and the rates prevailing on the date of the last day fixed for delivery.

The main defence was, that the contract was of a wagering or speculative character and consequently unenforceable. The Courts below found, that there was nothing to show that there was no intention not to take delivery of the goods. As observed in *Kong Yee Lone & Co. v. Lowjee Manjee*, (1) and *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji* (2) a contract may be unenforceable, if it only amounts to a wager on the rise or fall of the market, and is not accompanied by an intention to sell or to purchase goods at a given time and place at a certain rate. To some extent, speculation forms an element in many transactions relating to the sale and delivery of goods at a certain rate, because the market-rate for those goods may be liable to fluctuation; but the existence of such an element does not make the contract void, because it may yet be accompanied by a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold, at the contracted rate. Where such an intention exists, the contract is not a wagering contract and can be enforced. The Courts below found, though in a somewhat negative form, that the absence of such an intention was not proved. It is not possible to interfere with that finding here.

As regards the amount of damages, there was no disagreement between the parties as to the rates originally settled and those prevailing on the last date fixed for delivery. The plaintiff has, therefore, been rightly awarded the amount claimed.

The appeals fail and are dismissed with costs.

G. H.

Appeals dismissed.

(1) 29 C. 461; 28 I. A. 239; 5 C. W. N. 714; 3 Bom. L. R. 476; 8 Sar. P. C. J. 101 (P. C.).

(2) 44 Ind. Cas. 284; 42 B. 373; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29 (P. C.).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 103 OF 1921.

January 29, 1923.

Present.—Sir Norman Macleod, Kt.,

Chief Justice, and Mr. Justice Crump.

KALYANCHAND LALACHAND PATNI

AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHOGILAL JAYACHAND—

DEFENDANT—RESPONDENT.

Principal and surety—Decree against principal only—Appeal—Execution of decree—Limitation terminus a quo.

Where in a suit against a principal and his surety a decree is passed against the principal only, and the plaintiff appeals against that part of the decree exonerating the surety and the appeal is dismissed, the decree to be executed is the decree of the Trial Court, and limitation, for the purpose of execution, runs from the date that decree was passed.

First appeal from the decision of the First Class Subordinate Judge at Jalgaon, in Darkhast No. 664 of 1920.

Mr. S. S. Patkar, Government Pleader, for the Appellants.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.—The plaintiffs filed a suit in 1905 against the four sons of one Jayachand, deceased. They added as a defendant one Bhaichand who they alleged stood surety for the amount due by Jayachand. A decree was passed in March 1907 against defendants Nos. 1 to 4 as representatives of the deceased Jayachand. The plaintiffs' suit against defendant No. 5 was dismissed. Against that order of dismissal the plaintiffs appealed but without success. The plaintiffs made various applications for execution against defendants Nos. 1 to 4, including *Darkhast* No. 745 of 1917 filed in the First Class Subordinate Judge's Court at Dhulia, which was transferred to Jalgaon owing to the transfer of the territorial jurisdiction from Dhulia to Jalgaon. By that *Darkhast* the applicant sought to attach the particular house to which a claim was made by a third party which was successful. Thereafter, the applicant asked the Court to amend that particular *Darkhast* by substituting other property for the property therein mentioned which had already been declared to be not liable to be attached. We think that the amendment ought not to have been allowed and

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that the application must be considered as a fresh application. Otherwise, clearly, the provisions of section 48 of the Civil Procedure Code could easily be evaded, and a *Darkhast* could be kept alive for an indefinite time.

It is necessary, therefore, to consider whether Exhibits 35 and 71, which admittedly are applications for execution made more than twelve years after the date when the decree was passed against defendants Nos. 1 to 4, were in time, and it is contended that limitation runs from the date the plaintiffs' appeal in the High Court against defendant No. 5 was dismissed. That contention could only prevail if the High Court in dismissing the appeal, could be said to have passed a decree against defendants Nos. 1 to 4 which could be executed. It is not suggested that the High Court confirmed the decree against defendants Nos. 1 to 4 which had already been passed by the lower Court. It merely dismissed the plaintiffs' appeal as against defendant No. 5. It seems to me, therefore, that the decree which is sought to be executed is the decree of the Trial Court and no other, and that limitation must run from the date that decree was passed.

Various cases have been cited, but I doubt that any of them are really in point. In *Mashiat-un-nissa v. Rani* (1) a decree for possession of immovable property was passed not jointly, but severally as against all the defendants individually and specifically stated the proportions of which they were severally in possession. Two of the defendants appealed, and it was held that the first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree was barred by limitation. On the other hand, when a decree is passed in favour of the plaintiff against a particular defendant, and part of the decree is appealed against, then no doubt the whole case is before the Appellate Court and the decree of the Appellate Court will be the decree to be executed.

It seems to me this case stands entirely on its own facts, and the plaintiffs, as soon as the decree was passed against defendants Nos. 1 to 4, could have executed it. An application by defendants Nos. 1 to 4 to the Appellate Court for stay of execution, because the plaintiffs were appealing against defendant No. 5, certainly would not have been competent. There was nothing, therefore, to prevent the Court executing the decree passed against defendants Nos. 1 to 4 and the date of that decree must be the date from which limitation must run for the purposes of execution. We think the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION NO. 16 OF 1920.

October 17, 1922.

Present:—Mr. Kennedy, J. C., and
Mr. Madgavkar, A. J. C.SAKER CHAND NARSIDAS—
PLAINTIFF—APPLICANT

versus

YACOOB AND ANOTHER—OPONENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Preliminary decree—Execution, application for, whether can be treated as application for final decree.

When the holder of a preliminary decree, instead of applying for a final decree being passed, applies for the execution of the decree, the Court has no jurisdiction to treat the latter application as an application to make the decree final. [p 312, col. 1.]

JUDGMENT.—The question is whether this application of the plaintiff-applicant under O. XXXIV, r. 5 to make the decree final is within time.

The preliminary decree under O. XXXIV, r. 4 of the Code of Civil Procedure was passed on the 26th of October 1915. The period allowed to pay the mortgage amount was six months which expired on the 26th of April, 1916. The decree-holder or his legal advisers appear to have done nothing from start to the finish effectively to make the

(1) 13 A. J. A. W. N. (1890) 207; 7 Ind. J. ec. (N. S.) 1 (F. I.).

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decree final. The first application made was one for execution on the 3rd September 1918. The only reference made to it is in the present application made in the lower Court and that former application itself is not contained in the record before us. On referring to the former application, however, it appears that it was returned to the applicant with a direction that he should first apply for a final decree being passed. Despite this direction nothing further was done till the 24th of April 1919 when an application similar to the present one was made and it was dismissed for the failure to supply a copy. The second application was made on the 17th of June 1919 which was dismissed for default. The present application was made on the 17th of September 1919.

It is argued for the applicant that the application in September 1918 for execution should be treated as an application to make the decree final and secondly the present application should be taken to be a revival of the former application and thus to extend the period. Both the grounds appear to us to be without any substance. The law as laid down in O. XXXIV of the Code of Civil Procedure was expressly altered some what from the old law under the Transfer of Property Act. It is incumbent on the parties to comply with new provision. Nor can the Court be asked to remove such an omission by allowing an application for execution to be treated as an application for making the decree final. The object of amending the law, as was pointed out by Jenkins, C. J., who was himself partly concerned in framing the present Code, in the case of *Amolak Chand Parak v. Sharat Chandra Mukherjee* (1), was to end as far as possible the conflict of old decisions. And although a certain number of cases in the unauthorised reports of the Madras High Court, such as *Natesa Udayan v. Annasami Udayan* (2), are in favour of the contention of the applicant to a certain extent, we agree with the reasoning of Sir Lawrence Jenkins which found favour with the Allahabad High Court in the case of *Ahmed Khan v. Gaura* (3) that

an application for execution should not be treated as an application to make the decree final. There is no question that Art. 181 applies to the present case. When the law expressly lays down the period of three years from the expiry of six months in the preliminary decree within which the applicant is bound to apply to make the decree final we have no jurisdiction, we think, as we are asked to do to extend the period of limitation laid down by law by granting the present application which was clearly beyond time. Judgment-debtors have their rights equally with the decree-holders and the negligence of the latter to take the proper legal steps within the period of limitation should not be condoned on the ground set up in the present case.

The application fails and must be dismissed with costs.

N. K.

Application dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES.

Nos. 1516 TO 1530 AND 2012 AND 2013 OF 1919.

August 16, 1922.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

KRISHNA KAMINI DASÍ and ANOTHER

—DEFENDANTS—APPELLANTS

versus

NIL, MADHAB SAHA and OTHERS—

PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (1), (2), (3), operation of—Sub-division or amalgamation of tenure, effect of—Construction of Statutes—Expressio unius exclusio alterius, applicability of.

The operation of section 50 (1) and 50 (2) of the Bengal Tenancy Act is not excluded in the case of tenures merely by reason of sub-division or amalgamation. [p. 315, col. 2.]

The sub-division of a tenure does not operate as a breach of the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equals the original rent. [p. 315, cols. 1 & 2.]

(1) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N.

49.

(2) 34 Ind. Cas. 736; 3 L. W. 468.

(3) 43 Ind. Cas. 518; 16 A. L. J. 143.

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The maxim "*expressio unius exclusio alterius*" is often a valuable servant, but a dangerous master to follow in the construction of Statutes or documents. The *exclusio* is often the result of inadvertence of accident and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." [P. 316, col. 2.]

Appeals against the decrees of the District Judge, Nadia, dated the 5th of April 1919, modifying that of the Revenue Officer, Krishnagarh, dated the 14th of December 1916.

Babu Mahendra Nath Roy (with him Babu Baranashibasi Mukerjee), for the Appellants:—The defendants are the appellants. The appeals arise out of proceedings under section 105 of the Bengal Tenancy Act. Our defence was that we were not liable to assessment by virtue of the presumption raised in our favour under section 50 of the Bengal Tenancy Act. The Assistant Settlement Officer held that these were cases of tenures and he enhanced our rents. On appeal it was held at first that having regard to the provisions of section 50 of the Bengal Tenancy Act the rents were not enhanceable. On review, however, the learned Judge reversed that decision and affirmed that of the Assistant Settlement Officer. The question now to be decided is, whether the sub-division of a tenure affects the presumption raised under section 50 of the Bengal Tenancy Act. The finding is that the original tenures had been sub-divided with the consent of the landlords; each sub-divided portion was held at a proportionate rent and that the aggregate rent was equal to the original rent. The learned Judge holds that the sub-division amounts to the creation of new tenures and that, therefore, the provisions of section 50 of the Bengal Tenancy Act not applying to such a case the rent is liable to enhancement. I submit the continuity of a transferable tenure is not affected by sub-division. See *Chandra Kanta Chakrabarty v. Ram Krishna Mahalnobis* (1), *Jagabandhu Saha v. Magnamoyi Dassi* (2). The

decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) was distinguished in *Jyoti Prasad Singh v. Lachipur Coal Company* (4), *Bissesswar Roy Chowdhry v. Rajendra Kumar Singha* (5). I submit, in view of these decisions, the judgment of the learned lower Appellate Court is manifestly wrong and ought to be set aside.

Babu Ram Chandra Mazumdar (with him Babu Amarendra Nath Bose), for the Respondents.—There is nothing to show that these tenures were sub-divided before the passing of the Bengal Tenancy Act. The decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) has never been expressly dissented from. In the case of *Jyoti Prasad Singh v. Lachipur Coal Company* (4) the facts and circumstances were very different from the present case. Hence the case of *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) was distinguished there. In *Aditi Singha v. Sukhraj Rai* (6) also it was the case not of a tenure but of a *raiya* holding. The case of *Bissesswar Roy Chowdhry v. Rajendra Kumar Singha* (5) proceeded upon altogether different considerations. The case of *Jagabandhu Saha v. Magnamoyi Dassi* (2) was not a case under section 50 of the Bengal Tenancy Act. If you disagree with the decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3), I would ask for a reference to the Full Bench for the elucidation of the point. That case is evidently supported by section 50 (3) of the Bengal Tenancy Act. It has been found that the tenures in each case did not exist for 20 years.

Babu Mahendra Nath Roy, replied in brief.

JUDGMENT.—These seventeen appeals arise out of as many proceedings instituted by landlords under section 105 of the Bengal Tenancy Act for assessment of fair and equitable rent in respect of lands included in tenures held under them. The tenure-holders contended that they were entitled to the benefit of the presumption formulated in sec-

(1) 36 Ind. Cas. 707; 20 C. W. N. 1002; 24 C. L. J. 275.

(2) 36 Ind. Cas. 884; 44 C. 555; 24 C. L. J. 363; 22 C. W. N. 89.

(3) 1 Ind. Cas. 4; 36 C. 287; 13 C. W. N. 410.

(4) 12 Ind. Cas. 482; 16 C. W. N. 241; 38 C. 845; 14 C. L. J. 361.

(5) 25 Ind. Cas. 228; 18 C. W. N. 949.

(6) 21 Ind. Cas. 385; 17 C. L. J. 435.

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tion 50 (2) of the Bengal Tenancy Act and were consequently protected from enhancement under section 50 (1). It was found that the original tenures had been subdivided with the consent of the landlords; each fragment was held at a proportionate rent and the aggregate rent was equal to the original rent. Notwithstanding this, the Revenue Officer held that the provisions of section 50 were inapplicable to the disputed tenures, which must be deemed to be new tenures the rent whereof was liable to enhancement. On appeal, the Special Judge held that the sub-division of a tenure does not operate as a breach of the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equals the original rent. The Special Judge, however, reviewed his decision and ultimately adopted the view taken by the Revenue Officer. We have now to consider whether the earlier or the later view which commended itself to the Special Judge is correct.

Section 50 (3) of the Bengal Tenancy Act provides as follows —

"The operation of this section, so far as it relates to land held by a *raiyat*, shall not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding."

With reference to this provision, it was ruled by Sharfuddin and Coxe, JJ., in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3), that where a tenure existed from long before the Permanent Settlement but was subsequently split up into two equal halves, each bearing one-half of the original rent, the old tenure could not be regarded as continued in the shape of the two new tenancies. The Court held that the words "so far as it relates to land held by a *raiyat*" in section 50 (3) clearly imply that the operation of the section, so far as it relates to land held by a tenure-holder, is affected by the separation of the land from other land which formed with it a single tenure. It is plain that the Court held the maxim applicable, *expressio unius est exclusio alterius*. The construction of section 50 (3) adopted in this case has, however, found no favour with the Courts.

In *Mulluk Chand Das v. Satish Chandra Das* (7) where *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) was cited, the Court declined to lay it down as an inflexible rule of law of universal application that whenever the lands of a tenancy have been sub-divided, there is a creation of new tenancies, destructive of the original obligation, and added that the effect of the division must depend upon the intention of the parties. Again, in *Jyoti Prasad Singh v. Lachipur Coal Company* (4) Coxe, J., who had been a party to the previous decision, distinguished it with the concurrence of Teunon, J., and held that where the original grant was that of a permanent tenure, the mere fact that subsequently the tenure was split up into more than one would not affect the permanent character of the tenancies. The decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) was again pressed upon the attention of the Court in *Biswaswar Roy Chowdhry v. Rajendra Kumar Singha* (5), but the endeavour was fruitless. In *Adit Singha v. Sukhraj Rai* (6) the Court reserved its opinion upon the question decided in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) but pointed out that under the Bengal Rent Recovery Act, 1859, the principle recognised in section 50 (3) as applicable to *raiyati* holdings had been applied to tenures, *Kazee Khoda Newaz v. Nubo Kishore Raj* (8), *Raj Kishore Mookerjee v. Hureehur Mookerjee* (9), *Kasheenath Lushkur v. Bama-soonduree Dobia* (10) and *Soodha Mookhee Dassee v. Ram Guttee* (11). In *Chand Kanta Chakravariy v. Ram Krishna Mahalanabis* (1) the proposition was treated as well-settled that the continuity of a transferable tenure is not affected by sub-division or by consolidation. The Court added that the decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) overlooked, as had been already pointed out in *Adit Singha v. Sukhraj Rai* (6),

(7) 3 Ind. Cas. 306; 11 C. L. J. 56; 14 C. W. N. 335.

(8) 5 W. R. Act X, Rul. 53.

(9) 10 W. R. 117; 1 B. L. R. (S. N.) VIII; 1 Ind. Dec. (N. S.) 409.

(10) 10 W. R. 429.

(11) 20 W. R. 419.

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the pre-existing law on the subject, as indicated in the cases of *Hills v. Huro Lall* (12) and *Kazee Khoda Newaz v. Nubo Kishore Raj* (8), which are in conformity with *Ramnath v. Robert Watson and Company* (13), *Sukhimani v. Gangagobinda* (14) *Hill v. Basarat Mir* (15), *Ram Kumar v. Raghab Mondal* (16) and *Gopal Chandra v. Mathuramohan* (17). In *Jagabandhu Saha v. Magnamoyi Dassi* (2) the proposition was again affirmed that as the tenure was divisible, the fact of sub-division was not a breach of its continuity, and each fragment, carved out of the original tenure, retained its incidents. To the same effect is the decision in *Prossanna Deb Roykot v. Safuruddin Ahmed* (18), where it was ruled that mere sub-division of an old tenure or amalgamation does not necessarily mean the creation of a new tenure, so as to destroy the presumption under section 50(2) of the Bengal Tenancy Act, and the Court did not follow the decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3), as Chatterjee, J., had not done many years earlier in *Pirithi Chand Lal v. Sheikh Hazari* (19).

The position thus is, that the decision in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) stands by itself, and every effort made to induce the Court to follow it has been unsuccessful. It is further plain that when the decision was pronounced, the attention of the Court was not drawn to the fact that, under the pre-existing law, it was firmly established in respect of tenures at least, that neither sub-division nor amalgamation necessarily destroyed their continuity. It is difficult to believe that if the Legislature intended to introduce such a fundamental change in the existing law, the object would be attempted to be achieved by implication. The alteration would seriously prejudice all tenure-holders in the country

with retrospective operation. If sub-section (3) is interpreted as a provision enacted in favour of the *raiya*t and against the tenure-holders, it would restrict the operation of sub-section (1) as also of sub-section (2) to the case of tenure-holders, only so long as the tenures were not sub-divided or amalgamated. Sub-section (1), it will be observed, contains the substantive rule on the subject of protection from enhancement, while sub-section (2) deals merely with the mode of proof. If sub-section (3) had the effect attributed to it, the result would follow that, even in the case of a tenure, proved by direct evidence to have been created before the date of the Permanent Settlement, and to have been held at an unchanged rent or rate of rent since that time, the protection afforded by sub-section (1) would disappear in the event of sub-division, whether prior or subsequent to the enactment of the Bengal Tenancy Act. If an alteration of this character in what was settled law in respect of tenure-holders had been intended, an express provision would have been made in that behalf. We are of opinion that sub-section (3) must have been introduced solely with a view to secure the position of *raiya*t which it is well-known, was the chief aim of the legislation culminating in the Bengal Tenancy Act and not with a view to injure the position of tenure-holders. In fact, an examination of the judicial decisions shows that while the rights of tenure-holders in respect of the matter now before us, were assured, the positions of *raiya*t was by no means equally clear, see the decision of Sir Richard Couch, C.J., in *Moula Buksh v. Judoonath Sadoo Khan* (20). In our judgment, this is not a case where the maxim *expressio unius exclusio alterius* can be safely applied.

It may be conceded that, as stated by Sir Barnes Peacock in delivering the judgment of the Judicial Committee in *Blackburn v. Flavell* (21), a general rule of construction of Acts of Parliament is *expressio unius exclusio alterius*. Nor need we dispute

(12) 3 W. R. Act X, Rul. 135; 2 Board Dec. 676.

(13) (1863) Sevestre 36; 1 Board Dec. 169.

(14) (1864) 2 Board Dec. 181.

(15) (1864) 2 Board Dec. 192.

(16) (1865) 2 Board Dec. 277.

(17) (1865) 2 Board Dec. 675.

(18) 46 Ind. Cas. 433.

(19) 5 Ind. Cas. 453.

(20) 21 W. R. 267.

(21) (1881) 6 App. Cas. 628 at p. 634; 50 L. J. P. C. 58; 45 L. T. 52; 30 W. R. 67.

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the accuracy of the statement quoted from the judgment of Hargrave, J., in *Drinkwater v. Arthur* (22): "If there be any one rule of law clearer than another as to the construction of all Statutes and all written instruments (as, for example, sales under powers in deeds and Wills), it is this: that where the Legislature or the parties to any instruments have expressly authorised one or more particular modes or sale or other dealing with property, such expressions always exclude any other mode except as specifically authorised."

But it is important to bear in mind that the method of construction summarised in the maxim cannot be applied without limitation, for a failure to make an *expressio* complete may easily arise from the accidents of Legislative procedure, and it is common to find provisions put into Statutes *ex abundanti cautela* and at the instance of parties interested. Consequently, provisions sometimes found in Statutes enacting imperfectly or for particular cases only, that which was already and more widely the law, have occasionally furnished ground for a specious argument, based on the maxim, that an intention to alter the general law was to be inferred from the partial or limited enactment. But the maxim is plainly inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which often find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution. This point of view is lucidly explained in the following passages from the judgment of Farwell, L. J., in *Lowe v. Dorling* (23):—

"Acts of Parliament are not, in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of the maxim '*expressum facit cessare tacitum*', which was relied on, renders caution necessary in its application. It is not enough that the express and the tacit are merely incon-

gruous, it must be clear that they cannot reasonably be intended to co-exist." In *Colquhoun v. Brooks* (24) Wills, J., says: "I may observe that the method of construction summarised in the maxim '*Expressio unius exclusio alterius*' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the '*Expressio*' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind; and the application of this and every other technical rule of construction varies so much under differing circumstances, and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant." Lopes, L. J., in the Court of Appeal *Colquhoun v. Brooks* (25) says: "the maxim '*Expressio unius exclusio alterius*' has been pressed upon us I agree with what is said in the Court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of Statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

It may be observed that the view taken by Wills, J., in *Colquhoun v. Brooks* (24) which gave way to that of Stephen, J., in the Division Court was approved by Lord Esher, M.R., and Lopes, L. J., in the Court of Appeal, Fry, L. J., dissenting, *Colquhoun v. Brooks* (25) and, ultimately the decision in the House of Lords was in accordance with the dissentient judgment of Wills, J., *Colquhoun v. Brooks* (26).

We may also usefully re-call here the warning given by Lord Halsbury in *McLaughlin v. Westgarth* (27): "It might be
(24) (1887) 19 Q. B. D. 406; 57 L. J. Q. B. 70 at p. 73; 57 L. T. 448; 36 W. R. 332.
(25) (1888) 21 Q. B. D. 52 at p. 65; 57 L. J. Q. B. 439; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.
(26) (1889) 14 A. C. 493; 59 L. T. 850; 38 W. R. 289.
(27) (1906) 75 L. J. P. C. 117; 94 L. T. 831; 22 T. L. R. 594.

(22) (1879) 10 Sup. Ct. N. S. W. 103;

(23) (1906) 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243; 22 T. L. R. 779.

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that modern Statutes were drawn with greater particularity and minuteness. The misfortune in the framing of those Statutes was that any body of persons, seeing a possibility of liability on their part, apply to Parliament to have special provisions inserted for their protection. That application was occasionally complied with, and then the argument arose, which their Lordships had heard that day, namely, that any body who is not included in the enumeration of the particular persons so interested, must be taken to be excluded by the operation of the Statute from protection just because they were not excluded and others were. The doctrine applicable to all such cases was that a great many things were put into a Statute *ex abundanti cautela* and it was not to be assumed that any body not specifically included was, for that reason alone, excluded from the protection of the Statute." It may be mentioned here that before the High Court of Australia, *McLaughlin v. Fosbery* (28) the position that the protection given by a Statute must be construed strictly as extending only to those persons who are expressly mentioned and to things done under the Statute had been attempted to be supported by reference to *Fletcher v. Fletcher* (29), *Thomas v. Saunders* (30), *Eliot v. Allen* (31), *R v. Pinder, In re Greenwood* (32) and *Griffith v. Taylor* (33). In support of the view taken in *McLaughlin v. Westgarth* (27) reference may also be made to *West Derby Union v. Metropolitan Life Assurance Society* (34), *Mollwo, March & Company v. Court of Wards* (35), *Duke of Newcastle v. Morris* (36).

Our conclusion is that the maxim *expressio unius exclusio alterius* has no

application to the present case, that section 50(3) was inserted for the benefit of *raiyats* and not with a design to prejudice tenure-holders, that the operation of section 50 (1) and 50 (2) is not excluded in the case of tenures merely by reason of sub-division or amalgamation and that the decision to the contrary effect in *Uday Chandra Karji v. Maharaja Nripendra Narayan Bhup* (3) cannot be supported on principle. In this view, we need not consider whether the Special Judge should have at all entertained the application for review of judgment. But we may add that the decision of the Judicial Committee in *Chhajju Ram v. Neki* (37) lends support to the construction of the appellant that the review should not have been granted.

The result is that these appeals are allowed, the decrees made by the Special Judge after review, on the basis of his judgment dated 5th April 1919, are set aside and the decrees originally made by him pursuant to his judgment dated 25th May 1918 are restored. The appellants are entitled to their costs in this Court. The hearing fee will be assessed at one gold *mchur* in each case.

B. N.

Appeals allowed.

(37) 72 Ind. Cas. 566; 49 I. A. 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37. 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 168 OF 1921.

March 21, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

DAMRUPAT SINGH AND OTHERS—
PETITIONERS—APPELLANTS

versus

The Hon'ble Maharajadhiraj Sir
RAMESHWAR SINGH BAHADUR
OF DARBHANGA—OPPOSITE PARTY
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66, 90—Execution of decree—Sale proclamation—Valuation, alternative, whether can be entered.

- (28) (1904) 1 Com. L. R. 546 at p. 552.
(29) (1859) 1 El. & El. 420; 117 R. R. 271;
28 L. J. Q. B. 134; 5 Jur. (N. S.) 678; 120 E. R. 967.
(30) (1833) 5 B. & Ad 462; 110 E. R. 861.
(31) (1845) 1 C. B. 18; 14 L. J. C. P. 136; 68 R. R. 652; 135 E. R. 441.
(32) (1855) 24 L. J. Q. B. 148; 1 Jur. (N. S.) 522.
(33) (1877) 2 C. P. D. 194; 46 L. J. C. P. 152; 36 L. T. 5; 25 W. R. 196.
(34) (1897) A. C. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820.
(35) (1872) 4 P. C. 419; 10 B. L. R. 312; 9 Moo. P. C. (N. S.) 214; 18 W. R. 384; 1 A. Sup. Vol. 86; 3 Sar. P. C. J. 168; 17 E. R. 495 (P. C.).
(36) (1870) 4 H. L. 661 at p. 671; 40 L. J. Bk. 4; 23 L. T. 569; 19 W. R. 26.

MUHAMMAD AKRAM KHAN v. MUHAMMAD AZIM.

The insertion of any valuation in a sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and should not be permitted.

Beni Prasad v. Edal Singh, 49 Ind. Cas. 195; 4 P. L. J. 37, followed.

Appeal from an order of the Subordinate Judge, Darbhanga, dated the 29th July 1921.

Mr. K. P. Jayaswal, for the Appellants.

Messrs. P. N. Sinha and Murari Prasad, for the Respondent.

JUDGMENT.

Das, J.—Mr. Jayaswal, on behalf of the appellants, has no objection to the sale of the villages other than village Prasad but he contends that we ought to set aside the sale of village Prasad. It appears that the Court fixed the valuation of village Prasad at Rs. 16,112. The decree-holder did not accept this valuation and he assessed it at Rs. 3,664-3-0. The sale proclamation settled by the Court gave the valuation of the Court and also that of the decree-holder; and it is contended before us by Mr. Jayaswal, on the authority of *Beni Prasad v. Edal Singh* (1), that the insertion of any valuation in a sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and that it is, therefore, wrong.

We set aside the sale of village Prasad and direct that the valuation stated by the decree-holder in the sale proclamation be struck off and that the sale do proceed on the valuation already fixed by the learned Subordinate Judge. There will be no order as to costs.

Macpherson, J.—I agree.

Z. K.

Sale set aside.

(1) 49 Ind. Cas. 195; 4 P. L. J. 87.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2591 OF 1919.

January 31, 1923.

Present:—Mr. Justice Le Rossignol and Mr. Justice Harrison.

MUHAMMAD AKRAM KHAN—

PLAINTIFF—APPELLANT

versus

MUHAMMAD AZIM KHAN AND OTHERS

—DEFENDANTS—RESPONDENTS.

Pre-emption—Substitution, date of.

A successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of the sale but from the date when he enforces his rights, that is, from the date on which he satisfies the conditions of his decree and brings it into operation. No doubt he is substituted for the vendee in all the rights that were transferred by the sale, but the process of substitution does not take place on any date prior to the satisfaction by the pre-emptor of the conditions on which his decree has been granted to him. [p. 319, col. 1.]

Hakam Singh v. Indar, 46 P. R. 1902, dissented from.

A suit to pre-empt on the ground of possession of other property is open only to persons who at the time of sale have an established title in that property. [p. 319, col. 2.]

Second appeal from a decree of the District Judge, Attock, at Campbellpur, dated the 26th May 1919, affirming that of the Munsif, First Class, Campbellpur, dated the 31st March 1919.

Kanwar Dalip Singh, for Mr. D. C. Ralli, for the Appellant.

Mr. M. S. Bhagat, for the Respondents.

JUDGMENT.—The plaintiff's suit to pre-empt some land in Mohallah Urtak of Hazro has been dismissed by the Courts below. The plaintiff described the property as village immoveable property and based his claim to pre-empt on the ground that he was a collateral of the vendor. On the objection of the defendants that the site was an urban immoveable property the plaintiff alleged that he was entitled to pre-empt as a co-sharer. The Court below found that the land is an urban immoveable property and has dismissed the plaintiff's suit on the ground that as a fact the land in suit is not a part of an undivided holding and; therefore, plaintiff's claim to succeed as a co-sharer in an undivided holding must fail. The Court below arrived at this finding on the strength of a supposed statement by the plaintiffs that the land in suit had

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been partitioned off from the original undivided holding, but here the learned District Judge appears to have committed a mistake, for no such statement by the plaintiff appears to be on the record.

The question then remains whether plaintiff at the time of the sale in respect of which he claims to pre-empt was a co-sharer in the undivided holding. The date of the sale of the land in dispute is the 9th November 1917. The sale of the other portion of the undivided area was dated 14th May 1917 and on that sale the plaintiff brought a suit to pre-empt, and obtained a decree in May 1918. A consideration of the afore-mentioned dates will show that on the 9th November 1917 the plaintiff in this case was not a co-sharer in the undivided estate and the question for decision is whether, by reason of his decree of 1918, his title in the joint undivided estate must be referred back to the 14th May 1917. On his behalf it is urged that the right to pre-empt is a right to be substituted for the vendee. This is no doubt incontestable, but the further question arises, from what date does the right of the vendee pass to the person who is substituted for him. The appellant relies on *Hakam Singh v. Indar* (1) which does indeed support his contention, but the grounds upon which that decision reposes do not, we think with all respect, justify the conclusion arrived at. In our opinion a successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of the sale but from the date on which he enforces his rights, *i. e.*, from the date on which he satisfies the conditions of his decrees and brings it into operation. No doubt he is substituted for the vendee in all the rights that were transferred by the sale, but it seems to us unreasonable to conclude that the process of substitution takes place on any date prior to the satisfaction by the pre-emptor of the conditions on which his decree has been granted to him. Any other conclusion will greatly increase the difficulties of persons desiring to dispose of their property by sale, for they would have to enquire

regarding the existence not only of ostensible potential pre-emptors but would also have to enquire into the history of contiguous estates. In our opinion a suit to pre-empt on the ground of possession of other property is open only to persons who at the time of sale have an established title in that property.

For these reasons we dismiss this appeal with costs.

Z. K.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION NO. 24 OF 1921.

November 30, 1922.

Present:—Mr. Kincaid, J. C. and
Mr. Raymond, A. J. C.

VELJI HIRJI—DEFENDANT—

APPLICANT

versus

CHELLARAM COOVERJI—PLAINTIFF
OPPONENT.

Bombay Rent (War Restrictions, No. 2) Act (VII of 1918), s. 4 (6),—"Change of conditions," meaning of.

The words "change of conditions," occurring in section 4 (6) of the Bombay Rent (War Restrictions, No. 2) Act do not refer to any change of occupiers, but to the premises leased. [p. 320, col. 2.]

Mr. Pamanmal, for the Applicant.

JUDGMENT.—This is a very simple case. The plaintiff-opponent, Chellaram Cooverji, filed a suit against the applicant Velji Hirji in the Small Cause Court for the recovery of rent of a shop building which he had leased to Velji and he claimed rent on the basis of Rs. 19-13-0 per mensem which he stated was the standard rent of the premises.

It is alleged and not denied that the Controller of Rents had determined the standard rent of the premises in question.

(1) 46 P. R. 1902; 49 P. L. R. 1902.

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to be Rs. 19-13-0. But subsequently the Controller reduced the rent from Rs. 19-13-0 to Rs. 11-0-0. The owner of the premises applied to the Committee against the order of the Controller and they increased the rent to Rs. 14-0-0 per mensem. The plaintiff-opponent, however, filed a suit in the Small Cause Court for recovery of rent at Rs. 19-13-0 which he contended was the standard rent and he filed the Controller's certificate with the plaint. In the lower Court the applicant contended that the owner of premises was not entitled to rental of Rs. 19-13-0 per mensem but that the correct rent for which he could sue was the one determined by the Committee. And an issue on the pleadings before the lower Court was, "whether the order of the Controller dated 17th March 1920 (fixing the standard rent at Rs. 11-0-0) and that of the Committee (fixing the standard rent at Rs. 14-0-0) the dated 12th May 1920 were *ultra vires*." The learned Judge was of the opinion that both the orders were *ultra vires* and he decreed the plaintiff's suit at the rental of Rs. 19-13-0 as originally determined by the Controller.

Mr. Pamanmal has now applied to us to revise the order of the Small Cause Court Judge and contends that the order is wrong inasmuch as the learned Judge of the Small Cause Court was in error in holding the two orders to be *ultra vires*. There can be very little doubt that if the order of the Controller is not maintainable the order of the Committee which is based on it must fail and the primary question for our consideration is whether he is empowered, except under the conditions described in the Rent Act, to review his own order. Mr. Pamanmal relies on clause (b) to section 4 of the Act VII of 1918 which is as follows:—

"The Controller may, after such inquiry as he may think fit, from time to time having regard to the provisions of the principal Act, fix the standard rent of any premises determined by him or by the Committee to be small premises."

It is not disputed that in the present case the premises are small premises as described in the Act. Mr. Pamanmal faintly argued that when the Controller firstly fixed the rent, he did not hold proper inquiry. But

the nature of the inquiry to be held by him is one that is entirely within his discretion as stated in clause (1) to section 4. The principal words of clause (b) on which Mr. Pamanmal relies are the words "from time to time" and according to him the Controller is empowered to alter the standard rent just as he may deem necessary. Clause (b) of section (4) must be read with clause (6) of the same section.

"Subject as hereinafter provided and subject to the right of the Controller to re-fix the standard rent of any small premises should there be a change of conditions affecting the standard rent thereof, an order under sub-section (1) shall be final."

The section is perfectly clear and explicit in its terms. The first order that the Controller passed with regard to the standard rent at Rs. 19-13-0 was final and was only subject to alteration if there was a change of conditions. And it is not alleged that in the present case there was any change of conditions. Mr. Pamanmal raised an ingenious argument that the tenants of the premises had changed. But the change of conditions does not refer to any change of the occupiers but to the building and as I said clause (6) of section 4 must be read with clause (b) and as such they clearly point out that the alteration in the standard rent can be made by the Controller only when there is a change of conditions in the premises that are leased.

It was next argued that the plaint did not contain the certificate of the Controller and consequently it should have been rejected. But, as a matter of fact, the plaint was accompanied by the first certificate granted by the Controller and that was all that was necessary as the second certificate was a nullity.

The result is, that the application must be dismissed with costs.

N. K.

Application dismissed.

GANESH SHANKAR VIDYARTHI v. EMPEROR.

ODDH JUDICIAL COMMISSIONER'S COURT.CRIMINAL APPLICATION NO. 3 OF 1922.
January 31, 1922.

Present:—Mr. Daniels, A. J. C.

GANESH SHANKAR VIDYARTHI—

ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 108—Accused required to furnish security—Subsequent conviction of substantive offence—Security withdrawn—Committal to Jail—Date from which substantive sentence to commence.

Accused was, on 23rd May 1921, ordered to furnish security under section 108, Criminal Procedure Code, for one year, or undergo imprisonment for that period. On 31st July 1921 he was convicted of a substantive offence under section 500, Penal Code, and sentenced to undergo three months' simple imprisonment, but he remained on bail till 23rd November 1921, when the bail-bond was cancelled. In the meanwhile, on the 16th October 1921, he withdrew his security and on 23rd November 1921 was committed to Jail under section 108, Criminal Procedure Code. The question was whether the substantive sentence of three months should commence on the date the bail-bond was cancelled, or on the expiry of the period of one year under section 108:

Held, that the sentence of imprisonment under section 500, Penal Code, took effect on 23rd November 1921 when accused's bail-bond was cancelled, as on the date on which that sentence was imposed, he was not undergoing a sentence of imprisonment.

Criminal Application against an order of the Sessions Judge, Lucknow, dated the 7th December 1921.

Dr. J. N. Misra, for the Applicant.

Mr. Hamid Ali Khan, for the Complainant.

The Government Pleader, for the Crown.

JUDGMENT.—This application might have raised a question of great importance, namely, the question whether a sentence of imprisonment in default of finding security under the preventive sections of the Code of Criminal Procedure was a sentence of imprisonment within the meaning of section 397, Criminal Procedure Code. There is no case of this Court on the point. The Allahabad High Court in the well-known Full Bench ruling of *Emperor v. Tula Khan* (1) has held that it is a sentence of imprisonment within the meaning of the section. Other

(1) 30 A. 334; A. W. N. (1908) 133; 5 A. L. J. 318; 7 C. L. J. 427; 4 M. L. T. 41. (F. B.)

High Courts, such as the Bombay High Court in *Emperor v. Vishnu Balkrishna* (2), the Patna High Court in *Markandar Genda v. Emperor* (3), and the Madras High Court in *Joghi Kannigan v. Emperor* (4), have answered the question in the contrary sense. It appears, however, on an examination of the facts that it will not be necessary to decide the question, as the facts here are clearly distinguishable.

On 23rd May 1921 the applicant was ordered to furnish security for a period of one year under section 108, Criminal Procedure Code. In default of finding security it was directed that he should undergo rigorous imprisonment for the same period. The accused furnished the security required so that the alternative sentence of rigorous imprisonment did not come into operation. On 31st July the applicant was convicted of a substantive offence under section 500, Indian Penal Code, and sentenced to three months' simple imprisonment. He, however, remained on bail until 23rd November when the bail bond was cancelled. In the meanwhile, on October the 16th the applicant had withdrawn his security under section 108, Criminal Procedure Code, and had been committed to prison under that section. The question for decision is, whether the substantive sentence of three months' imprisonment should commence on the date on which the bail bond was cancelled, namely, 23rd November, or on the expiry of the period of one year under section 108.

Now, assuming the correctness of the ruling in *Emperor v. Tula Khan* (1) it is necessary for the provisions of section 397, Criminal Procedure Code, to be applicable that the person concerned should have been "undergoing a sentence of imprisonment" on the date on which sentence was passed on him for the substantive offence. The date on which he was sentenced for the substantive offence was 31st July. Can it be said that he was on that date undergoing

(2) 17 Ind. Cas. 785; 37 B. 178; 14 Bom. L. R. 965; 1 Bom. Cr. Cas. 203; 13 Cr. L. J. 849.

(3) 36 Ind. Cas. 495; 1 P. L. J. 212; (1917) Pat. 32; 2 P. L. W. 369; 17 Cr. L. J. 528.

(4) 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402.

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a sentence of imprisonment? Clearly not. He had been ordered to furnish security and had furnished security. But for his subsequent withdrawal of the security no sentence of imprisonment under section 108 would ever have come into operation. The sentence of imprisonment came into operation from October the 16th, two and-a-half months after the date on which the applicant was sentenced to imprisonment under section 500. On the date when he was sentenced for that offence he was not undergoing any sentence of imprisonment whatever.

I, therefore, allow the application and direct that the sentence of imprisonment under section 500 take effect from the date on which the accused's bail under that section was cancelled. If he had served any portion of the term before being admitted to bail this will of course be taken into account.

W. C. A.

*Application allowed.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION CASE NO. 731 OF 1922.

November 23, 1922.

Present:—Mr. Justice Newbould and
Mr. Justice Suhrawardy.

SHIB CHANDRA CHAKRAVARTY

—PETITIONER

*versus***RABBANI MONDAL AND OTHERS—****OPPOSITE PARTY.**

Criminal Procedure Code (Act V of 1898), s. 345—Penal Code (Act XLV of 1860), s. 342—Wrongful confinement of complainant and another—Complainant, power of, to compound offence.

Where a person is charged under section 342 of the Penal Code with wrongfully confining the complainant and another person, the complainant has authority to compound the offence as against himself but he has no authority to compound it as against that other person.

Criminal Revision.

Babus *Dasarathi Sanyal, Monmotha Nath Mukerjee, Upendra Kumar Roy and Lalit Mohan Sanyal*, for the Petitioner.

Mr. *Monier* and *Babu Sarat Chandra Mukherjee*, for the Opposite Party.

JUDGMENT.—Three persons who are the opposite parties before us were tried by B. Surendra Nath Banerjee, Magistrate, Second Class, at Bongaon, who framed charges against them for having committed offences punishable under sections 323 and 342, Indian Penal Code. In the first charge they were alleged to have caused hurt to one Hari Nath Bose and in the second charge they were alleged to have wrongfully confined Hari Nath Bose and Shib Chandra Chakravarty. They were convicted on both these charges and they appealed to the District Magistrate. At the hearing of the appeal an application was made by Hari Nath Bose to compound the case under section 345 Criminal Procedure Code. The District Magistrate allowed the compromise and acquitted all the appellants under that section.

This Rule has been obtained by Shiba Chandra Chakravarty on the ground that he was no party to the compromise and that, therefore, the acquittal so far as the offence committed against him was concerned, was illegal. We hold that this Rule must be made absolute on this ground. Though Hari Nath Bose was the complainant in the case that gave him no power to compound the offences under section 345, Criminal Procedure Code. Under that section the persons by whom an offence may be compounded are set out in the 3rd column of the statement which forms part of that section. Hari Nath Bose could compound the offences of hurt and wrongful confinement committed against him. But the only person who could compound the offence of wrongfully confining Shib Chandra Chakravarty was Shib Chandra Chakravarty himself. As he was no party to the compromise the acquittal of the accused on this part of the charge was illegal.

We accordingly make this Rule absolute. We set aside the order of acquittal so far as it relates to the conviction for the offence of wrongfully confining Shib Chandra Chakravarty. The appeal, so far as it relates to this offence, must be heard on the merits.

The three accused will appear before the Magistrate and execute fresh bail bonds for their appearance when called on.

N. H.

Rule made absolute.

NADAR v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL PETITION NO. 1700 OF 1922.

February 19, 1923.

Present—Mr. Justice Moti Sagar.

NADAR AND OTHERS—CONVICTS—

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 79, 183, applicability of—Offence committed during journey in foreign territory and British India—Offence, whether triable in British India—"Consequence" in s. 179, meaning of.

Section 183 of the Criminal Procedure Code applies only to cases where the offence is committed in British India and not in foreign territory. This section is part of a Code of Procedure for the trial of offences committed in British India; it extends to the whole of British India, but cannot give the Courts jurisdiction over offences committed beyond the limits of British India. The word "journey" used in the section does not include a journey in foreign territory, but is confined in its meaning to a journey within the territories of British India. [p. 324, col. 1.]

Babu Baldi v. Queen, 5 M. 23; 1 Weir 1; 2 Ind. Dec. (N. S.) 17, relied on.

Where an offence is committed in the course of a journey part of which lay through foreign territory and it is doubtful whether the offence was committed in foreign territory or in British India, section 183 of the Criminal Procedure Code is not applicable to the case and it is not triable in British India. [p. 324, col. 1.]

Semble:—The "consequence" contemplated by section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form any part of that offence. [p. 324, col. 2.]

In re Rambilas, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175; *Krishnamachari v. Shaw Wallace and Co.*, 29 Ind. Cas. 331; 29 M. L. J. 178; 18 M. L. T. 25; (1915) M. W. N. 418; 39 M. 576; 16 Cr. L. J. 491 and *Gokal Chand v. Phul Chand*, 5 Ind. Cas. 830; 7 P. R. 1910 Cr.; 7 P. W. R. 1910 Cr.; 172 P. L. R. 1910; 11 Cr. L. J. 253, relied on.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Rawalpindi, dated the 15th November 1922, affirming that of the Magistrate, First Class, Rawalpindi dated the 16th October 1922.

Mr. Har Charan Das Bhalla, for the Petitioners.

Mr. Beni Parshad Khosla, for the Government Advocate, for the Respondent.

JUDGMENT.—In this case the petitioners were tried and convicted of criminal breach of trust as carriers, under section 407 of the Indian Penal Code, and sentenced to three months rigorous imprisonment and Rs. 175 fine each. An appeal was preferred to the Sessions Judge but was dismissed and the convictions and the sentences imposed by the Trial Magistrate confirmed. The petitioners have now come up in revision to this Court.

It appears that the petitioners were entrusted with a certain amount of *ghee* at Islamabad in the Kashmir territory for conveyance to Rawalpindi. The charge against them was that on their way from Islamabad to Rawalpindi they abstracted about eleven maunds of *ghee* from the tins which were entrusted to their care, and that they committed criminal breach of trust in respect thereof.

On the facts found by the learned Sessions Judge there can be no doubt that the accused are guilty, and that it must be held that the charge of criminal breach of trust brought against them is fully established. I issued notice in this case only because I felt doubtful on the question of jurisdiction. I have now heard Counsel on both sides and, after giving a most careful consideration to the matter, have arrived at the conclusion that the Rawalpindi Courts had no jurisdiction to try this case and that the convictions must be set aside. No definite finding has been given by any of the Courts below as to the place where the offence was committed, and it has practically been taken for granted that the offence must have been committed within British India. I do not see there was any warrant for such a presumption. No evidence was produced by the prosecution upon this point and, in these circumstances, it would, in fact, be impossible for any Court to come to a definite finding that the offence was committed in British India or in foreign territory. The learned Sessions Judge in his judgment observes that the offence was committed somewhere between Islamabad in Kashmir and Rawalpindi and that the likelihood is that it was committed near Bharakau where Gulab lives. I do not see upon what evidence this conclusion has been arrived at. If there were any doubt upon

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this matter the benefit of the doubt ought to have been given to the accused and not to the prosecution. In the absence of any direct evidence upon the point, it is impossible to hold that the offence was committed in British India. In these circumstances it is clear that section 183 of the Criminal Procedure Code would be entirely inapplicable. This section applies only to cases where the offence is committed in British India and not in foreign territory. As ruled in *Bapu Baldi v. Queen* (1), the section is part of a Code of Procedure for the trial of offences committed in British India. It extends to the whole of British India, but cannot give the Courts jurisdiction over the offences committed beyond the limits of British India. The word "journey" spoken of in this section does not include a journey in foreign territory, but is confined in its meaning to a journey within the territories of British India. There being no evidence on the record that the offence was committed in British India, it must be held that section 183 does not apply. Nor has the section 181 (2), which the learned Sessions Judge thinks applies, anything to do with this case. That section provides that the offence of criminal misappropriation or a criminal breach of trust may be enquired into or tried by a Court within the local limits of whose jurisdiction any part of the property, which is the subject of the offence, was received or retained by the accused person or the offence was committed. It is obvious that none of the requirements of this section are fulfilled in the present case. It is admitted that there is no evidence on the record to show that any part of the 11 maunds of *ghee* which is said to have been abstracted from the tins, was received or retained by the accused persons within British Territory and the section cannot, therefore, be of any application whatever.

Next, it is argued that if none of the two sections above mentioned is applicable, section 179 of the Criminal Procedure Code might apply. I am unable to agree with this contention either. This section applies only to cases in which the offence is completed by reason of a consequence ensuing within the local limits of

another jurisdiction, or to cases in which the fact of a consequence ensuing in another jurisdiction is the cause of the offender being accused of the offence. It is clear that none of these things exist in the present case. Moreover, all the High Courts are not agreed as to the exact scope of the words "by reason of any consequence which has ensued." In a large number of cases it has been laid down that the consequence means a consequence which forms a part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form any part of that offence. *In re Rambilas* (2); *Krishnamachari v. Shaw Wallace & Co.* (3) and *Gokal Chand v. Phul Chand* (4). The complainants in the present case were certain commission agents at Rawalpindi to whom the *ghee* was consigned from Islamabad, and it is impossible to see how it can be said that the consequences of the offence, which was probably complete as soon as the *ghee* was abstracted, ensued to the complainants at Rawalpindi so as to give the Rawalpindi Courts jurisdiction to try this case.

In my opinion the trial of the case was without jurisdiction and the convictions and the sentences must be set aside and the proceedings quashed.

I allow the revision and order accordingly.

Revision allowed.

Z. K.

(2) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175.

(3) 26 Ind. Cas. 331; 29 M. L. J. 178; 18 M. L. T. 25; (1915) M. W. N. 418; 39 M. 576; 16 Cr. L. J. 491.

(4) 5 Ind. Cas. 830; 7 P. R. 1910 Cr.; 7 P. W. R. 1910 Cr.; 172 P. L. R. 1910; 11 Cr. L. J. 253.

(1) 5 M. 23; 1 Weir 1; 2 Ind. Dec. (N. S.) 17.

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UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION CASE NO. 1213 OF 1921.

January 24, 1922.

Present:—Mr. Saunders, J. C.

NGA TUN LIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Burma Village Act (VI of 1907), ss. 10, 28—Village headman—Protection from prosecution.

A village headman is protected by section 28 of the Burma Village Act to this extent that he cannot be prosecuted for an act or omission punishable under section 10 of that Act, or for an abuse of his power similarly punishable, even though such act or omission, or such abuse of power is punishable under the Penal Code, or some other law, unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner. [p. 326, col. 1.]

Mr. R. K. Banerjee, for the Applicant.

JUDGMENT.—The complainant here accused four persons, one of whom was a village headman, of illegally confining him and causing him hurt, offences punishable under sections 342 and 323 of the Indian Penal Code. The Deputy Commissioner appears to have had an enquiry made into the conduct of the headman, and, upon the 30th of May, issued an order "refusing sanction." This enquiry was initiated upon a report by the Magistrate to whom the complaint had been made that the action of the headman in confining the accused was, apparently, an abuse of his powers, punishable under section 10 of the Village Act or under section 342 of the Indian Penal Code, and the Magistrate thought that the sanction of the Deputy Commissioner was necessary. This view appears to have been accepted by the Deputy Commissioner and upon his refusing sanction, the Sub-Divisional Magistrate discharged the accused. An application was then made to the Commissioner of the Division who pointed out that no sanction was required for the prosecution of a village headman under sections 323 and 342 of the Indian Penal Code, but at the same time held that sanction should have been granted and, apparently acting under the powers conferred by section 23 of the Village Act, the Commissioner sanctioned the prosecution of the headman under those sections. Against this

order the headman appears to have applied in revision to the Local Government which recorded an order to the effect that the Local Government "is advised that no authority has power to sanction or to refuse sanction to a prosecution under section 342 of the Indian Penal Code, and the Lieutenant-Governor is, therefore, unable to interfere in the petitioner's behalf. The complainant then appears to have lodged another complaint under sections 323, 342 and 504 of the Indian Penal Code against the same accused in the Court of the Senior Magistrate. The Senior Magistrate after perusing the orders already passed, expressed an opinion, that the orders of the Commissioner were not legal and could not be regarded as an authority to prosecute the headman, and he, therefore, dismissed the complaint. The complainant then applied in revision to the Sessions Judge who pointed out that no defence of acting under the Village Act could be urged in answer to charges under sections 323 and 504 of the Indian Penal Code, and that, therefore, no order or authority from the Deputy Commissioner was required so far as those charges were concerned. The Sessions Judge then expressed an opinion that the order of the Deputy Commissioner was necessary for a prosecution for illegal confinement, and the Judge said that the opinion of the Legal Remembrancer who had been consulted by the Local Government had been overruled by the Government Advocate, who expressed an opinion that any order of a Deputy Commissioner giving or withholding leave to prosecute could be revised by a Commissioner under section 23 of the Village Act; and the Judge held that the order of the Commissioner reversing the order of the Deputy Commissioner refusing sanction was a good and valid order, and directed the Court to proceed to enquire into the charge under section 342. Against this order the headman now comes to this Court in revision. There appears to have been a good deal of misunderstanding and confusion of thought on the part of the various officers concerned in dealing with this case. Section 28 of the Village Act provides that no complaint against a headman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of, or under authority

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rom, the Deputy Commissioner. As was pointed out by the Legal Remembrancer when he was consulted by the Local Government, the Village Act says nothing about sanction of a Deputy Commissioner being required for a prosecution.

The case of *Nga Shwe Yi v. Crow* (1) may be referred to. That was a case under the Lower Burma Village Act of 1889, but the wording of section 28 of the present Act is identical with that of section 19 of that Act, and section 10 of the present Act corresponds exactly with the first part of section 8 of the former Act. I agree with much of the criticism of Irwin, J., in that judgment of the language of the Act, and I am not very greatly impressed by the arguments of the Judges who decided that case. At the same time, there can be no doubt that the interpretation given by the majority of the Judges to section 19, which corresponds with section 28 of the present Act, is in accordance with the ordinary practice and gets over the serious difficulty that, if the words of the section are strictly construed, they have no meaning and are superfluous. I think it must be taken, therefore, that a village headman is protected by section 28 of the Village Act to this extent, that he cannot be prosecuted for an act or omission punishable under section 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of or under authority from, the Deputy Commissioner. The wording is unfortunate because it must often be impossible to say whether a headman was acting or claimed to be acting in the exercise of his powers when he did the act complained of. It would appear to be the duty of a Magistrate to whom a complaint is made, if it is clear from the allegations of the complainant that the village headman was acting ostensibly in the exercise of his powers, to dismiss the complaint, and similarly to refuse to proceed with it if it appears in the course of the trial that the headman was exercising powers conferred upon him by the Act, even though he may have abused those powers unless the De-

puty Commissioner has authorised the prosecution.

As to the power of the Commissioner to institute or give authority to institute a prosecution which the Deputy Commissioner has not instituted or authorised, it appears to me very doubtful whether the provisions of section 23 give the Commissioner any such authority. The Deputy Commissioner is an executive officer who is presumably bound to obey the orders of his superior, and the correct procedure would apparently be for the Commissioner, if he considers that a headman should be prosecuted, to direct the Deputy Commissioner to institute or authorise his prosecution under section 28 of the Village Act.

Prima facie it does not appear that the village headman has any power to cause hurt to or insult another person and there appears to be no reason why the Magistrate should not enquire into the charges brought against the headman under sections 233 and 504 of the Indian Penal Code.

As far as the charge under section 342 of the Indian Penal Code is concerned, it would appear that the headman must have been acting under colour of his authority as headman, and I am of opinion that the correct procedure would be, if the Commissioner considers that the headman should be tried, that he should direct the Deputy Commissioner to institute or authorise proceedings against him; in the absence of such institution or authorisation the Magistrate is debarred from entertaining the complaint in respect of the charge under section 342 by section 28 of the Village Act.

W. C. A.

Order accordingly.

(1) 1 L. B. R. 336.

AJODHYA TEWARI v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 630 OF 1922.

November 13, 1922.

Present.—Justice Sir John Bucknill, Kt.

AJODHYA TEWARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 135, 141—Obstruction—Jury, appointment of—Failure to return verdict—Procedure.

Where a person against whom a conditional order is made under section 133 of the Criminal Procedure Code obtains the appointment of a jury, but the jury, for any reason, does not return a verdict within the time fixed by the Magistrate the latter must inquire into the matter before he passes a final order.

Raimohan Karmokar v. Emperor, 35 Ind. Cas. 969; 44 C. 61; 20 C. W. N. 1171; 17 Cr. L. J. 409, relied on.

Application against an order, dated 28th October 1922, passed by the Sub-Divisional Magistrate, Sitamarhi.

Mr. Bankim Chandra De, for the Petitioner.

JUDGMENT.—This is an application made by one Ajodhya Tewari asking that an order made by the Sub-Divisional Magistrate of Sitamarhi, directing the prosecution of the petitioner for an offence against the provisions of section 188 of the Indian Penal Code may be set aside.

The matter is a very simple one. The petitioner was alleged to have obstructed a roadway. Apparently, the petitioner maintains that at that time the roadway was not public. However, the Police received information that there was some obstruction and they reported that the petitioner had put up a post in a path running from the village to the well and had also erected a *talli* which had the effect of diminishing the width of the path. Proceedings accordingly were commenced against the petitioner under the provisions of section 133 of the Code of Criminal Procedure on the 25th of May this year. The petitioner, as he had a right to do, applied to the Magistrate for a jury in the manner provided by the provisions of section 135 of the Code of Criminal Procedure. The jury was accordingly appointed and instructed to report on a certain day; but they did not report on the day on which they had been told and on that day the Magistrate without any further ado made the conditional order, which

he had previously made; absolute, ordering the alleged obstructions to be pulled down. Apparently, the order directed the petitioner to pull the obstructions down by the 5th of August. For some reason or other he did not do so and some days later the fact that he had not done so was brought to the notice of the Magistrate who directed him to show cause why he should not be prosecuted, for an offence against the provisions of section 188 of the Indian Penal Code, *i.e.*, for having disobeyed an order duly promulgated by a proper authority. However, a little later on, the petitioner came and told the Magistrate that he had removed the alleged obstructions; but, nevertheless, the Magistrate has directed that he should still be prosecuted.

Now, one must proceed a little further and ascertain what has been brought before the notice of this Court. The position really is that, when the jury had failed to return their verdict as ordered at the time fixed, the Magistrate should not have, without giving any body an opportunity of being heard, made the order absolute. Section 141, which says that if the jury appointed does not return its verdict within the time fixed the Magistrate may "pass such order as he thinks fit" must mean that if the jury for any reason does not return its verdict, the Magistrate must inquire into the matter before he passes an order. This is obviously only in consonance with the proper conduct of legal investigation and I cannot imagine that it could seriously be maintained that without any investigation whatever and merely upon either an *ex parte* statement made by the complainant or on a report by the Police as to what the Police may have found at the place in question, a Magistrate is really justified in passing anything but an emergency order (which is provided for by another section) without any attempt to investigate the rights and circumstances which surround the position of the affair. This view, which I think is the correct one, is borne out by the case of *Raimohan Karmokar v. Emperor* (1) and the whole tendency of the

(1) 35 Ind. Cas. 969; 44 C. 61; 20 C. W. N. 1171; 17 Cr. L. J. 409.

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other decisions to which I have been referred points in the same direction. Under these circumstances, it appears to me that the proper course in this case is to set aside the order which was made by the Sub-Divisional Magistrate on the 28th October 1922 ordering the prosecution of the petitioner in connection with an offence against the provisions of section 188, Indian Penal Code. Of course, if there is obstruction still existing (which I do not find from the papers which are at present before me) there is nothing to prevent further proceedings being taken against the petitioner and with his being dealt in the manner provided by law.

Z. K.

*Rule made absolute.***LOWER BURMA CHIEF COURT.**

CRIMINAL APPEAL NO. 135 OF 1922.

April 3, 1922.

Present:—Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice Macgregor.

RAMBIT—ACCUSED*versus***EMPEROR—OPPOSITE PARTY.**

Criminal Procedure Code (Act V of 1898), ss. 367, 537—Judgment, place of, in criminal trial—Non-compliance with provisions of s. 367 of Act V of 1898 whether mere irregularity.

The delivery of judgment and the passing of sentence is an integral part of a Criminal trial. It is not a mere formality and, consequently, where a judgment is signed and dated before delivery and is translated to the accused by the Court Interpreter, the Judge himself being absent, it amounts to a breach of the provisions of section 367 of the Criminal Procedure Code and cannot be treated as a mere irregularity to be cured by section 537 of the Code.

Criminal Appeal from an order of the Additional Sessions Judge, Arakan, dated the 31st January 1922, in Sessions Trial No. 4 of 1922.

Mr. *Saw Hla Pru*, for the Appellant.

JUDGMENT.—The report of the learned Additional Sessions Judge shows that on the date fixed for delivery of judgment the Judge was ill. He signed and dated the judgment and sent it to his Chief Clerk to deliver. Counsel pointed out that this

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would be illegal. The Clerk, therefore, informed the Judge who directed the Court Interpreter to translate the judgment to the accused. There is, therefore, the fact that the judgment was signed and dated before delivery, it was not legally pronounced, there was no Court for no presiding Judge was present and there has thus been a breach of all the important provisions of section 367. The delivery of judgment and the passing of sentence is an integral part of a criminal trial. It is not a mere formality and the deliberate breach of express provisions of the law cannot be treated a mere irregularity to be cured by section 537.

We, therefore, set aside the conviction and sentence and direct a re-trial. The Additional Sessions Judge has now been transferred and, therefore, no order as to the Court is necessary.

N. K.

*Re-trial ordered.***CALCUTTA HIGH COURT.**

CRIMINAL REFERENCE NO. 159 OF 1922.

January 24, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

GIRIDHAR SARKAR AND OTHERS**—ACCUSED***versus***HARISH CHANDRA CHOWDHURY—****COMPLAINANT.**

Evidence Act (I of 1872), s. 114 (e)—Civil Procedure Code (Act V of 1908), O.XXI, r. 24 (2)—Warrant signed by Serishtadar "by order"—Presumption.

Where a Serishtadar signs a warrant "by order" the presumption under section 114 (e) of the Evidence Act is applicable, and he must be held to be the officer appointed by the Court to sign processes as required by clause (2) of r. 24 of O. XXI of the Civil Procedure Code.

Criminal reference by the Sessions Judge, Dinajpur, dated the 20th November 1922, recommending reversal of the order of the Deputy Magistrate of Dinajpur, dated the 7th August 1922.

A FIRST GRADE PLEADER, *In the matter of.*

FACTS appear from the following
ORDER OF REFERENCE.

The petitioners have been convicted under section 186, Indian Penal Code, in the under-noted circumstances:—

Warrants of attachment of the moveable property of two of them, in pursuance of decrees, were entrusted to a peon of the Civil Court for execution. The warrants purport to be signed by the officiating *Serishtadar* of the Court, and there is nothing on the record to show that he was authorised to sign them on behalf of the *Munsif*.

The peon attached some cattle belonging to the judgment-debtors, and made them over to two servants of the decree-holder, from whom the petitioners and others rescued them.

I am of opinion that the conviction is bad in law.

It had been held, in the case of *Deputy Legal Remembrancer v. Mir Sarwar Jan* (1), that where a warrant purports to be signed on behalf of the presiding officer of a Court by a person appointed to do so, there should be evidence, either on the face of the signature itself or otherwise, to prove the appointment. In that case a warrant of arrest issued under the corresponding section of the old Code, was held not to be a good warrant, and a conviction for resisting its execution was set aside.

I am, therefore, of opinion, that in the present case, the conviction under section 186, Indian Penal Code, cannot stand. I accordingly refer the matter for the consideration of the Hon'ble Judges with the recommendation that the conviction be quashed and a retrial directed in accordance with law.

Babu Indu Prokash Chatterjee, for the Accused.

Babys Mammatha Nath Mukherjee and Satindra Nath Mukherjee, for the Complainants.

JUDGMENT.—The facts of the present case can be distinguished from the facts of the case cited by the learned Sessions Judge in his letter of reference, namely, the case of *Deputy Legal Remembrancer v. Mir Sarwar Jan* (1). In that case the warrant signed by the *Serishtadar* did not show on the face of it that the *Serishtadar* had signed in the exercise of the authority

delegated to him by the Judge. But here we find that the *Serishtadar* who signed the warrant purported to make that signature "by order." We think, therefore, that the presumption under section 114 (e) of the Evidence Act can be applied to the present case, and we hold that the statement that appeared in the face of the warrant that the *Serishtadar* signed "by order" can be presumed to be true, and that we should hold, in the absence of anything to suggest the contrary, that he was actually the officer appointed by the Court to sign processes as required by clause 2 of r. 24, O. XXI, Civil Procedure Code.

We accordingly refuse to accept this reference and direct that the papers be returned. The accused must surrender to their bail and undergo the unexpired portion of their sentence.

W. C. A.

Interference declined.

MADRAS HIGH COURT.

APPLICATION UNDER THE LEGAL PRACTITIONERS ACT.

November 6, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

In the matter of A FIRST GRADE PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 13 (b) (g)—Giving wrong information to client—Professional misconduct—Absence of fraud—Costs.

Where a Pleader, who was in possession of documents belonging to his client, from some motive of fear and self-interest, caused by certain circumstances, concealed the fact from him and denied being in possession of them, but it appeared his conduct was in no way fraudulent and there was no intention to hurt the client:

Held, (1) that the conduct of the Pleader in telling a lie to his client, from whatever motive, amounted to professional misconduct;

(2) that in the absence of any fraudulent intention, it was not necessary to take any action against the Pleader beyond expressing strong disapproval of his conduct, especially in view of the fact that he had to defend himself against very serious charges of fraud which had not been made out;

(3) that having regard to the vindictive conduct of the petitioner and the fact that the charges of fraud brought by him against the Pleader had

A FIRST GRADE PLEADER, In the matter of.

not been substantiated it was not necessary to direct the Pleader to pay the costs of the petitioner.

Petition, under section 13, clauses (b) and (f) of the Legal Practitioners Act, praying that, in the circumstance stated in the affidavit filed therewith, the High Court will be pleased to take action against the professional misconduct of the respondent herein.

Messrs. K. Dorai Raja and Ganesa Ayyar, for the Petitioner.

Messrs. Nugent Grant, Counsel, and K. S. Krishnaswami Aiyangar, for the Respondents.

Mr. T. R. Ramachandra, for the Vakils' Association.

JUDGMENT.—This is an application under the Legal Practitioners Act for the legal practitioner in question to show cause why he should not be dealt with by the Court. The facts of this case have been put before us very fairly indeed by the learned Advocate-General as the President of the Vakils' Association and very frankly by Mr. Grant on behalf of the Pleader in question; and, although very sinister charges indeed were made against the Pleader, on examination the sinister aspect of the case disappears but there remain these facts. The Pleader having, in his professional capacity, had the custody of certain documents put them into Court. He was acting at that time for the father of the present petitioner and his brother, and, on the death of the father, he continued to act for a time for the two brothers. Those documents not being required for the purpose of the then pending suit, the practitioner applied to and got them back from the Court. They apparently were taken by his clerk and kept among other documents belonging to this practitioner by his clerk, and we are prepared to accept as a fact that he forgot that he had ever got them back and had not any knowledge of where they were. At a later time, the brothers having quarrelled, he was asked by one of them for the documents. He applied to the Court, believing that they were still with the Court, for those documents, and then discovered that, at any rate as far as most of them were concerned and in particular the document which the practitioner was particularly anxious to get hold of, they had

been returned to him. He discovered after search that those documents were in fact among the papers in the custody of his clerk. With that knowledge he wrote two letters stating in effect that he had not got the documents and concealing the fact that the Court had recently told him that he had got the documents and that he had discovered them in the hands of his clerk. Mr. Grant, appearing for him, used what is appropriate language. He says that those documents contained lies. A professional man in this profession must know perfectly well that lying to his client is unprofessional conduct. We have no doubt in this case he did so because he thought that if he spoke the truth he would get into considerable trouble with, at any rate, one of the two brothers, probably with both, and he realised, especially as one document was still missing, that the sinister suggestions which at that time apparently were already being made, that he had from the start acted fraudulently in concealing his custody of these documents, would seem to have been with some foundation and would probably be urged against him with the result that he would lose his clients, persons obviously of a very litigious nature and no doubt very valuable clients.

There can be no justification at all for not speaking the truth. The fact that a man is going to be injured professionally if he does speak the truth is no valid excuse for telling a lie; but, it is an attitude which is not uncommon and which is not of the most serious character. It is very different from the case of a professional man telling a lie fraudulently in the sense of wishing to assist his client in deceiving the Court or even wishing to assist his client in a claim that he is making against another. It is done recklessly, foolishly and wrongly, apparently partly from fear and partly in his own interest.

Having said so much, we think there is little else to be said or done in the matter. We think it is a case where, but for the circumstances to which I am about to refer we should order the practitioner to pay the costs of the petitioner in the matter, but in this case, the petitioner has acted throughout certainly vindictively. He has put in a petition to the Court, and before the District

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Judge in the enquiry which was directed to be held by the District Judge a sinister view of the whole matter and made charges of a very serious fraud, *viz.*, that the petitioner had originally got these documents from the Court in order to help not his own client but the brother, and had concealed the documents with the object of hurting his client in his suit and assisting the brother in any litigation that there might be between the two brothers. Those charges have wholly failed and, therefore, we do not think it right in this case to order the practitioner to pay the costs. While we must express our disapproval of the conduct of the practitioner in this matter we think that he has already been sufficiently punished by standing under the shadow of those much more serious charges, and by the expense that he has consequently been put to in having to appear in these proceedings.

V. N. V.

Action declined.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 597 OF 1920.

July 12, 1920.

Present:—Mr. Justice Scott-Smith.

INDAR SINGH—CONVICT—PETITIONER
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 379, 411—Theft—Receiving stolen property—Accused pointing out place of concealment.

The mere pointing out by an accused person of the place where stolen property is concealed, which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft, or for dishonestly receiving stolen property.

Petition for revision, under section 439, Criminal Procedure Code, of an order of the Sessions Judge, Ferozepore, dated the 16th March 1920, affirming that of the Magistrate, First Class, Ferozepore, dated the 14th February 1920, convicting the petitioner.

Dr. Nand Lal, for the Petitioner

Sardar Mehtab Singh, S. B., Public Prosecutor, for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Sessions Judge, Ferozepore, dismissing the appeal of Indar Singh who had been convicted of an offence under section 457, Indian Penal Code. The only evidence against him is, that he pointed out two places in which large amounts of cash said to be stolen were found and that his footprints were found in the *wara* of a neighbour of the complainant at a distance of 20 or 25 *karams* from the scene of the theft.

Now, it has been held frequently that the mere pointing out by an accused person of the place where stolen property is concealed which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft or for dishonestly receiving stolen property. The Sessions Judge himself was aware of the rulings to this effect but was of opinion that the track evidence was a sufficient corroboration. Now, the footprints said to be those of the appellant are of shoes and not of bare feet. There may be many other shoes which are similar to those of the appellant and it is, therefore, difficult to rely implicitly on the evidence of a tracker so as to say that the tracks are undoubtedly those of the shoes worn by the accused person. But granting for the sake of argument that the footprints found in Bachan Singh's *wara* were those of the appellant, it is difficult to see how they connect him with the theft. It is possible that the burglars may have got on to the roof of Bachan Singh's house and in that way reached the complainant's house, but there were no signs on the roof to show that this was done. The appellant lives in the same village and I do not see how the presence of footprints in the *wara* of Bachan Singh is any evidence that he took part in the burglary.

I, therefore, hold that there is no sufficient reason in this case for holding the guilt of Indar Singh proved. The revision is allowed and the order of the lower Appellate Court being set aside, Indar Singh is acquitted and it is ordered that he be forthwith released from custody.

W. C. A.

Revision allowed.

MANSUR v. EMPEROR.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.CRIMINAL REVISION PETITION No. 85
OF 1922.

December 7, 1922.

Present:—Mr. Pipon, J. C.

MANSUR—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 121, 514—Security for good behaviour—Forfeiture, grounds for—Offence, commission of before making of order—Commission of offence, proof of.

The period for which a person is bound over to be of good behaviour begins from the date on which he is bound over. [p. 333, col. 1.]

Therefore, where security is given for good behaviour neither the principal nor the surety can be made liable for an offence which occurred before the security was given. [p. 333, col. 1.]

A conviction is ordinarily considered necessary to establish that an offence has been committed but the commission of an offence, within the meaning of section 121 of the Criminal Procedure Code may be proved otherwise than by a conviction, for instance, by evidence recorded under section 512 of the Code. [p. 333, col. 1.]

Emperor v. Jalal Shah, 5 Ind. Cas. 827; 5 P. R. 1910 Cr.; 8 P. W. R. 1910 Cr.; 169 P. L. R. 1910; 11 Cr. L. J. 252, referred to.

The flight of a person accused of dacoity to Independent Afridi territory raises a strong presumption of the intention of the absconder to join a band of dacoits. In such a case a bond for good behaviour given under section 118 of the Criminal Procedure Code, on proceedings taken under section 110 of the Code is liable to forfeiture, provided evidence is produced to show either that the person bound committed an offence in British India prior to his absconding and during the currency of the bond, or that during the same period he committed an offence during his outlawry punishable with imprisonment. [p. 334, col. 1.]

Petition for revision, under sections 435, 439, Criminal Procedure Code, of an order of the District Magistrate, Peshawar, dated the 7th April 1922, by which the petitioner's appeal against an order, dated the 24th January 1922, of forfeiture of bond passed by the Magistrate, First Class, was dismissed.

Mr. Gokal Chand Dhawan, for the Petitioner.

Lala Dewan Chand, R. S., for the Respondent.

JUDGMENT.—The facts material to this case are as follows:—On the 15th of October 1920 a Magistrate received from the Police an information report recommending security proceedings under section 110, Criminal

Procedure Code, against Juma. Juma failed to appear in the first instance and a warrant for his arrest was issued. He was placed in custody on the 5th of November 1920 and released on bail on the 11th of November 1920. Notice was issued to him in due course under section 110, Criminal Procedure Code, on that date. After regular proceedings, he was ordered on the 6th of December 1920 to furnish Rs. 500 security with one surety for his good behaviour for one year under section 118, Criminal Procedure Code. On the 4th of January 1921 a security bond was filed under this order by Mansur as security. It would appear from the record that Juma disappeared again without attesting the bond, but it was finally attested by him on the 28th of January 1921. Between the date on which the case was originally sent up by the Police and the close of the proceedings a number of dacoities occurred on the 16th of November 1920. Juma does not appear to have been suspected at the outset, but on the 5th of December 1920 his name was mentioned by one of the complainants. After considerable inquiry certain persons were sent up for trial for one of the dacoities on the 16th of February 1921. Juma had been admitted to bail in that case on the 8th of January 1921 but had disappeared before the case came up for trial. His bail was duly confiscated. In respect of the dacoity, proceedings were taken against him under section 512, Criminal Procedure Code, by order of the 29th of April 1921. The case was referred to a *jirga* under section 11, Frontier Crimes Regulation, and on the 29th of June 1921 the *jirga* found that the accused including Juma were not guilty. A second *jirga* was appointed on the 2nd of August 1921 who found all the accused including Juma guilty. Three of the accused, who were then in custody, were sentenced to five years' rigorous imprisonment. It appears to have been on account of this dacoity that proceedings under section 514, Criminal Procedure Code, were instituted against Mansur, with a view to the forfeiture of the security which he had given for Juma under section 110, Criminal Procedure Code. The Magistrate ordered the confiscation of the security. The District Magistrate rejected the appeal, and Mansur has applied to this Court for revision.

MANSUR V. EMPEROR.

The order of the District Magistrate on appeal is distinctly misleading. It implies that the security taken under section 118, Criminal Procedure Code, has been forfeited by reason of the commission of the dacoity of 16th November 1920. As this dacoity occurred a month and-a-half before the security bond under section 118, Criminal Procedure Code, was filed, it is clear that it was not in itself a ground for forfeiture of the security. When security is given for good behaviour, neither the principal nor the surety can be made liable for an offence which occurred before the security was given. The period for which a person is bound over to be of good behaviour begins from the date on which he was bound over.

From the record, however, it appears that the ground on which the security was really forfeited was that Juma had absconded to Independent Afridi territory since the security was given, and had there joined a gang of habitual dacoits. What I have to consider, therefore, in these proceedings is whether the order forfeiting the security was justified on this ground. The conditions under which a security bond taken under Chapter VIII, Criminal Procedure Code, may be forfeited are given in section 121 of the same. In the case of a bond for good behaviour taken under the provisions of section 110, Criminal Procedure Code, the commission or attempt to commit, or the abatement of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. It is argued by the Counsel for the petitioner that the word "commission" in this section necessarily implies a conviction. It is true that a conviction is ordinarily considered necessary to establish that an offence has been committed. At the same time, I have been shown no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction. In fact the ruling published as *Emperor v. Jalai Shah* (1), which has been quoted for the petitioner as showing that proof of the actual commission of an offence is indispensable, distinctly lends colour to the view that the commission of an offence can be proved otherwise than by

an actual conviction. In that case the learned Judges considered the question as to whether there was sufficient evidence to show that a person had committed an offence and they disallowed the forfeiture of security on the ground that that evidence was insufficient. It was not suggested that the mere fact of the absence of a conviction was fatal. It is clear that there had been no conviction in that case, and if its absence had been sufficient in itself to vitiate the proceedings under section 514, Criminal Procedure Code, the learned Judges clearly would not have dealt with the evidence on its merits. It is, further, only common sense to recognise cases where bonds for good behaviour are liable to forfeiture when the person bound over has, after the commission of an offence, succeeded in escaping from justice. Such cases must necessarily have special prominence in the North-West Frontier Province where the extreme proximity of the border of Independent territory renders escape peculiarly easy and peculiarly tempting. It would appear to me to amount to negation of the preventive sections of the Criminal Procedure Code if it could be assumed that their object was *ipso facto* defeated by the flight of an offender across the administrative border. In such cases it appears to me that the proper course for Courts to take is to satisfy themselves both by the record of evidence under sections 512 of the Criminal Procedure Code, and by such other evidence as may be necessary that an offence punishable with imprisonment has actually been committed by the person bound over. In the present case evidence was recorded to show that Juma has, since the execution of the bond, become a member of a gang of persons associated for the purpose of habitually committing dacoities and located in *Ilamguddar* in Afridi territory. Whether or not the evidence produced was sufficient to establish this is a question of fact into which I do not propose to enter. It appears to me sufficient that the evidence was actually produced, and that it was sufficient to satisfy the Court. I can see no reason to hold that it was insufficient. The fact that section 400, Indian Penal Code, was not specifically mentioned as the offence in ques-

(1) 5 Ind. Cas. 827; 5 P. R. 1910 Cr.; 8 P. W. R. 1910 Cr.; 169 P. L. R. 1910. 11 Cr. L. J. 252.

ABDUL RAHIM v. MA SHWE MAY.

tion does not seem to me material. The flight of a person accused of dacoity to the Independent Afridi territory raises the strongest possible presumption of the intention of the absconder to join a band of dacoits. In such cases I hold that a bond for good behaviour given under section 118, Criminal Procedure Code, on proceedings taken under section 110 of the same is clearly liable to forfeiture, provided that evidence is produced to show either that the person bound committed an offence in British India prior to his absconding and during the currency of the bond, or that during the currency of the same he committed any offence during his outlawry punishable with imprisonment. I, therefore, decline to interfere in these proceedings and reject this petition for revision.

Z. K.

Petition rejected.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 138-B OF 1922.

March 30, 1922.

Present:—Mr. Justice Maung Kin.

ABDUL RAHIM *alias* KO PO—

PETITIONER

versus

MA SHWE MAY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488, scope of—Maintenance of son during period of study.

The rights conferred by section 488 of the Criminal Procedure Code are very restrictive. Under the provisions of the section, a father is bound to maintain his child, if the latter is not able to maintain himself. But where he is able to maintain himself, but wants to prosecute his studies in order to better his prospects, he has no right to force his father to comply with his wishes.

Criminal revision against an order of the Sub-Divisional Magistrate, Pegu, dated the 1st of December 1921, passed in Criminal Miscellaneous Trial No. 153 of 1921.

ORDER.—Order of reference read and considered. I am concerned with the boy

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Maung Ba, who is between 17 and 18 years of age. He has passed the 7th Standard Anglo-Vernacular examination and is now studying in the 8th Standard. A boy with such educational qualifications can maintain himself by taking up clerical work. By reason of his age he can earn his living also by manual labour, if he wishes to take up such work. The boy in question does not want to leave school now but wants to go on till he passes the 10th Standard. His father is not bound to keep him in school until then. The maintenance asked for is under section 488 of the Criminal Procedure Code. The rights conferred by that section are very restrictive. The father is bound to maintain a child, if he is not able to maintain himself. In this case the son is able to maintain himself because he is 17 or 18 and has passed the 7th Standard Anglo-Vernacular examination, if he wishes to go out into the world. But he wants to better his prospects by staying on in school for 3 years more at least, at the expense of his father. I do not think he has any right to force his father to comply with his wishes under the provisions of the section. Therefore Rs. 12-8 which has been allowed to him must be disallowed from the date of the father's application. The original amount of maintenance ordered will be reduced to Rs. 37-8 and this will be for three younger children.

N. K.

Application allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 17 OF 1923.

February 25, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

CHHOTAI SINGH ACCUSED (IN JAIL)
APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345—Penal Code (Act XLV of 1860), s. 498, offence under—Composition at revision stage.

A High Court in revision may allow an offence under section 498, Penal Code, to be compounded.

Lalla v. Emperor, 24 Ind. Cas. 975; 17 O. C. 92; 15, C. L. J. 567, followed.

KRISHNARAO V. EMPEROR.

Application against an order of the Sessions Judge, Rae Bareilly, dated the 21st January 1923, upholding an order of the Magistrate, First Class, Partabgarh, dated the 14th December 1922, confirming an order of the Honorary Magistrate, Second Class, Tala, District Partabgarh.

Mr. *Radha Kishen*, for the Applicant.

ORDER.—The accused, Chhotai Singh, has been convicted of an offence under section 498 of the Indian Penal Code, and sentenced to rigorous imprisonment for six months.

The complainant, Durjan, is present today and states that he has received Rs. 90 in cash from Gobind Singh, son of Lotan Singh, a relation of the accused, and that he is willing to compound the offence by withdrawing the charge and take the woman, Musammatt Sartagi to his house. In *Lalla v. Emperor* (1) an offence under section 325 of the Indian Penal Code was similarly allowed to be compounded in revision. In view of the composition of the offence the application is allowed and the accused, Chhotai Singh, acquitted of the offence charged.

He will be set at liberty.

G. H.

Application allowed.

(1) 24 Ind. Cas. 975; 17 O. C. 92; 15 Cr. L. J. 567.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 354 OF 1922.
January 30, 1923.

Present:—Mr. Batten, J. C.

KRISHNARAO—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 435—Revision—Pending case—Interference by High Court—Penal Code (Act XLV of 1860), s. 405—Pleader retaining fee, the recovery of which is time-barred—Offence.

It is inadvisable for a High Court to interfere in revision in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress.

Jagat Chandra Mozumdar v. Queen-Empress, 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103, relied on.

A Pleader retaining fees, the legal recovery of which is time-barred, is not guilty of criminal breach of trust.

Application for revision of an order of the Magistrate, Betul, framing a charge against the applicant under section 409, Indian Penal Code.

Sir *B. K. Bose*, Messrs. *M. Gupta* and *S. B. Gokhale*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The learned Standing Counsel does not oppose the application, saying that there does not appear to be any dishonesty disclosed in the prosecution evidence. It is unusual to interfere in revision with a pending case but a perusal of the record convinces me that this is one of the exceptional cases in which the High Court should interfere, according to the principles laid down in *Jagat Chandra Mozumdar v. Queen-Empress* (1) and *Hari Charan v. Srish Chandra* (2). The element of dishonesty necessary to constitute the offence of criminal breach of trust under section 405, Indian Penal Code, is entirely absurd in this case. There was no concealment. The Magistrate seems to think it to be a criminal offence in every case for a Pleader to retain fees the legal recovery of which may be time-barred, entirely leaving out of consideration the fact that a Pleader will not be willing to continue to act for a party as he did in this case unless he is paid all his fees; and the other item in respect of which the charge has been framed consists of money which the applicant openly admitted to belong to the complainants and held at their disposal. If the Magistrate's view were right the non-payment of a debt would always amount to criminal breach of trust. It is useless to enter into details. The criminal charge is clearly unsustainable. I quash the proceedings and direct that the applicant be discharged from his bail. He is acquitted.

N. K.

Accused acquitted.

(1) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103.

(2) 7 Ind. Cas. 747; 38 C. 68; 11 Cr. L. J. 5; 13 C. L. J. 43.

EMPEROR V. PUTTOO LAL.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NOS. 11 AND 12 OF 1923.

March 29, 1923.

Present:—Mr. Dalal, A. J. C.

EMPEROR—COMPLAINANT

versus

PUTTOO LAL—ACCUSED.

EMPEROR—COMPLAINANT

versus

DHOKHEY LAL AND OTHERS—ACCUSED.

Stamp Act (I of 1899), s. 62 (2)—Award directing partition—Stamp, liability to—Arbitrator, signature by—Arbitrator, prosecution of.

Where an arbitrator signs, otherwise than as a witness, an award directing partition on an unstamped paper, he is liable to prosecution under section 62 (2) of the Stamp Act, if the instrument is chargeable with duty.

Criminal reference made by the District Magistrate, Unao.

JUDGMENT.—This reference and Reference No. 12 of 1923 have been made to this Court by the learned District Magistrate of Unao. He has requested the Court to set aside a conviction and sentence imposed on certain arbitrators who made an award and signed it. The reason given is that in the opinion of the Board of Revenue these men were illegally convicted of an offence under section 62 (b) of the Stamp Act. That section makes punishable the executing or signing otherwise than as a witness any instrument chargeable with duty other than a Bill of Exchange, cheque or promissory note without the same being duly stamped. The instrument which these arbitrators signed was an instrument of partition because it is an award by an arbitrator directing a partition [see section 2 (15)]. The instrument is similar to the one which was before the Bombay High Court for consideration upon a civil reference in the case of *Kalidas Lalbhai v. Tribhuvandas Bhagwandas* (1). It appears that according to the learned District Magistrate also the instrument was liable to stamp duty. His opinion seems to be that only the party executing an instrument of partition is liable to prosecution under section 62 (b). In my opinion there is a certain

amount of confusion of thought in this opinion. It is true that under section 29 (g) the stamp duty on an instrument of partition is payable by the parties, whose properties are partitioned, but section 62 does not make only those parties liable to prosecution. Not only persons who execute an instrument of partition but also those who sign it otherwise than as witnesses are liable to prosecution, if they append their signatures to an instrument which is not duly stamped. The arbitrators certainly signed the instrument of partition otherwise than as witnesses and were, in my opinion, liable to prosecution because they put their signatures to a dutiable instrument which had not been duly stamped. I had the advantage of hearing Mr. Gokul Prasad who appeared on behalf of some of the arbitrators, but, in my opinion, the learned District Magistrate's interpretation is not justified.

Through no fault of theirs, the arbitrators have been put to the additional expense of appearing in this Court and engaging a learned Pleader. I shall, therefore, take the opinion of the Board of Revenue to amount to a disapproval of the arbitrator's prosecution and to the withdrawal of the sanction to prosecute them under section 70 of the Stamp Act. For these reasons I set aside the conviction and sentence in every case and order the fines, if recovered, to be refunded.

N. K.

Conviction set aside.

ASHIQ ALI v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 158 OF 1923.

May 2, 1923.

Present:—MR. Justice Walsh.

ASHIQ ALI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 435—Sessions Judge, powers of, in cases under s. 110—Private inquiries influencing judicial decision, effect of.

A Sessions Judge has power, under section 435 of the Criminal Procedure Code, to call for the record of proceedings under section 110 of that Code, before an inferior Criminal Court within his jurisdiction, and to refer the matter to the High Court.

Where a Magistrate has made private inquiries, and has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, his order is liable to be quashed as being vitiated by the admission of such information.

Criminal Reference made by the Sessions Judge, Azamgarh, dated the 6th March 1923.

Mr. G. W. Dillon, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I am told that this is the first case in which revision being sought from a Sessions Judge of an order resulting from proceedings before a Sub-Divisional Officer and a District Magistrate under the *badmashi* section, the Sessions Judge, being himself unable to make any final order in the case, has expressed his opinion, that there is cause for interference by the High Court and referred the matter to the High Court with the recommendation that the order be set aside. Having regard to the amended procedure which is probable when the new Criminal Procedure Code becomes law, and to the imminence of some new legislation separating the executive from the judicial, my decision is of very small importance and likely to be of short duration as an authority. But I am definitely of opinion that section 435 does enable a Sessions Judge to call for the record of proceedings under section 110, Criminal Procedure Code, taken before an inferior Criminal Court within his jurisdiction, and that the other provisions of the Code enable him to refer the matter as he has done.

I am not alarmed by the prospect that other attempts may be made to follow this precedent, if it is one. Having myself read a certain number of the voluminous records of cases under section 110, I am satisfied that no Judge would voluntarily take upon himself the task more often in his life time than he was absolutely compelled, and it would be doing scant justice to the capacity or sincerity of our Sessions Judges to assume that they will be likely to interfere in any case in which a really paramount reason for interference was not shown.

I do not propose to exercise an independent judgment in this case upon the merits. I am satisfied that the Sessions Judge had power to refer it, and I am satisfied that he has gone very carefully into the whole matter. He has done what I have been compelled to do more than once, submitted the whole record to an elaborate analysis in order to see whether the case was fairly tried according to law, and he has come to this conclusion. He finds the evidence for the prosecution partly inadmissible, partly inconclusive. He finds that it is hearsay, vague and unsubstantial. He finds nothing definite proved against the accused, and no evidence called against them from their own village. He makes the trenchant observation that if it is impossible to get evidence from their own village because of their sinister influence, the real ground for binding them over would be that there was no evidence against them. On the other hand, he finds a number of persons of good character and position from their village itself and from the neighbouring villages who speak well of these men, while nobody has been able to suggest that they have not got resources for living as they do live, without support from theft or bad means of livelihood. He holds very strongly that it would be unfair to brand these men as bad characters upon this evidence, and on the whole after a careful study of his judgment I am satisfied that if I had studied the record I should have come to much the same conclusion as he has done. I should, therefore, if the matter had come before me and I had been compelled to go through this record, have interfered in revision, and on that ground I accept the reference.

But there is one further ground upon which I think I should have interfered in

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any case. In the explanations tendered by the District Magistrate and the Sub-Divisional Officer respectively in answer to the Sessions Judge's opinion, it is stated that these gentlemen held private enquiries and confidential enquiries. No doubt a Magistrate is compelled in the performance of his duties to make private enquiries as to the character of his neighbourhood and as to the persons reputed to be of bad character and to be likely to cause trouble. These enquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge, but where it is shown, as it appears to be shown in this case, that the Magistrate has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, I would have no alternative but to quash the order which was vitiated by the admission of such information.

I accept the reference and quash the order.

W. C. A.

Reference accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 1045 OF 1922.

November 18, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice.

MATU RAM AND OTHERS—ACCUSED—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 186—Obstructing public servant—Assault on persons summoned by public servant to aid in investigation.

A Naib-Tahsildar of Income Tax visited the village of the accused where he was told by the *Lambardars* that the accused kept several shops and ought to be assessed to Income Tax. A dispute, thereupon, took place between the *Lambardars* and the accused and in the course of the quarrel the latter assaulted and beat the former, who, as a result, declined to render any help to the Naib-Tahsildar in his investigation:

Held, that the action of the accused did not amount to obstructing the Naib-Tahsildar in the discharge of his public functions within the meaning of section 186 of the Penal Code. [p. 339, col. 1.]

Case reported by the Sessions Judge, Karnal, with his No. 1326 of 12th July 1922.

FACTS.—A Naib-Tahsildar on special duty connected with the assessment of Income Tax visited the village of Pai, where the *Lambardars* told him that a certain family of *Mahajans* had several shops and ought to be assessed. A dispute took place between the *Lambardars* and Mattu Ram *Mahajan*. The former said he had only one shop, the *Lambardars* said he had several. The *Lambardars* showed the Naib-Tahsildar several shops. The dispute between *Mahajans* and *Lambardars* grew hotter and resulted in a fight between them. The Naib-Tahsildar, therefore, had to stop his work for the time being.

Seven accused persons were convicted by Tahsildar of Kaithal, Magistrate Second Class, under section 353, Indian Penal Code, and sentenced—Mattu Ram and Madho Ram each to Rs. 100 fine and five other accused each to Rs. 50 fine.

They appealed to the District Magistrate, Karnal, who held that the Naib-Tahsildar had not been assaulted and the conviction under section 353 could not stand. But he found that the accused had obstructed the Naib-Tahsildar in the execution of his duty, and altered the conviction to section 186, Indian Penal Code, but maintained the sentences.

GROUND.—After hearing the petitioners' learned Vakil I agree with the District Magistrate's finding as to the facts and think that the petitioners were rightly convicted under section 186, Indian Penal Code, but the sentences appear to be unduly severe. Mattu Ram and Madho Ram are real brothers. Of the other petitioners Sant Lal is their real brother, Beni is the son of Mattu Ram and Gita is real nephew of the three brothers. The remaining two petitioners Payara and Kali Ram are first cousins once removed of the three brothers, *i.e.*, all the petitioners are descended from the same great-grandfather. This family has been fined collectively Rs. 450 for a not very serious offence. The *Lambardars* who lodged a separate

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petition. have compromised it and the Naib-Tahsildar was not forced to leave the village merely to suspend operations for the time being.

I recommend that the fines be reduced as follows:—Mattu Ram and Madho Ram (who actually committed the assault on the *Lambardars*) Rs. 25 each and the other five petitioners Rs. 10 each, making a total of Rs. 100 on the family.

This will, I think, meet the ends of Justice.

Lala Balwant Rai, for the Petitioners.

ORDER.—The petitioners have been fined under section 186, Indian Penal Code, for voluntarily causing obstruction to a Naib-Tahsildar in the discharge of his public functions, and the contention urged on their behalf is, that on the facts found by the learned District Magistrate the case does not fulfil the requirements of the aforesaid section.

It appears that the Naib-Tahsildar of Income Tax visited the village of the petitioners where he was told by the *Lambardars* that the petitioners kept several shops and ought to be assessed. A dispute then took place between the *Lambardars* on the one side and the petitioners on the other, and it is alleged that the *Lambardars* were, in the course of the quarrel, assaulted and beaten. They thereupon filed complaints under section 323, Indian Penal Code, but these cases have been compounded.

The case, out of which this application for revision arises, relates to the alleged obstruction offered to the Naib-Tahsildar. Now, the learned District Magistrate finds that the Naib-Tahsildar was obstructed because the *Lambardars*, "whom he called in, as he had a right to do, to aid him in his investigation were assaulted and beaten." I consider that this is a far-fetched view. The learned Magistrate does not find that the petitioners either assaulted the Naib-Tahsildar or made any gestures, and I am not prepared to hold that the mere fact that the *Lambardars* who were assaulted, declined to render any help to the Naib-Tahsildar in his investigation can be viewed as an obstruction caused by the petitioners.

Accordingly, I hold that the guilt of the applicants under section 186, Indian Penal Code, has not been made out and, setting

aside their convictions, I direct that the fines be refunded to them.

Z. K.

Conviction set aside.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 279 OF 1922.

August 2, 1922.

Present.—Mr. Justice Jwala Prasad and
Mr. Justice Coutts.

MOTI SINGH AND OTHERS—PETITIONERS
versus

DHANUKDHARI SINGH AND OTHERS.
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Procedure—Evidence Act (I of 1872), s. 138—Cross-examination, right of—Examination-in-chief, value of, in absence of cross-examination.

The object of section 145 of the Criminal Procedure Code is to prevent a breach of the peace by a summary decision as to the possession of the contending parties, leaving them to decide their title and right to possession in a competent Civil Court where, naturally, the proceeding has to be a protracted one. It is, therefore, incumbent upon Magistrates to dispose of proceedings under section 145 of the Code as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section. The procedure for the trial of a case under this section is that laid down for the trial of summons-cases. [p. 340, cols. 1 & 2.]

Section 138 of the Evidence Act merely lays down the order in which witnesses will be examined, cross-examined and re-examined. An examination-in-chief of a witness, without an opportunity being offered to the opposite party to cross-examine, is not legally acceptable. [p. 341, col. 1.]

Messrs. Yunus and Reyasat Hussain, for the Petitioners.

Messrs. Akbari and Hasan Jan, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—I regret that the order of the Magistrate, dated the 3rd of May 1922, declaring the possession of the first

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party under section 145 of the Code of Criminal Procedure, must be set aside and the case remanded for continuing the trial thereof from the stage at which it had reached that day. This was a very old case. The dispute between the parties led to a proceeding under section 145 of the Code some time last year and on account of the indiscretion of the Magistrate who tried that case, the order had to be set aside by this Court on the 19th of October 1921 with the direction to start a fresh proceeding in case of a danger of the breach of the peace still existing. On the 26th of November 1921 the Magistrate considered the Police report and the High Court judgment referred to above and started the proceeding which is the subject-matter of the present application obviously because the dispute between the parties still continued in so acute a form as to necessitate the adoption of a fresh proceeding under section 145.

Now, the object of section 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where, naturally, the proceeding has to be a protected one. It is, therefore, incumbent upon Magistrates to dispose of proceedings under section 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section. These rules are very simple and it is to be regretted that the Magistrate in the present case has not adopted them although his attention was drawn to the rules by the order of this Court, dated the 19th October 1921. It is extremely harassing to the parties that the present proceeding, started on the 26th November 1921, could not be finished by the 3rd of May 1922.

Without going to the earlier orders in the case I would at once come to the order of the 6th of February 1922. By that order the case was made over to the Magistrate in question when the evidence had already commenced in the Court of the Magistrate who had before that the seizure of it. In the order of the 7th of February the Magistrate directed the witnesses of the first party to appear on the 17th of February; thereby he allowed the second party to keep back his witnesses till the evidence on behalf of the first party was finished.

Thereafter, on various dates, he examined several witnesses on behalf of the first party only in chief. The procedure for the trial of a case under section 145 is that laid down for the trial of summons-cases where witnesses are examined, cross-examined and re-examined and then discharged. The Magistrate in the present case started the enquiry as if it was a warrant-case. He examined the witnesses in chief and postponed their cross-examination till after the first party had closed its case. Then, on the 5th April 1922, the first party closed its case and the witnesses were directed to be produced for cross-examination on the 18th. One witness for the first party was then cross-examined on three dates, the 18th, the 19th and 20th of April. The cross-examination shows that the Magistrate would not have taken more than half an hour or so each day in recording the cross-examination of that witness. This was, as observed above, extremely harassing to the parties. For cross-examining one witness the second party had to go to the Court day after day. There is no reason why the Magistrate should not have taken up this case and continued the hearing of it till it was finished in two or three sittings. The result was that the parties had got tired of this procedure and on the 3rd May 1922 when the cross-examination of the witness had to be resumed the second party did not appear in time. The Magistrate then disposed of the case *ex parte*, holding that the evidence adduced by the first party was sufficient to prove its possession over the lands in question. No opportunity was given to the second party to cross-examine the witnesses other than the one already referred to and two other witnesses, Nos. 11 and 15. Witness No. 11 was a Sub-Deputy Collector and he was a formal witness. His cross-examination was declined by the second party. Witness No. 15 was also a formal witness. He simply proved the complaint petition.

Mr. Akbari says that the second party had a right to cross-examine these witnesses and if they did not cross-examine them, after they were examined in chief there was no irregularity committed by the Magistrate. He has also referred to section 138 of the Indian Evidence Act, I am unable to agree with this view. Section

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138 of the Act has obviously no application. It only lays down the order in which the witnesses will be examined, cross-examined and re-examined; and, referring to the cross-examination, it says that the witnesses will be cross-examined after the examination-in-chief if the party so desires. It certainly implies that the party had an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is a sufficient compliance with the requirements of the law.

Now, it is an elementary principle of law that in examination-in-chief of a witness, without an opportunity being offered to the opposite party to cross-examine, is not legally acceptable. Therefore the evidence of the witnesses in the present case was not such as upon which the Magistrate could act. It may, however, be said that the second party was absent when the case was called on and one of the witnesses of the first party referred to above who was under cross-examination was present in Court and, therefore, there was an opportunity to cross-examine him. The non-appearance of the second party does not, therefore, make evidence of that witness inadmissible. There is some force in this argument. But the Magistrate does not in his order say that he has acted upon the evidence of that witness alone and not upon the evidence of witnesses who were not cross-examined and whose evidence was, as observed above, inadmissible. It appears to me that apparently he has not referred to any evidence. After the default was committed by the second party he simply, in continuation of his recording the order that the second party did not put in appearance, wrote one passage in his order that the "first party had adduced sufficient evidence to prove possession." There is also a good deal of force in the contention of Mr. Yunus that on that day only the first party's witness referred to above was to be cross-examined and that the Magistrate ought to have given opportunity to the second party to adduce its evidence. This opportunity was never given.

Considering all the circumstances of the case, I hold that the order of the 3rd of May 1922, does not seem to have been based upon the legal evidence and is, therefore,

without jurisdiction. I also hold that the Magistrate has denied a fair trial of the case to the second party. I further hold that the Magistrate has in the present case shown great indifference in the disposal of the case. He seems to have treated this case as if of no importance and used to take it up when it suited him. This is, perhaps, due to his being in charge of the Treasury and thus not being able to afford much time for this case. I think some better arrangements should have been made for the trial of this case.

I, therefore, set aside the order of the Magistrate, dated the 3rd of May 1922, and direct that the case be taken up from that stage after giving an opportunity to the second party to cross-examine one witness already referred to and the other witnesses on behalf of the first party and to adduce its own evidence, if any.

Coutts, J.—I agree that the order must be set aside and the trial continued from the stage it had reached.

N. K.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 337 OF 1922.

August 2, 1922.

Present.—Sir Grimwood Mears, Kt.,
Chief Justice, and Mr. Justice Piggott.

CHHOTAY LAL—APPLICANT

versus

CHHEDI LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 10, 195 (1) (a)—Police Act (V of 1861), s. 4, District Magistrate acting under, whether Court—Jurisdiction of Sessions Judge to interfere—Revision whether competent—Superintendent of Police whether subordinate to District Magistrate.

Where a District Magistrate has authority to grant and does grant, contrary to the opinion of the Superintendent of Police, sanction to prosecute a person on the allegation that he had committed contempt of the lawful authority of an officer in-charge of a Police station, he does so by virtue of the provisions of section 4 of the Police Act. He is, however, not acting as the Presiding Officer of the Court of a District Magistrate, constituted under the Criminal Procedure Code and consequent,

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ly a Sessions Judge has no jurisdiction to interfere with his order. His order, not being that of a Court of Justice, is not subject to the revisional jurisdiction of a High Court.

The Superintendent of Police of a District is subject to the Magistrate of that district within the meaning of section 195 (1) (a) of the Criminal Procedure Code.

Emperor v. Shib Singh, 27 A. 292; 1 A. L. J. 597; A. W. N. (1904) 231; 1 Cr. L. J. 899, relied on.

Emperor v. Sarada Prosad Chatterjee, 32 C. 180; 2 Cr. L. J. 171, not followed.

Messrs. G. W. Dillon and S. N. Mukerji, for the Applicant.

Mr. A. P. Dube, for the Opposite Party.

ORDER.—This application was originally filed as one in revision against an order passed by the Sessions Judge of Etawah refusing to interfere with the order of a gentleman holding the office of District Magistrate of the district of Etawah whereby he overruled an order passed by the Superintendent of Police of that district and contrary to the opinion of the said Superintendent, granted sanction for the prosecution of the applicant, Chhotay Lal, on the allegation that the said Chhotay Lal had committed a contempt of the lawful authority of the Police Officer in charge of a certain Police station in that district by giving the said Police Officer false information with such intent as to make the giving of the information an offence punishable under section 182 of the Indian Penal Code. The Sessions Judge was perfectly right in refusing to interfere. If the District Magistrate had authority to grant the sanction in question he had that authority in virtue of the provisions of the Police Act V of 1861, section (4). He was not acting as the presiding officer of the Court of a District Magistrate constituted under the Code of Criminal Procedure, Act V. of 1898. The learned Sessions Judge rightly appreciated this fact and held that he had no jurisdiction to interfere. One of us was responsible for admitting this application and at the time of its admission, the suggestion was thrown out that the order of the Sessions Judge might be correct and yet the order of the District Magistrate a bad one. Upon this suggestion a further application in revision has been filed which assails the order of the District Magistrate direct. This was not the intention with which the suggestion above referred to was thrown out. The order of the District Magistrate, not

being that of a Court of Justice, is not in itself subject to the revisional jurisdiction of this Court. What was contemplated was that on proceedings being taken upon this order of sanction the person accused, or sought to be prosecuted, might have pleaded before the Court seeking to take cognizance of the matter that the said Court had no cognizance because of the invalidity of the alleged sanction. If proceedings had gone this length an issue of law would have been raised in a Court of subordinate jurisdiction to this Court and the opinion of this Court might have been sought by way of an application in revision. As the matter stands, however, we think it expedient to deal directly with the question sought to be raised. The real question in issue is whether the Superintendent of Police of the District of Etawah is or is not subordinate to the District Magistrate of Etawah within the meaning of section 195 (1) (a) of the Code of Criminal Procedure. There is clear authority of this Court for answering this question in the affirmative; *Emperor v. Shib Singh* (1). That authority has not, so far as we are aware, been challenged in this Court for some 18 years. Moreover, it seems to us that the words of the relevant section of the Police Act, referred to by the learned Judge who decided that case do have the force and meaning which he ascribes to them, that is to say, they do make the Superintendent of Police of a District subordinate to the Magistrate of that District. There is one authority of the Calcutta High Court to the contrary. It was referred to by the learned Judge of this Court who decided *Emperor v. Shib Singh* (1). We are by no means clear that the learned Judges of the Calcutta High Court have not to a considerable extent changed their view of the matter, *vide* the subsequent decision in *Emperor v. Sarada Prosad Chatterjee* (2). At any rate, it is sufficient for us to say that we find ourselves in general agreement with the view taken by Sir George Knox in *Emperor v. Shib Singh* (1). We reject both these applications. The stay order passed at the time when they were admitted is discharged.

N. K.

Applications rejected.

(1) 27 A. 292; 1 A. L. J. 597; A. W. N. (1904) 231; 1 Cr. L. J. 899.

(2) 32 C. 180; 2 Cr. L. J. 171.

GOPAL NAIDU, *In re*.**MADRAS HIGH COURT.
SPECIAL BENCH.**CRIMINAL REVISION CASE No. 387 OF 1922.
(CRIMINAL REVISION PETITION No. 336
OF 1922).

December 22, 1922.

Present :—Sir Walter Schwabe, K.T., Chief
Justice, Mr. Justice Phillips, Mr. Justice
Devadoss, Mr. Justice Venkatasubba
Rao and Mr. Justice Wallace.*In re* GOPAL NAIDU AND ANOTHER—

ACCUSED NOS. 1 & 2—PETITIONERS.

*Penal Code (Act XLV of 1860), ss. 96, 97,
102, 105, 340—Right of citizen to arrest
another—Apprehension of commission of offence
—Common Law, principles of, whether applicable
to British India.**In India, the Criminal Law has been codified
in the Penal Code and in the Criminal Procedure
Code, and where the Codes specifically deal with a
question, Courts are not entitled to invoke the
Common Law of England. [p. 345, cols. 1 & 2.]**Under the Penal Code, every citizen has the
right to arrest or confine another where there is
genuine and reasonable apprehension of danger
to person or property from that other. [p. 346,
cols. 1 & 2.]**The decision in In re Ramasami Iyar, 61 Ind.
Cas. 652; 44 M. 913; 14 L. W. 189; 22 Cr. L.
J. 412 approved but not the grounds of
decision.**Per Schwabe, C. J.—Under section 340 of the
Penal Code the arrest of any person who has not
been guilty of any offence for which arrest without
warrant is permitted is prima facie wrongful
confinement of the person, but sections 96 and 97 of
the Code give a right to every person to defend
his own body and the body of every other person
and the property of himself and every other person
against certain offences and this right of private
defence commences under sections 102 and 105
of the Code, when a reasonable apprehension of
danger to the person or property commences.
Therefore, a person who has a genuine and reason-
able apprehension that to allow another to remain
at large will endanger the person and property of
others is entitled, to arrest or confine that other.
[p. 345, col. 2; p. 346, col. 1.]**Petition, under sections 435 and 438 of
the Code of Criminal Procedure, 1898, pray-
ing the High Court to revise the judgment
of the Court of Session of the North Arcot
Division, at Vellore, in Criminal Appeal
No. 1 of 1922, preferred against the judg-
ment of the Court of the Sub-Divisional
Magistrate, Tiruvannamalai, in C. C.
No. 62 of 1921.**This case coming on for hearing on the
15th and 16th of November 1922, upon
perusing the petition and the judgments
of the lower Court, and the material papers**in the case, and upon hearing the argu-
ments of Mr. K. S. Jayarama Iyar, for the
Petitioners, and of the Public Prosecutor
on behalf of the Crown, the Court (Oldfield
and Ramesam, JJ.) made the following***ORDER OF REFERENCE TO A FULL
BENCH.***We are asked to revise the decision* of the
Sessions Judge of North Arcot, confirming
the conviction of the two petitioners, Head
Constables, of an offence punishable under
section 342 and their sentences to pay a fine
of Rs. 10 each. The findings of the lower
Court are, we take it, that on the night of
8th August 1921 the two petitioners arrested
one Nayinatha Udayan as he was drunk
and creating a disturbance in the Brahman
street of the village, and that they took him
to the station and confined him there, al-
though one of them, it is found, knew of his
name and address. On those findings the
learned Sessions Judge held that Nayinatha
Udayan, having committed a non-cognis-
able offence, could not be arrested or taken
to the station, inasmuch as there was no
necessity for the Head Constables under
section 57 of the Code of Criminal Procedure
to do so in order that his name or residence
might be ascertained.**Here the petition has been argued, first,
with reference to section 21 of the Madras
Police Act, XXIV of 1859, the contention
being that this section removes any restric-
tion on the power of arrest imposed by any
other law, including the Criminal Procedure
Code. Section 21, no doubt, states that "it
shall be the duty of every Police Officer to
use his best endeavour and ability to prevent
all crimes, offences and public nuisances
to preserve the peace, to apprehend dis-
orderly and suspicious characters;" and
then further duties are described with a
similar absence of precision. This section,
as we understand it, expresses only some of
the pious injunctions, to which our earlier
Indian Draftsmen were addicted, and was
not intended to enlarge the powers with
which the Police were at its date or have
since been invested under the substantive
law, whatever that law at the time
in question may have been or may be. We
cannot presume an intention to limit the*

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liberty of the subject by language so general We, therefore, turn to the second argument relied on by Mr. Jayarama Aiyar on behalf of the petitioners, that in fact what they did was authorised by the substantive law, as declared by Judicial Authority in this Presidency.

Shortly, petitioners rely on the decision in *In re Ramasami Iyar* (1) as justifying their action. That decision we read as founded on three propositions. First, that the Common Law of England would authorise an arrest not only by the Police or a Magistrate but by any person, in the circumstances of the present case; next, that the Common Law of England is applicable to India, except where a Statute either expressly or by implication has abrogated it, and, thirdly, that the Common Law has not been abrogated in any way, so far as it is applicable to the facts before us.

The first of these propositions has not been disputed here, and we observe only that the Common Law power to terminate a nuisance, such as is here in question, by the arrest of the offender is an effective and immediate remedy adapted to the circumstances of such cases. The second rests in this Presidency on the authority of *Potluraju Venkata Reddy v. Emperor* (2). The learned Public Prosecutor has drawn our attention to *Satis Chandra Chakrabarti v. Ram Dayal De* (3) and it is possible that re-consideration of the principle involved, in the light of the latter decision may be justified. We do not, however, pursue this further, since we are clear that in connection with the third of the propositions above stated a reference to a Full Bench must be made.

To the third proposition the learned Public Prosecutor has taken objection on the ground that certain provisions of Statute Law were not considered by the learned Judges in the previous case. The offence in ques-

tion then, as now, was one punishable under section 290 or section 510, Indian Penal Code, Nayinatha Udayan having in fact been convicted of an offence punishable under the former. Which section, however, was really applicable does not matter, because the offence under each is one, for which the Police cannot arrest without warrant; that is, it was non-cognisable. There is then the provision regarding arrest in non-cognisable offences, section 57, Criminal Procedure Code, and, whatever the inconvenience involved, we cannot disregard the existence of this apparently exhaustive provision regarding the powers of the Police in them. There is no mention of these provisions in *In re Ramasami Iyar* (1) and no consideration of the extent to which they abrogate the right of arrest under the English Common Law. In the absence of such mention we entertain doubt as to the correctness of the learned Judge's conclusion; and we accordingly refer to a Full Bench the question whether *In re Ramasami Iyar* (1) was correctly decided.

This case came on for hearing on the 28th of November 1922 in pursuance of the Order of Reference to a Full Bench, dated the 16th November 1922.

Mr. K. S. Jayarama Aiyar, for the Petitioner.

Mr. J. C. Adam, Public Prosecutor for the Crown.

OPINION.

Schwabe, C. J.—The question referred to the Full Bench is whether *In re Ramasami Aiyar* (1) was correctly decided.

This is not a desirable form of reference to a Full Bench, because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full Bench is desired should be formulated. In *In re Ramasami Iyar* (1) a Village Magistrate arrested a drunken man whose conduct was at the time a grave danger to the public. In this case two Police Constables arrested a man who was drunk and creating a disturbance, but to what extent he was

(1). 61 Ind. Cas. 632; 44 M. 913; 14 L. W. 189; 22 Cr. L. J. 412.

(2). 14 Ind. Cas. 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 4161; 23 M. L. J. 39.

(3). 39 Ind. Cas. 143; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31; 48 C. 388.

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a danger to others does not appear in the Order of Reference. The decision in *In re Ramasami Iyar* (1) went on the ground that the English Common Law which is "that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct showed that the public peace is likely to be endangered by his acts" [as per Parke, B. in *Timothy v. Simpson* (4)] applies to India and affords a good answer to any person charged for wrongful confinement under section 342 of the Indian Penal Code if the facts of the case comply with that definition.

The first introduction of English Common Law in this country was in a Charter of Charles II in 1689 whereby it was ordained that the law of the Kingdom, which would include the Common Law, should be administered in this country. In later Charters and enactments it has been provided that the Hindu Law is to be applied between Hindus and the Muhammadan Law between Muhammadans and in cases not otherwise provided for, the principles of equity, justice and good conscience and these later words have been held to include material parts of the English Common Law. But for the purpose of this case it is not necessary to consider precisely to what extent and with what restrictions the Common Law of England is part of the Law of India.

In this country the Criminal Law has been codified in the Indian Penal Code and in the Code of Criminal Procedure and the principle has been well-established and is fully enunciated in the speech of Lord Halsbury in the *Bank of England v. Vagliano Brothers* (5) that "where a Statute is expressly said to codify the law, you are not at liberty to go outside the Code so created, because, before the existence of that Code, another law prevailed." This perhaps should be limited by the speech of Lord Herschell (at page 145) to the effect that the purpose of the codified Statute is that on any point not specifically dealt

with by it the law shall be ascertained by interpreting the language used.

Now, there can be no doubt that the Code of Criminal Procedure deals with the powers of arrest with or without warrant, and the Indian Penal Code deals specifically with the question of wrongful confinement. It is, however, to be observed that the Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crime, although there are specific instances given permitting the arrest of persons suspected of crime and it may be correct to say that the Code of Criminal Procedure does not specifically deal with the matter under discussion here. However this may be, the Indian Penal Code makes 'wrongful confinement' an offence by section 342. What amounts to wrongful confinement must be ascertained by examining the definition contained in sections 339 and 340. If the acts complained of come within both definitions the offence has been committed unless there are other sections in the Code which provide an excuse for or a defence to what otherwise would be a crime. The Indian Penal Code defines the offence and also states what matters will afford a defence and, therefore, it may be said that this Code deals specifically with the question, and it follows that the Court is not entitled to invoke the Common Law of England in the matter at all. I, therefore, cannot agree with the grounds of decision in *In re Ramasami Iyar* (1) but, in my judgment, the decision was perfectly correct and can be supported on other grounds to be found on a proper interpretation of the Code itself.

By section 340 of the Indian Penal Code, whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is said to wrongfully confine that person. By section 339, whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed is said wrongfully to restrain that person. So on the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted *prima facie* it is wrongful confinement of the person; sections 96 and 97

(4) (1835) 4 L. J. (N. S.) Ex. 81; 1 Cr. M. & R. 757; 5 Tyr. 244; 6 Car. & P. 499; 4 L. J. M. C. 73; 40 R. R. 722; 149 B. R. 1285.

(5) (1891) A. C. 107; 60 L. J. Q. B. 1451; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

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give a right to every person to defend his own body and the body of every other person and the property of himself and of every other person against certain offences, and this right of private defence 'commences,' under sections 102 and 105, when a reasonable apprehension of danger to the person or property commences. In our judgment these provisions are quite wide enough to have afforded a complete defence in the case reported as *In re Ramasami Iyar* (1) and in effect provide for this country what is provided in England by the rule of Common Law referred to. The question in each case must be whether the person arresting or confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Some such provision is a necessity in a civilised community, for, otherwise, its citizens would be left the alternative of standing by until a crime has been committed or of themselves becoming criminals by taking what might be the only course to prevent the commission of a crime, namely, the confinement of the person whose actions show that the persons and property of others are endangered. In my judgment the Indian Penal Code adequately provides the solution of the difficulty.

Reliance has been placed on section 21 of the Madras City Police Act, XXIV of 1859, which provided that it shall be the duty of every Police Officer to use his best endeavour to prevent all crimes and offences and public nuisances to preserve the peace, to apprehend disorderly and suspicious characters. This was followed by many sections providing when a Police Officer could or could not arrest with or without warrant but on the coming into force of the first Code of Criminal Procedure these sections were repealed but section 21 was left unrepealed. This, no doubt, was done deliberately and it states the duties of the Police in the matter of prevention of crime, leaving the matter of arrest of persons for crimes that have been committed or are suspected to have been committed to be dealt with in future under the Code of Criminal Procedure. It is not necessary to consider in this case whether this section gives to the Police wider powers in cases such as the one in question than are enjoyed by all

citizens; but it is to be observed that it would be remarkable if Police Officers were by Statute enjoined to preserve the peace and a genuine attempt to do so under circumstances like the present would amount to the commission of a criminal offence by the Police. It is not, however, necessary to consider this point further as it has not been specifically referred to us, but it must not be taken that I am expressing my view of the correctness or otherwise of the decision of the Referring Bench on this point.

The answer to the question referred to us is that the case in *In re Ramasami Iyar* (1) is rightly decided on the ground stated above. It will be for the Referring Bench to consider, on the facts of this case, whether the accused had a genuine and reasonable apprehension that unless the prosecutor was arrested there would be damages to the person or property of others.

Having had the opportunity of reading the judgments of my learned brothers I would add that it will be also open to the Referring Bench to consider the applicability of section 81 of the Indian Penal Code.

Phillips, J.—I agree and would only add that in the present case and in similar cases the provision in section 81 of the Indian Penal Code may also be considered. That section lays down that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property. While I am not prepared to say that this provision is strictly applicable to the facts of the case referred, it appears to me that it and other provisions of Chapter IV of the Penal Code have been framed to provide for cases like the present one, to which, before the enactment of the Code, the Common Law would have applied.

Devadoss, J.—The question referred to the Full Bench is, whether *In re Ramasami Iyar* (1) was correctly decided. In that case a Village Magistrate was convicted under section 341, Indian Penal Code. Ayling and Coutts-Trotter, JJ., held that the Common Law of England was applicable to this country and that on the facts

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found the petitioner "had ample justification, not as Village Magistrate, but as a private citizen to put a restraint upon the complainant who was drunk and disorderly and threatened to commit a breach of the peace and was a danger to the other villagers." In the case under reference the petitioners who are Police Constables have been convicted under section 342, Indian Penal Code, for wrongfully confining the complainant and sentenced to pay a fine of Rs. 10 each.

Two questions arise for consideration.

1. Whether the Common Law of England is applicable to India except where a Statute either expressly or by implication has abrogated it.

2. Granting that the Common Law of England is applicable to India, whether the Statute Law has not abrogated it so far as it is applicable to this case.

As regards the first point Mr. Jayarama Iyer for the petitioners contends that the Common Law of England is applicable to India and relies upon *Baboo Gunnesht Dutt Singh v. Mugneeram Chowdry* (6) and *Ramloll Thackoorseydass v. Soojumnull Dhondmull* (7). In *Ramloll Thackoorseydass v. Soojumnull Dhondmull* (7) an action was brought in the Supreme Court of Bombay on a wager. Lord Campbell in delivering the judgment of their Lordships of the Privy Council observed, at page 310: "The Statute, 8 and 9 Vic., Ch. 109 does not extend to India, and although both parties on the record are Hindus, no peculiar Hindu Law is alleged to exist upon the subject; therefore, this case must be decided by the Common Law of England" and held that the wager in question was not illegal and could be enforced in a Court of Justice.

In *Baboo Gunnesht Dutt Singh v. Mugneeram Chowdry* (6) the question was whether witnesses could be sued for damages in respect of evidence given by them in a judicial proceeding. Their Lordships of the Privy Council held, "that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recog-

(6) 11 B. L. R. 321; 17 W. R. 283.

(7) (1848) 6 Moor. P. C. 300; Perry's O. C. 173 at 193; 1 Sar. P. C. J. 361; 4 M. L. A. 339; 4 Ind. Dec. (O. S.) 161; 18 E. R. 729; 13 E. R. 699; 79 R. R. 62 (F. C.).

nised by all the Courts of this country to be one based upon principles of public policy. The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury." In the former case, their Lordships assumed as a matter of course that the Common Law of England was applicable to contracts in Bombay. According to the Charter of the Supreme Court the King's Judges were enjoined to administer the Common Law of England, and it was evidently on that ground the question whether the Common Law of England was applicable or not was not raised in argument in that case. In the latter case their Lordships rest their judgment upon the principles of public policy. They do not invoke the aid of the Common Law of England for holding that a witness could not be sued for damages in respect of the evidence given by him.

In *Potaraju Venkata Reddy v. Emperor* (2) a Full Bench of the Madras High Court held that the statement of an accused person in answer to a question by the Court is absolutely privileged under the Common Law of England and could not form the subject of an indictment, under section 499, Indian Penal Code, even though false and made without good faith, and that exceptions to section 499, Indian Penal Code, were not exhaustive. This decision has been dissented from by a Full Bench of the Calcutta High Court in *Satis Chandra Chakrabarti v. Ram Dayal De* (3) with the greatest respect to the learned Judge who decided *Potaraju Venkata Reddy v. Emperor* (2). I share with Spencer, J., the apprehension entertained by him in that case that the cause of justice might suffer by the extension of the principle of absolute privilege to unscrupulous persons who in a petty case might make the most unfounded aspersions on the character of the relations of the complainant and his witnesses.

When the Charter was granted to the Madras High Court it was provided by section 30 that all persons brought for trial before the High Court of Madras either in

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the exercise of its Original Jurisdiction as a Court of Appeal, Reference or Revision, charged with any offence the law as contained in the Penal Code or Amending Acts of such Code should be applied. Section 112 of the Government of India Act lays down that the High Courts of Calcutta, Madras and Bombay should, in the exercise of their Original Jurisdiction in suits against the inhabitants of the three Cities, apply the personal law in the matter of inheritance, succession and contract where the parties are subject to a personal law. But no distinction is to be made with regard to the administration of the Criminal Law of the land except so far as that law is laid down in the Acts of the Legislatures. The powers of the Governor-General in Council to make the laws are embodied in section 65 of the Act. Subject to certain restrictions, which it is unnecessary to detail here, the central Legislature has power to legislate on all subjects. The Common Law of England has not been made applicable to this country by any Act of Parliament or by any enactment of the Indian Legislature. Our attention has not been drawn to any Statute or legislative enactment which makes the Common Law of England the law of the land. The Charter of Charles II. granted to the East India Company and the later Charters enjoin upon the Company and its servants due obedience to the Common and Statute Law of England. It was only towards the close of the 18th century that the Supreme Courts in Madras, Calcutta and Bombay were established, where the King's Judges administered the Common Law of England. Outside the jurisdiction of the Supreme Courts, the law of the land with regard to civil matters and the Muhammadan Law as regards offences were administered by the Company's Courts. The principal Civil Court was called *Sudder Adalat*, and the principal Criminal Court was known as *Fowzdari Adalat*. In Madras, as well as in other provinces, Regulations were passed empowering the Courts to deal with Civil and Criminal matters. In Madras, Regulation II of 1802 was passed giving jurisdictions to Civil Courts. Then by Regulation III Rules of Civil Practice in the *Zillah* Courts were enacted. By Regulation V the *Saddar Adalat* or Chief Court of civil jurisdiction was estab-

lished. Regulation VI laid down rules for the guidance of Magistrates. By Regulation VIII the *Fouzdari Adalat* or Chief Criminal Court was established. From 1802 onwards various Regulations were passed with regard to the trial of offenders and the trial of civil suits. By those Regulations the Judges of the *Zillah* Court and the *Sudder Adalat* were enjoined to apply the Hindu Law to Hindus and the Muhammadan Law to Muhammadans and "in cases for which no specific rule may exist the Court shall act according to justice, equity and good conscience." Regulation II of 1802, section 17, and Regulation V of 1802, section 30. This provision was re-produced in Madras Civil Courts Act of 1873; and by section 16 clause (c) "in cases where no specific rule exists the Court shall act according to justice, equity and good conscience. English Judges who sat in the Company's Courts had *Cauzees* and *Pundits* to advise them on points of Muhammadan Law and Hindu Law. They naturally looked for guidance to the principles of the Common Law of England as they were familiar with that law. As well said by a famous Judge, the Common Law of England is the embodiment of common sense and in most cases the Common Law of England supplied the Judges with rules and precedence which were in accordance with justice, equity and good conscience. In this manner the Common Law of England came to be considered to be the law of the land.

There is no statutory law of torts in this country, and under the Customary Law of India, suits for damages for civil wrongs were almost unknown. British Courts in India entertain suits for damages for torts and give relief according to the rules of the Common Law of England. The same may be said as regards easements and specific relief before the passing of the Easements Act and the Specific Relief Act. In enjoining the Judges in India that where there is no rule of law applicable to a particular case, they should act according to justice, equity and good conscience, the Legislature left it to them to invoke the aid of the Common Law wherever possible. By such practice of the Courts a custom has sprung up of looking to the English Common Law for guidance and precedents where there is no Customary, Hindu

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or Muhammadan Law or Statute Law governing the case. It is unnecessary to pursue this interesting subject further, in view of my opinion on the second question.

The second question is, granting that the Common Law of England is applicable to India, whether the Statute Law had not abrogated it so far as it is applicable to this case. Section 22 of the Police Act of 1859 empowered Police Officers to arrest without a warrant. But after the passing of the Indian Penal Code in 1860 and the Criminal Procedure Code in 1861 sections 22 to 43 were repealed by Act XVII of 1862. It is contended for the petitioners that section 21 gives power to arrest without a warrant. Section 21 lays down the duties of Police Officers. Among other things, it shall be their duty to use their best endeavours to prevent crimes, etc., and to apprehend disorderly and suspicious characters. This section does not empower them to arrest persons without a warrant. The intention of the Legislature is made quite clear by the repeal of the section 22 which gave power to the Police to arrest without a warrant; and the preamble to Act XVII of 1862 puts the matter beyond doubt. Therefore, the contention that a Police Officer is entitled to arrest without a warrant by virtue of section 21 is untenable. Under section 44 of the Act penalties are provided for neglect of duty, and that section, as the Act now stands, immediately follows section 21; and it can be safely assumed that a Police Officer is enjoined by section 21 to carry out certain duties, and his failure to do so without lawful excuse will subject him to penalties under section 44. We must, therefore, look for authority to arrest without a warrant elsewhere. The law as to arrest without warrant was first codified in sections 100, 101 and 104 and 108 of the Code of the Criminal Procedure, Act XXV of 1861, and the provisions contained in those sections have been re-produced with slight amendments in sections 54 to 57 of the Criminal Procedure Code of 1898. Under section 54 a Police Officer may arrest without any warrant a person concerned in a cognisable offence, any person having in his possession without lawful excuse house breaking implements, proclaimed offenders, persons in possession of

stolen property, etc. Offences are classified as cognisable and non-cognisable by the Criminal Procedure Code. Cognisable offence is one in which a Police Officer may arrest a person charged or suspected of the offence without a warrant. Under section 55 an officer in charge of a Police Station may arrest (1) any person preparing to commit a cognisable offence under certain circumstances, (2) persons without ostensible means of subsistence, and (3) habitual offenders. Section 57 gives power to a Police Officer to arrest without warrant when any person in the presence of such Police Officer commits or is accused of committing a non-cognisable offence and refuses on demand by a Police Officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false. Such person may be arrested without a warrant in order that his name and residence may be ascertained. The offence of being drunk and disorderly is not a cognisable offence, and a Police Officer cannot arrest the alleged offender without a warrant. He can arrest him only if he refuses to give his name and residence or gives a false name or residence. If his name or residence is known to a Police Officer, the law does not empower him to arrest such person without a warrant. In no case other than that provided by sections 45, 55 and 57 can a Police Officer arrest a person without a warrant. The law being jealous of the liberty of the subject has set wholesome bounds to the power of the Police to arrest without a warrant. The Criminal Procedure Code being a complete Code defining the powers of the Police with regard to arrest, it is not open to a Court to travel outside the Code for finding powers either for the Police or for private persons to interfere with the liberty of the subject. The provisions enacted in 1861 have not been altered though the Criminal Procedure Code has been amended and re-enacted in 1872, 1882 and 1898. In this connection, I may quote the well-known observations of Lord Herschell in *Bank of England v. Vagliano Brothers* (5). In that case the question was as regards the interpretation to be placed upon section 7, sub-section (3), of the Bills of Exchange Act of 1882. The Court of Appeal relied upon the law as it

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existed before the Bills of Exchange Act was passed; in interpreting the section Lord Herschell observed: "I cannot bring myself to think that this is the proper way to deal with such a Statute as the Bills of Exchange Act, which was intended to be a Code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Under certain special and local laws power is given to certain officers to arrest without a warrant for offences under these Acts. Under the Madras Salt Act, VIII of 1889, for instance, a Salt Officer may arrest without warrant a person concerned in the manufacture, sale or keeping of such contraband salt or dealing therewith. Under the Madras City Police Act, a Police Officer may arrest without warrant in certain cases.

I may also quote the words of Lord Abinger in *Henderson v. Sherborne* (8): "The interpretation of Statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so." The liberty of the subject should not be curtailed by importing something which is not warranted by the Statute Law of the land. At the same time, it is not necessary to invoke the aid of the Common Law of England in order to justify the arrest of a person who is threatening to commit an offence against the person of an individual. The general exceptions contained in Chapter IV of the Indian Penal Code afford ample protection against threatened violence to person or mischief to property.

With due respect, I may observe that the learned Judges who decided *In re Ramasami Iyar* (1) need not have rested their decision on any rule of Common Law, as the

(8) (1837) 2 M. & W. 236; 6 L. J. M. C. 28; M. & H. 401; 1 Jur. 152; 150 E. R. 743.

Village Magistrate arrested the complainant to prevent harm to himself and to others, and he was protected by section 81, Indian Penal Code. If a person threatens to commit an assault he can be disarmed and, if necessary, put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm happening to himself or to another person provided he does that act, *bona fide* and without unnecessary force or violence. Both the Indian Penal Code and the Criminal Procedure Code are complete Codes of laws regulating the rights of citizens to personal freedom; and such rights could not be curtailed by judicial decisions unless warranted by Statutes. The Common Law of England applicable to a case of arrest without warrant does not apply to India. The case of an alleged illegal arrest or wrongful confinement has to be decided according to the law as contained in the Indian Penal Code and Criminal Procedure Code. My answer to the question referred to us is, *In re Ramasami Iyar* (1) was rightly decided, not because the Common Law of England was applicable, but by reason of the act complained of coming within the exceptions contained in Chapter IV of the Indian Penal Code.

Venkatasubba Rao, J.—I have come to the same conclusion, and as the question raised is one of great importance, I desire to say a few words.

It has been argued that the Common Law of England may be applied to India in regard to power to arrest and that a Police Officer or a private citizen can exercise the power independent of the provisions of the Criminal Procedure Code and any special or local law which by section 1 of the said Code is expressly declared not to be affected thereby. I am totally unable to accept this argument. The Code sets out in great detail circumstances in which arrests may be made and persons who may exercise the right. Provision is made for arrests not only after the commission of an offence but also with a view to prevent offences being committed and in some instances for securing the preservation of the peace. I may instance section 54, clause (2), which empowers a Police Officer to arrest without warrant any person having in his possession without lawful

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excuse any implement of house-breaking. Section 55, again, authorises any officer in charge of a Police Station to arrest similarly subject to certain qualifications, a person found taking precautions to conceal his presence with a view to committing an offence or any person who has no ostensible means of subsistence or any person who by repute is an habitual robber or thief. It is thus clear that the Code contains provisions in respect of arrest both for the purpose of preventing crimes and for bringing offenders to book. The subject is exhaustively dealt with, and it is impossible to hold that a power of arrest is possessed apart from and independent of the Statute Law. This is my view of the law as it stands, and I may add that as the question relates to interference with the liberty of the subject it is far more desirable on the grounds of public policy and expediency, that the right should be precisely defined and regulated by the Legislature than that it should be left to the Magistracy of the country to ascertain the law, in the words of Lord Herschell in *Bank of England v. Vagliano Brothers* (5), by roaming over a vast number of authorities extracting the law by a minute critical examination of previous decisions and probably also, I may add, of the statements to be found in ancient text-books. It has been pointed out to us that the only case which so far has decided that a private citizen possesses a right of arrest apart from the Statute Law is in *In re Ramasami Iyar* (1). Speaking for myself, I am glad to find that there is so little authority in support of the position that such right exists. In that case the accused removed to the Police Station an individual who was very drunk and bit him in the foot and tore the sacred thread of one of the witnesses. The question arose whether the accused committed an offence of wrongful restraint under section 341 of the Indian Penal Code. The learned Judges, very naturally, considered that it would be unjust to punish a person for doing an act which, in the interest of the orderly government of the society and the preservation of the peace, should be declared lawful and they justified the act with reference to the power of arrest which every individual as an ordinary member of the general public poss-

esses, under the Common Law of England. But with great respect, it seems to me, that if their attention had been invited to certain sections of the Indian Penal Code they would probably have rested their judgment upon grounds other than that underlying their decision. Section 81 enacts that nothing is an offence if it be done without criminal intention and in good faith for the purpose of preventing or avoiding other harm to person or property. It was suggested that if a person who is under the influence of drink carries a revolver in his hand and runs amuck there must be the power to arrest him on the part of every citizen, as otherwise disastrous results may follow. But this argument ignores that any reasonable act on the part of any citizen interfering with the freedom of the drunken person is amply protected by the aforesaid section and by other sections of the Indian Penal Code. The right of private defence conferred by that Code is quite adequate to meet all reasonable requirements. By section 97 every person is given a right to defend his own body and the body of any other person, his own property as well as the property of other persons. Under sections 100 and 104, the right of private defence may be exercised when there is a reasonable apprehension of danger to life or of grievous hurt to body or of robbery or of house-breaking or commission of other serious offences. Section 100 sets out in very clear terms that the offence which occasions the exercise of the right may be an assault as may reasonably cause the apprehension that death or grievous hurt will be the consequence of such assault. Assault is defined by section 351 as consisting of a gesture or preparation that is likely to cause an apprehension that criminal force will be used. Section 103 similarly provides for the exercise of the right of private defence not only when the offences specified therein are committed but also when attempts to commit them are made. In my opinion, therefore, there is no need to have resort, in the circumstances such as those existed in *In re Ramasami Iyar* (1), to the doctrine of the Common Law that every private individual has a right to arrest. Dealing with the Sale of Goods Act, 1893, 56 and 57 Vic. Ch. 71, Cozens Hardy, M. R., in *Bristol Tram-*

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ways & Carriage Company v. Fiat Motors (9) observes:—"I rather deprecate the citation of earlier decisions such as *Chanter v. Hopkins* (10) or *Shepherd v. Pybus* (11). The object and intent of the Statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior Common Law." In an earlier case *Bank of England v. Vagliano Brothers* (5) Lord Herschell remarks: "I think the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated." I think that every word in the observations of these eminent Judges applies with great force to the subject on hand.

The learned referring Judges conclude their Order of Reference with these words: "And we accordingly refer to a Full Bench the question whether *In re Ramasami Iyar* (1) was correctly decided." My answer is, that the grounds of the decision are wrong though the decision itself is correct.

Wallace, J.—I agree with the judgment of the learned Chief Justice and would also with my learned brothers, call in aid section 81 of the Indian Penal Code.

V. N. V.

Reference answered in the affirmative.

(9) (1910) 79 L. J. K. B. 1197 at p. 1199; 2 K. B. 831; 103 L. T. 443; 26 T. L. R. 629.

(10) (1838) 4 M. & W. 399; 1 H. & H. 377; 8 L. J. (N. S.) Ex 14; 3 Jur. 58; 150 E. R. 1484; 51 R. R. 650.

(11) (1842) 4 Scot (N.R.) 434; 3 Man. & G. 868; 11 L. J. C. P. 101; 133 E. R. 1390.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 123 OF 1922.

November 23, 1922.

Present:—Mr. Daniels, A. J. C.

SANKU—ACCUSED

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 110

—Evidence of instances in which accused suspected, value of—Corroboration.

Evidence of instances in which the accused has been suspected, is not evidence of general repute, nor evidence on which the Court can bind the accused over under section 110 of the Criminal Procedure Code, but such evidence may be admissible as corroborating independent evidence given of accused's reputation.

Application against an order of the District Magistrate, Sitapur, upholding an order, dated the 8th June 1922, of the Magistrate First Class, Sitapur.

Mr. S. M. Ahmad, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of an order binding over the applicant to give security under section 110, Criminal Procedure Code. The chief plea urged on behalf of the applicant is that evidence of specific instances in which the accused was suspected has been admitted. In this connection, I may refer to what I said in the case of *Raja Ram v. Emperor* (1). Evidence of instances in which the accused has been suspected is certainly not evidence of general repute, nor evidence on which the Court could bind the accused over under section 110, Criminal Procedure Code, but when independent evidence of the accused's reputation has been given, evidence that he has been suspected in a number of instances may in my view be admissible as corroboration. In this case I looked into the record and I find that there was sufficient evidence of general repute to justify the order which has been passed. I accordingly dismiss this application.

W. C. A.

Application dismissed.

(1) 60 Ind. Cas. 673; 23 O. C. 371; 22 Cr. L. J. 273.

DARSHAN RAM-GANESH DAS V. KHAIR DIN ALLAH BAKHSH.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 159 OF 1922.

December 2, 1922.

Present.—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Fforde.

FIRM DARSHAN RAM-GANESH

DAS—DECREE-HOLDER—APPELLANT

versus

FIRM KHAIR DIN-ALLAH BAKHSH

AND OTHERS—JUDGMENT-DEBTORS—

RESPONDENTS.

Contract Act (IX of 1872), s. 133—Principal and surety—Variance in contract—Discharge of surety.

A suit to recover a sum of money was compromised on the terms that the amount in suit should be paid by the defendant by certain instalments and that meanwhile an attachment order made against the property of the defendant in the course of the suit should remain in force until the terms of the compromise had been complied with. One F became surety for the performance of the terms by the defendants. Subsequently, the Court, without the knowledge or consent of the surety, gave the defendant liberty to sell the attached property privately on certain conditions. The surety, thereupon, applied to the Court to be discharged from his obligation:

Held, (1) that the attachment order itself carried with it power in the Court to order a sale of the property attached; and that, therefore, the order giving liberty to the defendant to sell did not amount to a variance of the contract between the principal and the creditor; [p. 354, col. 1.]

(2) that in any case the order giving the defendant liberty to sell not having been acted upon, amounted at most to an agreement to vary the contract and did not amount to an actual variance of its terms; [p. 354, col. 1.]

(3) that, therefore, on neither ground could the surety claim to be discharged from his obligation. [p. 354, col. 1.]

Letters Patent Appeal under section 10 of the Letters Patent from an order of Mr. Justice Abdul Raof passed on the 12th June 1922 in Civil Appeal No. 1652 of 1921 and printed as 71 Ind. Cas. 783.

Dr. G. C. Narang, for the Appellant.
Lala Durga Das, for Bakhshi Tek Chand,
for the Respondents.

JUDGMENT.—The relevant facts in this case are these:—An action to enforce a debt was fixed for hearing on the 7th October 1920. On that date the parties appeared in Court together with one Fateh Muhammad, and there entered into an agreement to compromise the suit. The terms of the agreement were that the indebtedness in question should be discharged by certain instalments, and that, meanwhile, an attach-

ment order made against the property of the defendant in the course of the suit should remain in force until the terms of the compromise had been complied with. On the same date a decree was made in accordance with this compromise and again on the same day an order was made giving the judgment-debtor liberty to sell the property attached. The property was subject to a mortgage and the order of sale provided that it should not be sold for less than the amount of the mortgage, and further ordered that the sum realised in excess of the mortgage by the sale should be lodged in Court. The only material issue of fact was, whether or not the order giving liberty to sell was made with the knowledge and approval of the surety. The judgment-creditor contends that the compromise, the order giving liberty to sell, and the decree in terms of the compromise, were recorded in the above order, and that the surety was present during the whole of the time and was fully cognisant of all that took place. The surety, on the other hand, contends that, though he was present when the compromise was entered into and when the decree was made on foot of that compromise, he was not present when the order was made giving liberty to sell and knew nothing about this order.

Upon these facts three questions arise for determination,—

(1) Was there a variance in the compromise to which the surety had subscribed?

(2) If so, was that variation made with the knowledge and consent of the surety?

(3) Has the variation the effect of discharging the surety?

So far as question (2) is concerned, the issue of fact has been inferred both in the inferior Court and before the Single Judge on appeal in favour of the surety without investigation. It would rather appear from the various orders made that the surety was cognisant of the order for liberty to sell. However, it may be assumed for the purposes of this appeal, that the surety was not so cognisant. It remains then to be considered whether the order giving liberty to sell amounts to a variance in the terms of the compromise, and, if so, whether such variance discharges the surety from all liability as from that date. The compro-

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mise decree constitutes the contract between the principal and the creditor. It is clear on the fact of the compromise decree that the surety was aware of the attachment order and approved of its continuance. The attachment order itself carries with it power in the Court to order a sale of the property attached. How, then, can it be said that a further order giving liberty to sell under the Court is a variance of the contract between the principal and the creditor?

Even if the order giving liberty to sell did in fact alter the contractual relations between the parties as embodied in the decree, this order was never acted upon. It may at the most amount to an agreement to vary the contract, but it certainly does not amount to an actual variance of its terms. We, therefore, hold that, upon the facts of this case, as they appear before us, there has been no variance in the terms of the compromise and accordingly the surety is not entitled to be discharged.

The appeal must, therefore, be allowed and the objections of the surety stand dismissed. The parties to pay their own costs.

Z. K.

Appeal allowed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO.

285 OF 1922,

January 23, 1923.

Present :—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

BALKRISHNA DAJI GUPTÉ—

PETITIONER

versus

THE COLLECTOR, "BOMBAY SUBURBAN"—OPPONENT.

Land Acquisition Act (I of 1894), s. 18—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Geo. V, C. 61), s. 107—Collector, refusal by, to make reference—Revision—"Subordinate" Court, meaning of.

The High Court has no power to interfere in revision under section 115 of the Civil Procedure Code with an order of a Collector refusing to make a reference under section 18 of the Land Acquisition Act. [p. 356, col. 2.]

Macleod, C. J.—Having regard to the provisions of section 107 of the Government of India Act, wherein the High Court is said to have superintendence over Courts which are subject to its appellate jurisdiction, it may be assumed, in the absence of any other statutory direction to the contrary, that unless the High Court has

appellate jurisdiction over a Court, that Court will not be subordinate to it within the meaning of section 115 of the Civil Procedure Code. [p. 355, col. 1.]

A Collector acting under section 18 of the Land Acquisition is not a Court, but even if a Court, it is not a Court subordinate the High Court. [p. 355, col. 1.]

Civil Extraordinary Application against an order passed by the Collector declining to refer a case under section 18 of the Land Acquisition Act.

Mr. W. B. Pradhan, for the Petitioner.

Mr. S. S. Pathar, Government Pleader, for the Opponent.

JUDGMENT.

Macleod, C. J.—Certain lands situated in the District of Thana were notified for acquisition under the Land Acquisition Act. Notice was served by the Collector on Mr. P. N. Gupte, in whose name the lands stood in the Government records.

On May 5, 1920, Mr. P. N. Gupte put in a claim for compensation under section 9 of the Land Acquisition Act. Mr. B. D. Gupte, his uncle, who was present, stated that he and Mr. P. N. Gupte, his nephew, were interested in the same land.

After the award was made, Mr. B. D. Gupte wrote, on July 8, 1922, to the Salsette Development Officer stating that he was the owner of one-half of the land, and had appeared before the Collector to make a demand for compensation. He complained that, without any further intimation to him, a cheque for the full value of the land had been ordered to issue to his nephew, Mr. P. N. Gupte, and in spite of his protest made when he appeared again on June 30, the cheque was handed over to Mr. P. N. Gupte. He, therefore, made an application under section 18 that the matter might be referred to the District Judge of Thana for settling the apportionment of payment. On that letter a note was made that nothing could be done by the Collector as Mr. P. N. Gupte only had been recognised as the claimant.

On July 14, Mr. B. D. Gupte wrote that he might be furnished with a true copy of the award made in respect of the land and he was informed that the land which he said stood in the name of his late father, Daji Govind Gupte, never so stood in his name. He was also informed that no land

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acquired for the protection of Vehar Lake stood in the name of Daji Govind. If he referred to the land in which he claimed half a share, he knew already that the land stood in the name of Mr. P. N. Gupte.

An appeal was made to the Commissioner. In August 1922 the Commissioner for the Bombay Suburban Division replied that he was unable to ask the Collector to make a reference to the District Court as desired by him. The applicant was referred to the Civil Court.

We are now requested by the petitioner to interfere under the powers given us by section 115 of the Civil Procedure Code. The first question that arises is, whether the Collector, acting under the powers given him by the Land Acquisition Act, is a 'Court,' and, then, if he is a 'Court,' whether it is subordinate to the High Court. What constitutes a 'Court' does not appear to have been defined by any Act of Legislature but it may be presumed that an officer to be a 'Court' must be competent to make a judicial decision. But even if the Collector is a 'Court' when an application is made to him to make a reference under section 18 of the Land Acquisition Act, can he be said to be subordinate to the High Court? Under section 107 of the Government of India Act each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do the various things mentioned in the section. So it may be presumed, in the absence of any statutory direction to the contrary, that unless the High Court has appellate jurisdiction over a Court, that Court will not be subordinate to the High Court.

In *Sayed Mohamed Husen v. City Survey Officer* [(1919) Civil Extraordinary Application No. 165 of 1918, decided on July 29, 1919, by Macleod, C. J., and Heaton, J., (unreported)] this Court was asked to interfere in revision with an order passed by the City Survey Officer of Broach who has been directed to acquire certain land for the Broach Municipality. The petitioner, after an award had been made by the City Survey Officer, made an application that the case should be referred to the Court, and the City Survey Officer passed an order

that the application was time-barred. The judgment of the High Court said: "The first question is whether we can interfere with the decision of the City Survey Officer under section 115 of the Civil Procedure Code, and we are clearly of opinion that the City Survey Officer was not 'a Court' within the meaning of that section."

Again, in *Bibi Sardarbibi v. The Land Acquisition Officer, Ahmedabad* [(1922) Civil Extraordinary Application No. 282 of 1921, decided on April 10, 1922 by Macleod, C. J., and Shah, J., (unreported)] the petitioner prayed that the order passed by the Land Acquisition Officer on the applicant's application for making a reference to the District Court of Ahmedabad under section 18 of the Land Acquisition Act should be set aside. Following the decision in the previous case, it was held that the Land Acquisition Officer was not 'a Court' within the meaning of section 115 of the Code, although it was said that if there had been any merits in the case, the Court would have expressed an opinion that the petitioner's request should be treated with some consideration at the hands of Government.

We have been referred to the decision in *Parameswara Iyer v. Land Acquisition Collector, Palghat* (1). In that case an application had been made to the Collector to refer the matter of compensation to the Court. An order was made on the application that the applicants did not appear to be the accredited representatives of the *devaswom*. The petition was, therefore, rejected. It was held that the act of the Collector in refusing to make a reference under section 19 was a judicial act. It could not be denied that the proceedings under Part III of the Land Acquisition Act which resulted in an award of the Court were judicial proceedings, and by virtue of section 54 the Court was subordinate to the High Court. Sections 18 and 19 provided for the procedure to be adopted to initiate those proceedings. Ordinarily, a proceeding is commenced in a Court of Law by the presentation of a plaint or a petition to it; but the Land Acquisition Act had adopted a somewhat different

(1) 49 Ind. Cas. 659; 42 M. 231; 36 M. L. J. 5.

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method, viz., the presentation of the application to the Collector. If the requirements of section 18 were complied with, the Collector had no option but to make the reference and, in doing so, in addition to the statement to be sent by him under section 19, clause (1), he had to attach a Schedule of the particulars of the notice served and of the statements made by the parties. It seemed clear, therefore, that the proceedings which culminated in the Court's award commenced with the filing of the application under section 18. As soon as it was filed the matter of the amount of proper compensation assumed a litigious form and became a contentious proceeding between the owner and the Collector. It followed, therefore, that if the Collector decided to reject it or passed any orders regarding it, he did so judicially and not administratively; for a judicial proceeding once commenced could not be affected by administrative action. The view that the Collector was a 'Court' seems to have been adopted, as stated by Mr. Justice Krishnan at page 235*, because it was consistent with the language and scheme of the Act, and because, if the High Court did not do so, there would be no proper and adequate remedy to prevent a misuse of power by the Land Acquisition Collector who, by adopting the simple expedient of refusing to refer, might prevent an enquiry by the Court into the correctness of his own award, at any rate in all cases arising outside the Presidency towns. The remedy by 'mandamus' under section 45 of the Specific Relief Act was available only within the ordinary original civil jurisdiction of the High Courts and not outside it.

With all due respect, I cannot agree with this reasoning. I can quite understand that if the Collector refuses to do an act which is incumbent upon him under the provisions of the Land Acquisition Act, Part III, there should be some remedy available to the party aggrieved. But it does not follow that the refusal of the Collector to his duty is a judicial act, or that, even if it is a judicial act, it is a judicial act of a Court subordinate to the High Court. In this case I admit there seem to have been no reasonable grounds for the refusal of

*Page of 42 M.—[Ed.]

the Collector, or the Commissioner to refer to the Court the question of the apportionment of the compensation awarded, though, at the same time, there is nothing to prevent the present petitioner filing a suit against his nephew for the division of the compensation money. As far as I can see, the High Court has not been given the power to interfere with the proceedings of the Collector, so that if he refuses to do what seems incumbent upon him under the provisions of section 18 of the Land Acquisition Act, we cannot direct him to make a reference, and the proper remedy is either for the Legislature to give us powers of superintendence over the Collector's proceedings under the Land Acquisition Act, or for the Government to draw the attention of their officers to the provisions of the Act, and lay down rules for their guidance, if they have not already done so.

No doubt, as the expression "person interested" in section 3 (b) of the Land Acquisition Act includes "all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act," and as, under section 18, clause (1), "any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested," the Collector, provided he does not consider the application as time-barred, is bound to make a reference. But if he fails in the duty imposed upon him by that section, in my opinion, this Court has no power to direct him to perform it. I think, therefore, that the Rule must be discharged with costs.

Crump, J.—The question for our decision in this case is, whether we have power to interfere with an order of the Collector refusing to refer to the Court the question of apportionment of compensation. That the petitioner here was a person interested cannot be denied, for he was a person claiming an interest in compensation made on account of the acquisition of land under the Land Acquisition Act, and he, therefore, fell within the definition of section 3 (b).

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The real question is, whether the Collector refusing to make a reference under section 18 is a 'Court,' and as such subject to our powers of revision or superintendence. Now, it is clear from the decision in *Ezra v. Secretary of State for India* (2) that the functions of the Collector in making an award are administrative and not judicial. In that case the Lordships of the Privy Council say (page 425):—

"The objection is based and depends upon the theory that the enquiry by the Collector was a judicial proceeding, and that the rules of judicial proceedings apply. The argument of the appellant starts from the word 'award' (which is used to describe the conclusion of the Collector), and has nothing else to support it. When the sections relating to this matter are read together, it will be found that the proceedings resulting in this 'award' are administrative and not judicial; that the 'award' in which the enquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the land; and that, if the judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court. The sections directly relevant (besides the 9th already set out are) the 11th, 12th, 13th, 14th, 15th, and 18th."

It is clear, therefore, that, up to the time when the petitioner made his written application to the Collector requiring the matter to be referred the determination of the Court, the Collector was acting administratively only, and speaking for myself I can find nothing in sections 18 and 19 to lead me to hold that the Collector at that stage of the proceedings became 'a Court.' In the absence of any definition of 'Court,' the question would be whether the Collector was clothed with any judicial functions; that is to say, had he power to hear and determine any question between conflicting parties?

Now, apart from the power to decide the question of limitation, which is dealt with by the proviso to section 18, a matter with which we are not concerned with the present case, all that the Collector had to do was,

(2) 7 Bom. L. R. 422 (P. C.); 9 C. W. N. 454; 1 C. L. J. 227; 32 C. 605; 4 A. L. J. 771; 8 Sar. P. C. J. 779; 32 I. A. 93.

on receipt of the application, to take the steps set out in section 19. I cannot say that he had power to determine anything. He was bound to proceed, and as his refusal to proceed was contrary to the plain duty imposed upon him by the Statute, it seems to me a contradiction in terms to say that in refusing to do that which he was bound to do he was acting judicially.

These, shortly, are the reasons for which I hold that the Collector acting under section 18 of the Act cannot be held to be 'a Court,' and if that is so, it necessarily follows that we have no power to interfere with his order in this case. That there is a hardship is plain. But that is not, in my opinion, a reason for placing upon the words of the Statute an interpretation which they do not reasonably bear. That is a matter for consideration of the Executive Government or for the Legislature, and one with which we have no concern. I agree, therefore, that this Rule should be discharged with costs.

N. H.

Rule discharged.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1920.

February 13, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Fforde.

SARUP SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PAL SINGH AND ANOTHER—PLAINTIFFS

Musammat BHAGO AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—*Punjab Limitation (Ancestral Land Alienation) Act* (I of 1900), s. 1, applicability of—Custom—Alienation by grandfather—Suit by grandson to challenge alienation—Limitation—Collateral, right of, nature of.

A collateral governed by the Customary Law of the Punjab does not derive his right to challenge an alienation of ancestral property from or through his father, but from or through the common ancestor who owned the land. [p. 359, col. 1.]

Sundar v. Salig Ram, 9 Ind. Cas. 300; 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911 (F. B.), followed.

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The Punjab Limitation (Ancestral Land Alienation) Act does not affect any prescriptive right or title which had accrued or was acquired before the Act came into operation. [p. 358, col. 2.]

Sahib Dad v. Rahmat, 90 P. R. 1904; 88 P. L. R. 1904 (F. B.), followed.

Plaintiff sued to recover possession of certain land which had been sold to the defendants by their grandfather in 1887. The alienor died in 1898. Plaintiff's father had not been heard of for ten years before the institution of the suit and was presumed by the Court to have been dead;

Held, (1) that the suit was governed by Art. 144 of Schedule I to the Limitation Act and not by the Punjab Limitation (Ancestral Land Alienation) Act. [p. 358, col. 2.]

Sahib Dad v. Rahmat, 90 P. R. 1904; 88 P. L. R. 1904 (F. B.), *Tulsi v. Madho Ram*, 13 Ind. Cas. 343; 30 P. R. 1912; 72 P. L. R. 1912; 133 P. W. R. 1912 and *Arur Singh v. Solakhan Singh*, 37 Ind. Cas. 412; 174 P. W. R. 1916, followed.

(2) that limitation under Art. 144 of Schedule I to the Limitation Act began to run against the plaintiffs when the possession of the defendants became adverse to the former, that is to say, on the death of their father, when their right to possession accrued; [p. 358, col. 2; p. 359, col. 1.]

(3) that the plaintiff's father not having been proved to have died more than twelve years before the institution of the suit, the suit was within limitation. [p. 359, col. 1.]

Roda v. Harnam, 18 P. R. 1895 (E. B.) and *Arur Singh v. Solakhan Singh*, 37 Ind. Cas. 412; 174 P. W. R. 1916, followed.

The *terminus a quo* under Art. 144 of Schedule I to the Limitation Act is the date when the possession of the defendant becomes adverse to the plaintiff. [p. 359, col. 1.]

Second appeal from a decree of the District Judge, Ferozepore, dated the 17th November 1919, reversing that of the Munsif, First Class, Zira, District Ferozepore, dated the 18th February 1919,

Mr. B. D. Qureshi, for Dr. Nand Lal, for the Appellants.

Lala Kahan Chand for Pandit Bindra Ban, for the Respondents.

JUDGMENT.—Plaintiffs-respondents sued for possession of 142 kanals 8 marlas of land sold by their grandfather, Dula Singh, to Jai Singh, Daya Singh and Sarup Singh on the 9th June 1887. The present defendants-appellants are the representatives-in-interest of the original vendees. Dula Singh died two or three years before the Punjab Act, I of 1900, came into force. Daswandha Singh, plaintiff's father, did not challenge the alienation and is said not to have been heard of for ten years before the institution of the suit. Plaintiffs asked the Court to presume

his death as they would have no *locus standi* to sue for possession were he still alive. Daswandha Singh's death has been presumed and it was held by the District Judge that, out of the consideration, only Rs. 593 were raised for necessity. He accordingly decreed the plaintiff's claim upon payment of the said sum. The defendants have filed a second appeal to this Court and it is contended on their behalf that the suit is barred by time.

Mr. Qureshi began his arguments by urging that Punjab Act I of 1900 governed the case. It was, however, held in *Sahib Dad v. Rahmat* (1) that the Punjab Limitation Act, I of 1900, does not affect any prescriptive right or title which had accrued or been acquired before the Act came into operation. Now, under the old law plaintiff's father had 12 years from the date of Dula Singh's death within which to sue for possession of the land in suit. According to the Full Bench ruling, therefore, as Act I of 1900 was passed subsequent to his death it did not affect his right to sue within 12 years which had accrued to him before the Act came into operation. This was followed in *Tulsi v. Madho Ram* (2) and again in the case of *Arur Singh v. Solakhan Singh* (3). We, therefore, hold that the present suit is governed by the Indian Limitation Act and not by Punjab Act, I of 1900.

It was next contended by Mr. Qureshi that time having begun to run against plaintiff's father upon the death of Dula Singh the plaintiff's suit is barred, having been instituted more than 12 years after the death of the alienor. To this respondents' Counsel replies by quoting *Sundar v. Salig Ram* (4) in which it was held, following the principle underlying *Roda v. Harnam* (5), that the claim was not barred under Art. 144 of the Limitation Act, 1908, inasmuch as the plaintiff's right to sue for possession was not derived from or through B (the nearest

(1) 90 P. R. 1904; 88 P. L. R. 1904 (F. B.).

(2) 13 Ind. Cas. 343; 30 P. R. 1912; 72 P. L. R. 1912; 133 P. W. R. 1912.

(3) 37 Ind. Cas. 412; 174 P. W. R. 1916.

(4) 9 Ind. Cas. 300; 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911 (F. B.).

(5) 18 P. R. 1895 (F. B.).

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reversioner), and, consequently, the defendant's possession, though adverse to B, could not be adverse to the plaintiffs until after his death, when their right to possession accrued. Now, the plaintiffs' right to possession did not accrue until the death of their father, and it is not contended that he died more than 12 years before the institution of the suit. The case reported as *Arur Singh v. Solakhan Singh* (3) is exactly on all fours with the present case.

The Judges in their judgment in that case referred to the Full Bench decision reported as *Sundar v. Salig Ram* (4) wherein it was pointed out that a collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father but from or through the common ancestor who owned the land. The plaintiffs in the present case, therefore, did not derive their right to sue from or through their father, Daswandha Singh, but from or through Dula Singh who alienated the land. Under these circumstances, we are clear that the possession of the defendants-appellants did not become adverse to them until the death of their father. As pointed out in *Arur Singh v. Solakhan Singh* (3), the *terminus a quo* under Art. 144 of the Limitation Act is the date when the possession of the defendants became adverse to the plaintiff. We, therefore, hold that the present suit is within time.

Mr. Qureshi also sought to contest the finding as to the question of necessity arrived at by the District Judge, but as it was clearly one of fact we did not allow him to argue it.

We accordingly dismiss this appeal with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 90 OF 1920.

November 21, 1922.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

MAHADEO PRASAD SAHU—

DECREE-HOLDER—APPELLANT

versus.

GAJADHAR PRASAD SAHU—JUDGMENT-DEBTOR—RESPONDENT.

Encumbrance—Lease, whether encumbrance.

Apart from dealings such as mortgages, which create a charge upon land, there are other dealings which amount to an encumbrance. Anything which interferes with the unrestricted rights of the proprietor is an encumbrance, for instance, the granting of a lease of *zerai* lands. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land, amounts to an encumbrance. [p. 360, col. 2; p. 361, col. 1.]

Appeal from an order of the District Judge, Muzaffarpur, dated the 2nd May 1921, passed in Execution Case No. 13 of 1920.

Messrs. K. Sahai, S. C. Mitter and S. S. Bose, for the Appellant.

Messrs. S. Ahmed and R. T. N. Sahai, for the Respondent.

Miller, C. J.—This is an appeal from an order of the District Judge of Muzaffarpur, dated the 2nd May 1921, dismissing the appellant's application for execution of a decree. The suit was instituted by the appellant Babu Mahadeo Prasad Sahu against the respondent Gajadhar Prasad Sahu, his uncle, and others claiming partition of family property. The decree of which execution is sought was passed on the 24th July 1908 and was the result of a compromise between the parties. In the present execution case various points were raised and determined by the learned Judge against the appellant. In order to understand how these points arise it is necessary, shortly, to state the history of the case. In the year 1901 it appears that a previous suit for partition was instituted by the appellant against the same defendants or their predecessors and in that suit a compromise was arrived at and a decree was passed in April 1901 dividing the family property in the terms of the compromise. Subsequently, the appellant sued the respondent

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and other parties claiming to set aside the compromise and have a fresh partition. The suit was decreed in the lower Court; there was an appeal and in the Appellate Court, after a further compromise, a decree was passed, as I have already said, on the 24th July 1908. The question for determination in that appeal depends principally upon the construction of the compromise decree passed on the 24th July 1908 in the High Court. Some of the properties which had been awarded to the appellant under the previous decree were exchanged for properties which had been awarded by that decree to the respondent Gajadhar Prasad Sahu, each of them exchanging the properties which they had received by the previous decree. Under the third clause of the decree it was provided that, instead of certain properties mentioned in Schedule I, part 1, of the present decree, which had been allotted to the plaintiff under the decree of 1901 the properties mentioned in Schedule III, part 1, of the present decree with all outstanding and accruing rents and profits except the amount covered by the decrees which the defendant Gajadhar had already obtained against any tenant be allotted to the plaintiff. Then farther provision is made with respect to other properties with which we are not concerned and clause 4 says that the interchange of the properties between the plaintiff and the defendant No. 1, that is to say, the present appellant and the respondent, be subject to the following condition, that any holdings purchased from *raiyats* on account of arrears of rent or other dues to remain with the parties who would themselves be entitled to the villages according to this decree subject to one party paying to the other the purchase-money as stated in the sale certificates; that the interchange of allotments be regarded to have taken place from the 1st *Assar* of the current *Fasli* year 1315; (that is, June, 1908) agreeing with the 1st *Assar* 1316 of the agricultural year; that the village papers, *kabuliyats*, etc., of the properties exchanged between the plaintiff and the defendant No. 1 be delivered to each other within 3 months of the date of the decree. Then the 5th clause provides for the delivery of possession of the interchanged properties and holdings within two weeks from the

date of the decree. The 7th clause which is the only other that we have been referred to provides that if the plaintiff or the defendant No. 1 has sold at a time when he was in possession under the decree of the 17th April 1901 any of the said properties respectively allotted to him he has to pay to the other party the consideration money received by such sale and if any property had been mortgaged or otherwise encumbered the party mortgaging or encumbering it do redeem the property or otherwise indemnify the other party for any loss that the latter may sustain.

The first question which arises is, as to the properties mentioned in Schedules I, 2 and 3 of the plaintiff's petition. Those mentioned in the First Schedule are *zerait* lands which between the time of the decree of 1901 and the decree in the present suit in 1908 were granted as *brahmottar* by the respondent Gajadhar Prasad to a Kabiraj Jaisri Bhat Misra in consideration of certain medical services rendered by him to the respondent's family. That was granted rent-free. The property in the Second Schedule was *zerait* lands which had been permanently settled by the respondent under *patta* and *kabuliyat* with certain tenants and the property mentioned in the Third Schedule was *zerait* lands settled by the respondents under *Adhkati* receipts and *jamabandi* situated within certain of the villages which had to be handed over to the appellant. The question with regard to these properties is, whether the disposition of them made by the respondent was an encumbrance in respect of which, under the terms of the decree which I have read, there would be a liability upon the respondent to indemnify the appellant. The learned Judge took the view that the mere grant of lands rent-free or the grant of the landlord's *zerait* land to a tenant for the purpose of cultivation could not be regarded in the nature of an encumbrance. In my opinion, in arriving at this decision, he was wrong. In the ordinary acceptation of the term, it seems to me that, apart from mere dealings such as mortgages which create a charge upon the land, you may well have other dealings which amount to an encumbrance. Anything, in my opinion, which interferes with the unres-

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stricted rights of the proprietors as they then existed would be an encumbrance upon the land, even the granting of a lease of *zerai* lands, that is to say, the lands which the landlord is entitled to hold in direct possession and to cultivate for his own purposes. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land would, in my opinion, amount to an encumbrance. Therefore, in so far as the learned Judge came to the conclusion that the properties mentioned in Schedules 1, 2 and 3 had not been encumbered I think he was wrong. Upon this part of the appeal the case must go back to him to determine the amount which the appellant is entitled to recover from the respondent as compensation or indemnity for the encumbrances created. That is a question of fact which will depend upon the evidence produced.

The next point which was raised before us was, that the respondent had cut down certain trees standing upon the villages which had to be transferred to the appellants. The learned Judge considered that, even if there had been a breach of the terms of the compromise, or the implied terms of the compromise, by reason of the cutting down of the trees, that was not a matter in respect of which the appellant could claim any relief in execution of the decree but he would have to bring a separate action in order to enforce his claim; in my opinion, in arriving at that decision, he was wrong, but the appellant has claimed compensation not only for any trees which may have been cut down after the date of the decree but also for all those which were cut down between the date of the first decree in 1901 and the date of the present decree. His right to compensation depends again upon the terms of the decree itself. It is perfectly clear, to my mind, that the appellant has no right to any compensation for trees which may have been cut down before the date of the present decree. Up to that time the parties knew exactly what the condition of the properties was. The appellant was claiming these particular properties in lieu of those which had been awarded to him under the previous decree and he cannot complain if those properties

turn out eventually to have less trees upon them than he imagined they had at the date when the decree was passed. But the decree having once been passed the respondent was bound under the terms thereof to hand over property as it then existed in accordance with the terms of the decree to the appellant and if, before doing, so he chose to cut down trees and appropriate them to his own use, then he was acting in breach of the obligation he was under by reason of the decree and was in fact committing a breach of trust. From that time he was only in possession of the property in a fiduciary capacity and for the purpose of handing it over to the appellant. I think, therefore, that, in so far as it can be shewn that any trees were cut down after the time when the appellant became entitled to possession of the properties, the respondent will have to pay their value. I may point out, however, that in the petition no distinction is made between the trees which were cut down before the date of the decree and those which were cut down afterwards. Nor, indeed, is it in terms alleged that any of the trees were cut down after the date of the decree. What is claimed is a lump sum in respect of trees according to the different villages. I think that the learned Judge, when this case goes back to him, should insist upon the appellant giving full particulars, as far as he is able, of the trees which he alleges were cut down since the date of the decree, their value and their situation, that is to say, the villages in which they are alleged to have been. The respondent will then be in a position to know, exactly, what case he has to meet, whereas under Schedule IV, as it at present appears, it would be impossible for him to do so. Any particulars which the respondents may require with regard to the nature and situation of these trees, I also think ought to be furnished by the appellant.

The next point relates to the recovery of a sum of money amounting to Rs. 2,055 the value of a 5 annas 6 *gandas* share in Yaqubpur, one of the villages which had to be handed over to the appellant. The appellant contends that, although he recovered a sum of Rs. 320 in a previous execution as the sale-proceeds of this village

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in accordance with his rights under the decree, in fact he is entitled altogether in respect of that village to a sum of Rs. 2,375, after giving credit for that which he has already received. The position with regard to this village is somewhat peculiar. It appears that, between the date of the previous decree and the date of the present decree, that village was sold by the respondent in execution of a money-decree obtained against him by Abdul Rahman for a sum of Rs. 320. That sale took place on the 22nd April 1908 very shortly before the decree was passed. When the appellant applied for execution of the decree in 1908 he raised the point that this sale to Abdur Rahman, the auction-purchaser who held a decree against the respondent, was a purely collusive affair, that Abdur Rahman never in fact had any legal claim against the respondent, that the suit was allowed to go by default and that the property was sold to Abdur Rahman merely as the creature of the respondent, and that, although the sum of Rs. 320 was named as the sale price, in fact the property never passed out of the possession of the respondent although nominally Abdur Rahman was put in possession. It appeared further that on some day in August of the same year the purchaser sold the property to one Shamsuddin for a sum of Rs. 367-8-0. The appellants' contention was that this also was merely another attempt on the part of Gajadhar to defeat the appellants' claim by pretending to have the property transferred not only once but a second time from the original purchaser to a third party, whereas, in truth, it remained all along the property of the respondent. When this matter was raised before the learned Judge in execution, he, on the 24th September, 1908, said that the appellant must either accept the purchase-money which was admittedly Rs. 320 recovered by the respondent, or he must claim and prove that the property had never in fact passed out of the possession of the respondent. What action the appellant actually took is not very clear, but we do know that on the 4th March 1909, in the same execution proceedings, he put in a petition claiming that possession of this property, 5-annas 6 gandas share in Yaqubpur, should be given to him. That application was apparently

refused, the learned Judge of the Executing Court considering that the petition, as he stated thereon, had no connection with the execution case. What his reasons for arriving at that conclusion were one cannot, from the materials before us, positively state. It may be that he thought that the appellant was only entitled to get the actual sale-proceeds. It may be that he thought the appellant could not in that execution case ask that the property which had been sold should be handed over to him but must first seek to have the sale set aside or to pursue the property in the hands of the purchasers. However that may be, no further action was taken upon the decision of the learned Judge of the Executing Court. There was no appeal from his decision, and there the matter rested until the 31st March 1911 when the decree-holder took out of Court the sum of Rs. 320 which had been paid in as the purchase price of this property. It is said that he took it out of Court under protest but we have not seen any document which shows that that was so. However that may be, whether he took it under protest or not, the fact remains that the decision of the Court having been against him, he subsequently took no action to try and get that decision set aside and he did eventually take out this sum of Rs. 320. In the present application he is asking that this matter should be re-opened and he alleges, and it is not disputed that, on the 9th November 1911, Shamsuddin, the purchaser from Abdur Rahman, sold this very property back again to Gajadhar for a sum of Rs. 400. The appellant again says that this was a purely fictitious transaction, Gajadhar having been the owner all along, and that, subsequently, in August 1918, Gajadhar sold this property, this time apparently a genuine transaction, for Rs. 2,375. The appellant in his present petition claims that the property never really having passed out of the hands of Gajadhar he was entitled to it under the decree and that that property or, at all events, its real value which he says was Rs. 2,375, should be handed over to him. It seems to me that the appellant has put it out of his power to ask us now to re-open this question. The matter was one which was *sub judice* in the year 1908. It was decided against the appellant and he accepted that decision.

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He was given the option either of accepting the sale-proceeds or of proving that the sale in fact was merely a bogus transaction. He eventually elected to accept the sale-proceeds and I do not think that it makes his case any better, even if it be a fact as he states, that he took the sale-proceeds out under protest. He elected the course that he would pursue and he cannot afterwards turn round, merely because Gajadhar has bought back the property and sold it for a greater price, and be heard to say that the matter should now be re-opened. So far as this question is concerned, I think that the learned Judge's decision, although he arrived at it upon a different consideration, must be upheld.

The next point for our consideration is one which arises under Schedule 6 of the application and relates to the arrears of rent which were due at the time when the decree was passed. It will be remembered that by the terms of the decree the properties to which the appellant was entitled were to be handed over with all outstanding and accruing rents and profits except the amounts covered by decrees which the respondents had already obtained against the tenants, and delivery of possession was to be given within two weeks. The appellant's case is that the arrears of rent due at that time were something over Rs. 21,000, that the actual rents which appeared to have been still outstanding and not recovered at the date when he got possession were Rs. 10,680 leaving a balance of something over Rs. 10,500. He, therefore, claims that the respondent should refund him this amount. He alleges in his petition that, soon after the passing of the decree in the High Court, the respondent fraudulently and illegally got a considerable amount of the arrears of rent realised from the tenants of the villages which were allotted to the appellant and after remitting portions of the rent got entries made ante-dated in the *Staha* in respect of the same and issued receipts, also ante-dated, with the result that the actual amount of rent shown to be still outstanding at the date of the decree was only roughly about half of what it ought to be. Of course, if the appellant could make out this case he will undoubtedly be entitled to recover the balance from the respondent to the extent to which the respondent has himself improperly collected

these rents. When I say improperly collected the rents, what I mean is, not that he was not entitled to collect but that if he did he must hold them as trustee for the benefit of the appellant. There was only a short time between the date of the decree and the actual date when the appellant got possession and whether it was necessary to collect any rents during that time for the purpose of saving limitation or for any other reason we do not know nor is it material. But if the appellant can make out his case then it is quite clear that any arrears of rent which were collected in fact during that period must be handed over to the appellant. It was contended again with regard to this part of the case that the question was not one which could be dealt with in this execution but that a fresh suit must be brought to establish the appellant's claim. I am unable to accept this view. It seems to me that, under the decree itself, the arrears of rent were clearly due to the appellant and if the land was handed over, the rent having been already collected, then the respondent who collected them is clearly responsible under the decree to hand them over to the appellant.

A further point with regard to this part of the case was taken, namely, that in stating the actual amount which was due the appellant in his application for execution did not properly state how the amount of arrears of rent improperly collected was made up. This is quite true. The manner in which he has done it is certainly no basis upon which a decision upon this part of the case can be based. Nor does it afford the Court any assistance in arriving at the proper amount, if any, which is due under this head. What the appellant has done is this. He says in respect to the properties which I had to exchange with you, the respondent, there was a sum of a little over Rs. 21,000 due for arrears of rent. You told me that the arrears of rent of the property which you had to hand over to me were about the same sum. Therefore, he puts down that sum as the proper sum to be received. He deducts the arrears which in fact had been left uncollected, namely, Rs. 10,680 which shows a balance of Rs. 10,554 and this he says is the sum due. That, of course, is not the proper way to arrive at it. What the appellant

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will have to show will be the actual amount that he has collected for arrears since he got possession of the property, that is to say, arrears due at the date of the decree and the actual amount of arrears which were, in fact, then due and which have been improperly collected by the respondent.

In my opinion the appeal must be allowed, the decision of the District Judge is set aside except as to the question arising under Schedule V with regard to Mauza Yaqubpur and the case will be sent back to the lower Court to dispose of this application for execution after enquiry into the evidence in accordance with the directions which appear in this judgment. I ought to add that it will be open to the judgment-debtor to raise any of the points which he raised in his objection and which have not already been disposed of in this appeal. There was also a question raised as to the Court-fee, but that does not seem to us to arise at the present juncture. I think that the appellant is entitled to his costs of this appeal to the extent to which he has succeeded.

Jwala Prasad, J.—I agree to the order proposed.

Appeal allowed;

Case remanded.

N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 775 OF 1922.

November 27, 1922.

Present.—Mr. Justice Broadway.

NIAZ ALI KHAN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

MUHAMMAD AFZAL KHAN, MINOR,

THROUGH HIS MOTHER *Musammât*

GAUHAR BEGAM—PLAINTIFF AND

HASHMAT KHAN—VENDOR—

DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), s. 22—Pre-emption, suit for—One of several vendees impleaded after expiry of limitation, effect of.

In a suit for pre-emption one of several vendees was, owing to the negligence and carelessness of the plaintiff's next friend, not impleaded as defendant till after the expiry of the period of limitation for the suit:

Held, that the suit had become barred by time and the mere fact that the plaintiff was a minor was no ground for condoning the negligence and carelessness of his next friend. [p. 365, col. 2.]

Second appeal from an order of the District Judge, Jhelum, dated the 25th January 1922, reversing that of the Munsif, First Class, Jhelum, dated the 27th April 1921.

Mr. Anant Ram, for the Appellants.

Mr. B. D. Kureshi, for the Respondents.

JUDGMENT.—On the 11th November 1919 one Hashmat Khan sold 53 *kanals* 19 *marlas* including his share in the *shamilât* and his rights in a further 1 *kanal* 18 *marlas* of *shamilat* to Niaz Ali Khan and five others, including a minor named Riasat Khan, son of Faiz Talib Khan. The deed was duly registered. On the 27th August 1920 a minor named Muhammad Fazil, nephew of Hashmat Khan, vendor, acting through his mother, *Musammât* Gauhar Begam, instituted a suit claiming possession of the land sold by Hashmat Khan by pre-emption. The first hearing of the case took place on the 6th November 1920 when it was found that the defendants had not been served. The plaintiff was told to furnish the necessary addresses and on the same date filed in an application giving particulars. In this application the name of Riasat Khan, son of Faiz Talib Khan, was mentioned. On the 10th December 1920 the defendants appeared and pointed out that Riasat

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Khan was one of the vendees but had not been impleaded in the plaint. In spite of this omission having been brought to the notice of the plaintiff, no steps were taken to bring Riasat Khan on to the record until the 24th January 1921, when the Court returned the plaint for amendment owing to the omission of Riasat Khan's name, directing the plaintiff to cause the necessary amendment to be made. Riasat Khan's name was entered in the plaint on the same day.

It should be noted that in the original plaint amongst the defendants' names was that of Feroz Khan, son of Imam Ali Khan, a person who was not a vendee and had nothing whatever to do with the case. On the 4th January 1921 an application was made on behalf of the plaintiff asking that his name be struck off, yet no steps were taken in regard to Riasat Khan. The defendants pleaded that, inasmuch as Riasat Khan had been impleaded after the expiry of one year from the date of sale, the suit was barred by limitation. The Trial Court held that the omission of Riasat Khan's name was due to a mistake but that this did not excuse the plaintiff, and the suit was accordingly dismissed. The plaintiff preferred an appeal to the District Court and the learned District Judge, while recognizing the extreme carelessness of the plaintiff's next friend, considered that the mistake made should be condoned. He, therefore, accepted the appeal and remanded the case for trial on the merits. Against this order of remand this second appeal has been preferred on behalf of the vendees-defendants through Mr. Anant Ram and I have heard Mr. Kuresbi on behalf of the plaintiff.

It has been contended by Mr. Kureshi that, as a matter of fact, Riasat Khan's name (should be regarded as having been entered in the plaint from the outset, inasmuch as instead of his name that of Feroz Khan was inadvertently entered. Seeing that the fathers of these two persons are different and that Feroz Khan was a major while Riasat Khan was a minor this contention has, in my opinion, no force.

It was next contended that it was not necessary under the present Code to enter the names of all persons against whom a

relief is claimed in a plaint. Here, again, I am unable to agree.

Next, it was urged that Riasat Khan had been added by order of the Court and that, therefore, on the authority of *Fakera Pasban v. Bibi Azimunnissa* (1), no question of limitation arose. I am unable to agree that the name of Riasat Khan was added at the instance of the Court. It seems to me that the circumstances disclose extreme carelessness on the part of the plaintiff's next friend and advisers. The deed was a registered one and the suit was not filed for some nine months after its execution. It may be considered a little hard to penalise a minor plaintiff for the gross neglect of his guardian. At the same time, it has to be borne in mind that Riasat Khan, one of the vendees, is also a minor and that his interests have also to be considered. By the negligence disclosed in this case this minor, Riasat Khan, has secured a valuable right, and I am unable to see any justification to deprive him of that right for the simple reason that the plaintiff in the case is also a minor. It has not been contended that Art. 10 of the Limitation Act did not apply.

I accordingly accept this appeal and, setting aside the order of remand, restore the decree of the Trial Court dismissing the plaintiff's suit with costs throughout.

Z. K.

Appeal dismissed.

(1) 27 C. 540; 4 C. W. N. 459; 14 Ind. Dec. (N. S.) 355.

BOMBAY HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 119
OF 1922.

February 7, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

MOTILAL SATYANARAYAN AND

ANOTHER—HEIRS OF PLAINTIFF

—APPELLANTS

versus

HARNARAYAN PREMSUKH AND

ANOTHER—ORIGINAL DEFENDENTS—

RESPONDENTS.

Malicious prosecution—Damages, action for—
Death of plaintiff—Right to continue suit, whether
survives.

MOTILAL SATYANARAYAN V. HARNARAYAN PREMSUKH.

An action for damages for malicious prosecution being personal to the plaintiff does not survive beyond his lifetime, and the action, so far as it relates to the expense incurred by the deceased plaintiff in defending himself against the prosecution, cannot be transmitted to his personal representatives. [p. 367, col. 1.]

Rustomji Dorabji v. Nurse, 62 Ind. Cas. 260; 44 M. 357; 40 M. L. J. 173; (1921) M. W. N. 121; 29 M. L. T. 121; 14 L. W. 200 (F. B.) and *London v. London Road Car Company*, (1888) 4 T. L. R. 448, relied on.

Twycross v. Grant, (1878) 4 C. P. D. 40 at p. 45; 48 L. J. C. P. 1; 39 L. T. 618; 27 W. R. 87, distinguished.

Krishna Behari Sen v. Corporation of Calcutta, 31 C. 993; 8 C. W. N. 745, not followed.

Second appeal against the decision of the First Class Subordinate Judge, Dhulia, in Suit No. 417 of 1920.

Mr. B. G. Rao, for the Appellant.—My Lord, the lower Court is wrong in rejecting the application of the heirs of the deceased plaintiff, to bring them on record. I submit, the right to sue for malicious prosecution does survive to the heirs within the meaning of O. XXII, r. 1 of the Code of the Civil Procedure. The law on the subject is codified in section 89 of the Probate and Administration Act. The suit for damages for malicious prosecution falls within the general words of the section and not within the exception. The exception excludes the cases of assault, defamation and the other personal injuries not causing the death of the party. The expression "personal injury" refers to physical or bodily injury only and this only is the class of injuries connected by that expression. This view of the interpretation is fortified by the illustration to the section. To bring the case of malicious prosecution under the exception is to strain the language of the section.

[Macleod, C. J.—How is assault defined in the Penal Code?]

The word 'assault' may be taken in its ordinary and natural acceptance of the sense, meaning personal and physical injury. I rely upon the case in *Krishna Behari Sen v. Corporation of Calcutta* (1).

[Cramp, J.—The Full Bench decision in *Rustomji Dorabji v. Nurse* (2) is against your contention.]

(1) 31 C. 993; 8 C. W. N. 745.

(2) 62 Ind. Cas. 260; 44 M. 357; 40 M. L. J. 173; (1921) M. W. N. 121; 29 M. L. T. 121; 14 L. W. 200 (F. B.).

Second point I wish to urge before your Lordships is this. Conceding that the action does not survive to the heirs, according to the Full Bench ruling of the Madras High Court, the action to sue for pecuniary loss caused to the estate of the deceased plaintiff does survive. The plaintiff has to defend himself against the criminal prosecution and had to incur heavy expenses. The heirs are at least entitled to this portion of the relief. To that extent the injury had been caused to the estates and the cause of action survives. I rely upon the underlying principle in *Twycross v. Grant* (3).

Mr. B. J. Desai (with him Mr. H. B. Gummaste), for the Respondents—The second point urged by Mr. Rao is considered in *London v. London Road Car Company* (4). These are losses merely incident to the personal injuries. As to *Twycross v. Grant* (3) it is not an action for injuries to the person but for pecuniary damage arising from a wrongful act of another kind.

JUDGMENT.—The plaintiff Satyanarayan Dhanjishet brought a suit against the defendants to recover damages for malicious prosecution. Before the suit came on for hearing the plaintiff died and his heirs sought to continue the action. Their application to be placed on record as heirs of the original plaintiff was dismissed by the Subordinate Judge; and the appellants in their arguments before us rely mainly on the decision in *Krishna Behari Sen v. Corporation of Calcutta* (1), where it was held by a Full Bench that a suit for malicious prosecution falls within the general words of section 89 of the Probate and Administration Act, and not within any of the exceptions.

In *Rustomji Dorabji v. Nurse* (2) the learned Judges dissented from the decision in *Krishna Behari Sen v. Corporation of Calcutta* (1), holding that "the expression 'personal injuries not causing the death of the party' in section 89 of the Probate and Administration Act, does not mean injuries to the body merely but all injuries

(3) (1878) 4 C. P. D. 40 at p. 51; 48 L. J. C. P. 1; 39 L. T. 618; 27 W. R. 87.

(4) (1888) 4 T. L. R. 448.

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which do not necessarily cause damage to the estate of the person wronged."

We prefer to agree with that decision, as otherwise we would have to read into the section the words "physical" or "to the body." It has been argued that the expression "other personal injuries" must refer to injuries *ejusdem generis* as the injuries referred to in the preceding sentences, namely, "assault" as defined in the Indian Penal Code. When we refer to section 351 for the definition of the word "assault" in the Indian Penal Code, we find that the offence of assault, does not involve physical injury, but merely a threat to cause physical injury. Therefore, the exception includes cause of action for the defamation and assault neither of which cause physical injury; and then includes "all other personal injuries" except those which cause the death of the party. We think the intention of the section was to express in a statutory form the maxim *actio personalis moritur cum persona*. Accordingly, an action for malicious prosecution does not survive beyond the lifetime of the plaintiff.

But it was argued, on the strength of the decision in *Twycross v. Grant* (3), that the action so far as it related to the expenses incurred by the deceased plaintiff in defending himself against a prosecution could be transmitted to the personal representatives. That case was considered in *London v. London Road Car Company* (4) which was a case against a defendant for damages for personal injuries caused by an accident. The plaintiff had claimed as consequential damages £ 75 for loss of earnings, and various sums for medical expenses. The plaintiff died before the action was heard. An application had been made on the part of the administratrix, asking to be allowed to continue the action for these parts of the claim, which was refused by the Judge at Chambers. In appeal from that order Lord Coleridge said: "The action was for personal injuries—that is for injuries to the person—and the heads of damage relied upon (except as to the damage to the coat) resulted directly from these personal injuries. As to *Twycross v. Grant* (3), it was not an action for injuries to the person, but for pecuniary damage arising from

wrongful acts of another nature. No case showed that an action for personal injuries causing pecuniary loss could be continued after the death of the party injured; and the case of *Pulling v. Great Eastern Railway Company* (5) showed just the contrary."

In this case the injury caused to the plaintiff by wrongful prosecution was personal just as much as if he had been injured in Railway accident. Consequently, his representatives cannot continue the action to recover the pecuniary loss which he suffered owing to his having had to defend himself against the prosecution. We think, therefore, the decision of the Court below was right and the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

(5) (1882) 9 Q. B. D. 110; 51 L. J. Q. B. 353.
30 W. R. 798; 46 J. P. 617.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, No. 741 OF 1922.

November 28, 1922.

Present:—Mr. Justice Harrison.

HARNAM—PLAINTIFF—APPELLANT

versus

GANPAT AND OTHERS—

DEFENDANTS—RESPONDENTS.

Insolvency—Claim to property sold as insolvent's disallowed—Suit to establish title, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXI, r. 92 (3), application of.

Where an Insolvency Court disallows the claim of a person to property attached and sold as the property of the insolvent, a regular suit to establish his right to the property is maintainable. The provisions of the Code of Civil Procedure do not apply to such a case.

Ram Piya v. Bhana Mal, 61 Ind. Cas. 332; 2 L. 147; 3 U. P. L. R. (L.) 401; 3 L. L. J. 233, relied on.

Second appeal from a decree of the District Judge, Hissar, dated the 19th December 1921, affirming that of the Subordinate Judge, Second Class, Hissar, dated the 23rd December 1920.

Mr. Shamair Chand, for the Appellant.

Pandit Nanak Chand, for the Respondents.

HARNAM V. GANPAT.

JUDGMENT.—One Neki was adjudicated an insolvent, and when his property came to be dealt with a certain enclosure was attached with a view to sale. An objection was presented by Harnam on the 8th August 1919, and dismissed the same day. The enclosure was sold on the 25th January 1920, and an objection was put in by the same man Harnam on 19th January 1920, which was dismissed by an order of the 10th May 1920. On 15th May 1920, Harnam and two others instituted the present suit stating their cause of action to be the order of the 10th May 1920, and prayed for a declaration that the property belonged to them. This suit was dismissed by the Subordinate Judge on the ground that O. XXI, r. 92, barred such a suit and that their only remedy, or rather the only remedy of Harnam, was by way of appeal. Harnam appealed to the District Judge who dismissed the appeal, holding that under O. XXI, r. 92 (3) the suit did not lie, and he also pointed out that the question of whether Hardu or Kanhaya could bring the suit was not before him inasmuch as Harnam only had appealed to him. From this order the present appeal has been lodged and the position taken up by Counsel is that the chapter of the Civil Procedure Code regarding execution does not apply to insolvency proceedings and that, if it does, his suit would have been within time had he shown the dismissal of his application during attachment as the cause of action instead of the dismissal of the application lodged subsequent to the auction-sale. The respondent on the other side contends that the suit as lodged must be disposed of, that the Code applies in virtue of section 47 of Act III of 1907, and that, any how, the suit should now be dismissed because the auction-purchaser has not been impleaded. The appellant relies mainly upon a recent ruling *Ram Piyara v. Bhana Mal* (1) in which the question of the competency of a regular suit to establish title after attachment in insolvency was decided. It was apparently not even urged that the Code of Civil Procedure governed the proceedings under the Insolvency Act and the only possibilities which were con-

templated were that such proceedings were governed by the Provincial Insolvency Act or the Punjab Laws Act. Had it been possible to apply the Code of Civil Procedure no difficulty would have arisen in that case or in the many cases decided by the Calcutta and Madras High Courts on the same point, for r. 63 would have made it quite clear that the suit did lie. It is, therefore, I think, clearly established that the Code does not apply and both the lower Courts have wrongly decided that the suit is barred by r. 92. Even if the suit as instituted were barred and the provisions of the Code applied it would be very arguable under the circumstances, the plaintiff being clearly entitled under r. 63 to prove his title as the year of limitation has not as yet expired, whether the mere fact that he made his cause of action the second order of dismissal and not the first should debar him from obtaining any relief.

Finding, therefore, that the suit lies I accept the appeal and return the case for decision on the merits. The question of whether the auction-purchaser is to be impleaded or can be impleaded at this stage will have to be decided as soon as it is raised in the lower Court.

The costs will follow the result, and the order of remand being under O. XII, r. 23 the stamp on appeal will be refunded.

Appeal accepted;

Case remanded.

N. H.

(1) 61 Ind. Cas. 332; 2 L. 147; 3 U. P. L. R. (L.) 40; 3 L. L. J. 233.

DAGADU v. SAKUBAI NANA BODAKE.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 229 OF 1922.

—February 23, 1923.

Pres. nt.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
DAGADU AND ANOTHER—DEFENDANTS
—APPELLANTS

VERSUS

SAKUBAI NANA BODAKE

—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Joint family—Partition—Intention to divide—Partial partition—Express agreement.

Under the Hindu law of the *Mitakshara*, an unambiguous and definite intimation of intention on the part of one member of a joint family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then he held in jointness.

Girja Bai v. Sadashiv Dhundiraj, 37 Ind. Cas. 321; 43 I. A. 151; 20 C.W.N. 1085; 14 A. L. J. 822; 20 M.L.T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.), followed.

Ramalinga Annavi v. Narayana Annavi, 68 Ind. Cas. 451; 24 Bom. L. R. 1209; 30 M. L. T. 255; (1922) M. W. N. 399; 45 M. 489; 26 C. W. N. 929; (1922) A. I. R. (P. C.) 201; 43 M. L. J. 428; 16 L. W. 639; 20 A. L. J. 839; 37 C. L. J. 15 (P. C.), disapproved.

Where, in the case of a division of property among members of a Hindu joint family, there is evidence sufficient to show that the parties intended to sever, any property which is not divided by metes and bounds will be considered to be held by them as tenants-in-common, unless there is an express agreement between the parties that they should treat that property as belonging to them as joint tenants. They will then be joint tenants, not as members of the joint family which no longer exists, but under a special agreement made after the severance.

Gaurishankar v. Atmaram, 18 B. 611; 9 Ind. Dec. (N. S.) 916, not followed.

Second appeal against the decision of the First Class Subordinate Judge, A. P., Nasik, in Appeal No. 44 of 1921.

Mr. D. A. Tulzapurkar, for the Appellants.

Mr. D. R. Patwardhan, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to obtain possession of the properties described in paragraph 1 of the plaint and for an injunction against the defendants, alleging that the lands were the ancestral property of her deceased husband, Nana, and his brothers, defendants No. 1 and 2, that they were divided after the family became separate and enjoyed separately by each member.

The defendants contended that the lands were ancestral and jointly acquired; that they were in possession, and that there had been no partition as alleged by the plaintiff. It has been proved that there was a division of the greater part of the family property, and also that the three brothers commenced to live separate. That would indicate an intention of the members of the family to sever in interest. In *Ramalinga Annavi v. Narayana Annavi* (1) their Lordships said, after expressing disapproval of the argument that the joint family status was not dis-severed until a decree for partition was passed, "This view is opposed to the laws laid down in the case of *Girja Bai v. Sadashiv Dhundiraj* (2), where it was held expressly, that under the Law of the *Mitakshara* to which the parties... are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co-partners when the plaintiff Narayan served on them the notice Exhibit II, on July 30th 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages."

If, then, a mere notice served upon the rest of the family by one of the members is sufficient to create a severance of interest, it is obvious in this case, that the evidence which is referred to by the learned Appellate Judge was sufficient to put an end to the joint family status. The fact then that two lands were left undivided would not affect the interests of the parties in these lands which would thenceforth be held by them as tenants-in-common and not as joint tenants.

We have been referred to the decision in *Gaurishankar v. Atmaram* (3) where

(1) 68 Ind. Cas. 451; 24 Bom. L. R. 1209; 30 M. L. T. 255; (1922) M. W. N. 399; 45 M. 489; 26 C. W. N. 929; (1922) A. I. R. (P. C.) 201; 43 M. L. J. 428; 16 L. W. 639; 20 A. L. J. 839; 37 C. L. J. 15 (P. C.).

(2) 37 Ind. Cas. 321; 43 I. A. 151; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.).

(3) 18 B. 611; 9 Ind. Dec. (N. S.) 916.

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the Chief Justice said: "The circumstance that there had been a partition in 1876-77 would not, in the absence of any special agreement between the parties, alter their rights as to the property still undivided, as to which they would continue to stand to one another in the relation of members of an undivided Hindu family, and no such agreement amounting to a partition of the fields in question is alleged by the plaintiffs" with all respect, I should say that the effect of the decision in that case was, undoubtedly undermined by the decision of the Privy Council to which I have just referred. Once there is evidence sufficient to satisfy the Court that the parties intended to sever when the joint family status is put an end to, and with regard to, any of the property which had hitherto been joint and has not been divided by metes and bounds there will have to be an express agreement between the parties that they should treat that property as belonging to them as joint tenants. They will then be joint tenants, not as members of the joint family which no longer exists but under a special agreement made after the severance. There is no evidence here of any such special agreement. The learned Judge thought the reasons given by the plaintiff for saying that these lands had been kept undivided were substantially correct. It would certainly require very strong evidence that properties held by the parties as tenants-in-common at the date of the severance as the result of the severance were thereafter held as joint tenant. My opinion is that if that was attempted to be done, it would amount to a transfer of an interest in immoveable property. I think the decision of the First Class Subordinate Judge was right and the appeal must be dismissed with costs.

Crump, J.—I agree that in the present case the decision of the First Class Subordinate Judge should be upheld. It has been found by him as a question of fact that there was a division of the family property, and that certain specific lands were allotted to the share of the plaintiff's husband. The only doubt which can be suggested is as to those lands which were left joint at this partition and upon that point the decision in *Gauri-shankar v. Atma Ram* (3) has been relied upon as showing that, in the absence of any

special agreement, the members of the family would stand to one another as members of an undivided family after the date of partition. As to that I agree with the view expressed by my Lord the Chief Justice that the decision in the Privy Council in *Girja Bai v. Sadashiv Dhundiraj* (2) makes it difficult to accept the previous decision of this Court in its entirety. Once it is held that there has been partition, I should myself be inclined to hold that the presumption must be that as regards that portion of the estate which remained undivided, the members of the family would hold as tenants-in-common unless and until a special agreement to hold as joint tenant is proved. I agree, therefore, that the appeal must be dismissed with costs.

N. H.

*Appeal dismissed.***LAHORE HIGH COURT.**

MISCELLANEOUS SECOND CIVIL APPEAL

No. 2033 OF 1918.

November 15, 1922.

Present:—Mr. Justice Le Rossignol and

Mr. Justice Zafar Ali.

AMIR KHAN AND OTHERS—**DEFENDANTS—APPELLANTS***versus.***MINH MAL AND OTHERS—****PLAINTIFFS—RESPONDENTS.**

Punjab Tenancy Act (XVI of 1887), s. 59—Occupancy tenancy—Joint tenants—Survivorship—Separation of shares—Partition.

The principle to be followed in cases of succession to an occupancy holding, as against the landlord, is that joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant, and as long as any of them, or the descendants of any of them, survive, the landlord cannot claim in the share of any tenant whose line has died out. [p. 371, col. 2.]

Mohru v. Mutsaddi, 109 P.R. 1894 (F. B.), relied on.

The division of a joint occupancy holding for purposes of cultivation or in order to enable the co-sharers to raise money by mortgaging their shares in the holding does not indicate that the holding has, as a matter of fact, been finally partitioned. [p. 371, col. 2.]

Miscellaneous second appeal from an order of the District Judge, Jullundur, dated the 30th April 1918, reversing that of the Honorary Subordinate Judge, Jullundur, dated the 20th August 1917 and remanding the case to the lower Court under O. XXI, r. 23, Civil Procedure Code, for disposal on the merits.

AMIR KHAN v. MINH MAL.

Lala Fakir Chand, for the Appellants.

Lala Har Gopal, for Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit in which the plaintiffs, claiming to be the successors of the two original co-sharers in an occupancy holding, sued to redeem certain fields of that holding which one of the two said co-sharers, now dead, had mortgaged to the landlords themselves. The facts bearing on the points argued before us are briefly as below:—

One Chanda Singh was originally the sole tenant of the occupancy holding in question but he associated with himself in the tenancy his collateral Labh Singh, the father of the plaintiffs, and consequently both were entered in the Revenue Records as joint tenants in equal shares. However, though the holding remained joint, they separated in cultivation so that some fields were cultivated by one and some by the other and they both individually as well as jointly affected several mortgages by which some of the fields were mortgaged from time to time. Chanda Singh mortgaged much more than his own share. The mortgage in question is one of the mortgages effected by Chanda Singh. Labh Singh died first and was succeeded by his sons, the plaintiffs. On the death of Chanda Singh, the plaintiffs were entered in the Revenue Records as tenants of the entire holding. Thus they claimed to have succeeded by right of survivorship to Chanda Singh's share in the holding and to have become entitled in this way to redeem the mortgage effected by him. The defendants pleaded, *inter alia*, that Chanda Singh and Labh Singh were not joint tenants even if they were tenants-in-common, that, as a matter of fact, the holding had been partitioned as evidenced by separate possession and mortgages, and that this being so the rule of succession by survivorship was not applicable in this case. It was further contended that before suing for redemption the plaintiffs should have obtained a decree from a Revenue Court declaring that they were occupancy tenants as successors to the share of Chanda Singh.

The Trial Court dismissed the suit on arriving at the conclusion that the holding

had been partitioned. On appeal the learned District Judge decided that separation in cultivation and alienations made by the co-sharers were not sufficient to establish final partition of the holding, and that the holding having remained joint, the plaintiffs were at present tenants of the whole of it and so could not sue to redeem the fields that had been mortgaged by Chanda Singh.

The landlords appeal, and their Counsel has strenuously urged before us the pleas referred to above, but we are of opinion that his arguments carry no force. To take the last point first the plaintiffs were recognised by the Revenue Authorities as lawful successors of Chanda Singh. As stated above, according to the mutation sanctioned on the death of Chanda Singh they are recorded to be the occupancy tenants of the entire holding. Therefore, no Revenue Court's decree is needed to declare them occupancy tenants of Chanda Singh's share in the holding.

As regards the main contention that there was no joint tenancy, the argument is based on the assumption that joint tenancy which the Punjab Custom recognises is the same as the estate known as joint tenancy to English conveyancers. In *Mohru v. Mutsaddi* (1) it was explained that the principle to be followed "*as regards the landlord*, is that the joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant, and that as long as any of them, or the descendants or any of them, survive, the landlord cannot claim the share or any tenant whose line has died out." This being the guiding principle, it cannot be gainsaid with any show of reason that the plaintiffs being the survivors of the two joint tenants Labh Singh and Chanda Singh now represent the entire estate and have occupancy rights in the entire holding.

The contention that the holding had been partitioned can be of no avail because, obviously, what the joint tenants did was to divide the holding for purposes of cultivation or in order to raise money, but this does not indicate that the holding had, as a matter of fact, been finally partitioned.

(1) 109 P. R. 1894 (F. B.).

BANKE BEHARI LAL, v. MANNA LAL,

For these reasons we dismiss the appeal with costs.

Z. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL, APPEALS NOS. 152 AND 166 OF 1922.

November 29, 1922.

Present:—Mr. Daniels, A. J. C.
Babu BANKE BEHARI LAL,—

PLAINTIFF—APPELLANT

versus

MANNA LAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Estoppel—Pre-emption suit—Vendee, right of, to prove real nature of transaction.

It is open to the vendee in a pre-emption suit to prove the real nature of the transaction against a third party.

In order to maintain a plea of estoppel in a pre-emption suit, it must be proved that the plaintiff believed the representation made to him, and brought his suit on the basis of it.

Nawab Begam v. Hamid Ali, 11 O. C. 176. relied on.

Second appeal against a decree of the District Judge, Hardoi, dated the 22nd March 1922, upholding that of the Munsif, Sandila at Hardoi, dated the 4th April 1921.

Messrs. A. P. Sen and M. B. Qidwai, for the Appellant.

Mr. Ram Prasad, for Respondent No. 1.

JUDGMENT.—These are two connected appeals arising out of two pre-emption suits. The property sold was grove-land and it has been found by the lower Appellate Court that the vendor had no proprietary right in the land but only the interest of a grove-holder. Two points are pressed in appeal,—

(1) that it was not open to the vendees to take this plea, and

(2) the question of costs.

It can hardly be contended at this time of day that it is not open to a vendee to prove the real nature of the transaction against a third party in a pre-emption suit. There have, for instance, been a number of cases in which it has been held that what

was sold was not an actual proprietary interest but merely a share in a law suit. There is, moreover, the case, *Nawab Begam v. Hamid Ali* (1) relied on by both the Courts below, in which it was pointed that in order to maintain a plea of estoppel in a pre-emption suit it must be proved that the plaintiff believed the representation made and brought his suit on the basis of it. There is no evidence of this, and in fact the plaintiffs-appellants in the two suits were respectively the superior and under proprietors in the village and, therefore, were in a good position to know the true facts. The fact that the plaintiffs for the purpose of these proceedings did not wish to assert their proprietary right cannot affect the case.

On the question of costs it is urged that the plaintiffs were bound to bring these suits in view of the description of the right as proprietary in the sale-deed. The sale-deed is in this respect inconsistent with itself. In one place it does definitely state that the area of the grove was possessed and owned by the vendor; in another place it states equally clearly that right was only that of a *muafidar*. A transaction to which the plaintiff was no party could not affect his proprietary right and indeed the opinion of the Court below was that the plaintiffs took advantage of the wording of the deed to try to get hold of the grove to which they were not entitled. On the whole, I see no reason to disturb the order of the Court below as to costs.

The appeals are, therefore, dismissed with costs.

W. C. A.

Appeals dismissed.

(1) 11 O. C. 176.

BAKAR HUSAIN V. HUSSAIN MIRZA.

PATNA HIGH COURT.

CIVIL REVISION No. 229 OF 1922.

December 8, 1922.

Present:—Mr. Justice Mullick and

Mr. Justice Kulwant Sahay.

Syed BAKAR HUSAIN—

PLAINTIFF—PETITIONER

versus

Mirza HUSSAIN MIRZA AND OTHERS—

DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, rr. 8, 9, O. XVII, rr. 2, 3, O. XLIII, r. 1 (c)—Dismissal of suit for default—Remedy—Procedure—Revision.

Where a suit is dismissed under r. 2, O. XVII of the Civil Procedure Code, the plaintiff's remedy is by way of an application to set aside the dismissal under O. IX, r. 9 of the Code, and if that application is dismissed he has a right of appeal against the order of dismissal under O. XLIII, r. 1 (c) of the Code. When a suit is dismissed under r. 3 of O. XVII, of the Code the plaintiff has a right of appeal against the decree passed in the case.

In neither case does a revision lie against the order of dismissal.

Application against an order, dated the 28th April 1922, passed by the First Munsif at Patna.

Mr. Janak Kishore, for the Petitioner.
Messrs. Shiveshwar Dyal and Brijkishore Prasad, for the Opposite Party.

JUDGMENT.

Mullick, J.—On the 28th April 1922 the defendant in the suit, out of which this application arises, was present, but the plaintiff was not present in person and his Pleader filed a petition for time to adduce evidence. The plaintiff's application was rejected and the Pleader thereupon said that he had no further instructions. The Court then proceeded to hear the case and allowed the defendant to file a petition for the amendment of issues and to tender the certified copy of a decision in the previous application under O. IX r. 13, Civil Procedure Code, which related to the case. The Court, after considering this decision and hearing the defendant's Pleader, found that the suit was barred by *res judicata* and he accordingly made a decree of dismissal. In making this order the Court was careful to note that it was acting under provisions of r. 3 of O. XVII, Civil Procedure Code.

Now, whether or not the Court was right in disposing of the case under O. XVII, r. 3, Civil Procedure Code, or whether it should have acted under r. 2 of that Order is not a point which appears to be material for the decision of the present application before us. Here the plaintiff applies to us to exercise our revisional jurisdiction under section 115, Civil Procedure Code, in respect of the order of the 28th April 1922 on the ground that the Court had no jurisdiction to make it under O. XVII.

He contends that by reason of r. 2 of that Order the Court should have proceeded under O. IX and, therefore, any decree purporting to have been passed under r. 3 was made without jurisdiction. Now section 115, Civil Procedure Code, clearly lays down that the High Court cannot interfere in revision if there is an appeal against the order complained of. Whether we view the order of the 28th April as an order properly made under r. 3 of O. XVII or as an order under O. IX, r. 8, the plaintiff had a right of appeal. In the former case he had an appeal against the decree and in the latter case it was open to him to apply under O. IX, r. 9 and in the event of being unsuccessful, he had a right of appeal under O. XLIII against the decision under O. IX, r. 9. He did in fact apply under O. IX, r. 9, and that application was rejected. No appeal was filed against that order of rejection and there is no application for the revision of that order before us. It is clear that the present application is not maintainable.

The result is that the application is dismissed with costs; hearing fee one gold mohur.

Kulwant Sahay, J.—I agree.

Z. K.

Application dismissed.

RAMABHADRA CHETTY V. RAMASAMI CHETTY.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 341 OF 1921.

November 9, 1922.

Present :—Mr. Justice Spencer and

• Mr. Justice Vekantasubba Rao.

RAMABHADRA CHETTY—

RESPONDENT NO. 2—APPELLANT

versus

V. RAMASAMI CHETTY AND OTHERS—

PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 66, 68—Sale held by Receiver—Court, whether can interfere.

The Court's power to interfere with a sale held by the Official Receiver under the Provincial Insolvency Act is not limited to cases where there has been some *mala fides* on the part of the Receiver, or purchaser. Where the action of the Receiver is irregular and has prejudiced the general interests of creditors, the Court can set aside the Receiver's order. [p. 375, col. 1.]

Thiruvengkatachiar v. Thangayi Ammal, 29 Ind. Cas. 294; 39 M. 479; 17 M. L. T. 432; 29 M. L. J. 755, followed.

Ex parte Lloyd, In re Peters, (1883) 47 L. T. 64, distinguished.

Appeal against an order of the District Court of Trichinopoly, dated the 21st of February 1921, and made in Civil Miscellaneous Petition No. 773 of 1919, in I. P. No. 20 of 1917 on its file.

FACTS.—This is an appeal against an order of the District Court setting aside a sale by the Official Receiver in favour of the appellant on a petition by some of the creditors of the insolvent.

Notice of sale stated the sale was to be between 7-9 A. M. on 8th August 1919. The highest bid was Rs. 2,000. The Official Receiver thought it too low. Hence he stopped it and advertised for fresh auction on 13th October 1919 stating the auction was to begin at 7 A. M. There were certain anonymous petitions stating that the date had been changed to 12th. The Official Receiver still proceeded with the sale on 13th October 1919 and concluded it for Rs. 1,500, on these facts the creditors petitioned within the 21 days provided by section 66 of Act V of 1920. The District Judge set it aside. The appeal is against this order. It may be stated that a fresh sale had subsequently taken place for Rs. 2,300.

Mr. Tyagaraja Iyer for Mr. S. Doraswamy Iyer, for the Appellant. The

order setting aside the sale is wrong. The Official Receiver having reserved to himself the right to stop the auction if he pleased and he not having thought fit to do so, the Court ought not to have set it aside.

On the analogy of O. XXI, r. 90, admittedly no fraud or illegality or misconduct has been alleged upon which alone an ordinary contract could be set aside. The jurisdiction of a Court to set aside a contract duly concluded by its officers is not absolute nor can it be rested on mere considerations on what a more prudent Receiver would have done. Lastly, owing to the procedure adopted by the District Judge, the appellant had no opportunity to meet the case as stated in the affidavit.

Further, the Official Receiver who appears here by Counsel concluded this contract with me and is bound to stand by me and support me.

Mr. S. T. Srinivasagopalachariar, for the Respondent.—On the last point as to the position of the Official Receiver for whom I appear, the Official Receiver is an officer of Court and acts under its instructions. His acts and decisions are subject to the advice and review by Court. (See section 68, apart from his general position as officer of Court). The first sale conducted by me was not confirmed by Court and I no longer stand by it. I have in fact concluded a fresh sale.

There is a difficulty which faces the other side in this appeal. The subsequent sale has not been attacked. It has been confirmed without objection and there is no appeal against it. The purchaser is not a party here in appeal and there can be no effective order at all in this appeal.

It is too late in the day to question the jurisdiction of Insolvency Court to confirm, modify, reverse the act of Official Receiver under section 68 of the Provincial Insolvency Act.

The creditors for interference are very general. Discretion of the Court is absolute and practically unfettered and is not confined to fraud or *mala fides*. The matter is concluded by authority *Thiruvengkatachiar v. Thangayi Ammal* (1) and also *Ex parte Lloyd, In re Peters* (2) cited and

(1) 29 Ind. Cas. 294; 39 M. 479; 17 M. L. T. 432; 29 M. L. J. 755.

(2) (1883) 47 L. T. 64.

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explained therein. The Receiver is a trustee for creditors. The acts of Official Receiver are only of conditional validity. The Insolvent Court has inherent powers of supervision over the conduct of its officers. There is no analogy between section 68 of the Provincial Insolvency Act and O. XXI, r. 90 of the Civil Procedure Code and the matter is settled by the course of authorities. The judgment of the lower Court is correct.

JUDGMENT.—It is contended that the Court's power to interfere with a sale held by an Official Receiver is limited to cases where there has been some *mala fides* on the part of the Receiver or of the purchaser.

Reliance is placed on the case of *Ex parte Lloyd, In re Peters* (2) where the Master of the Rolls observed that the Court would not interfere unless the trustee did that which was so utterly unreasonable and absurd that no reasonable man would so act. The same objection was taken in *Thiruvengkatachiar v. Thangayi Ammal* (1) and overruled. It was then observed: "It [the case of *Ex parte Lloyd, In re Peters* (2)] is not an authority for the proposition that where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should not set aside the order passed by the Receiver". We adopt these observations in dealing with the present case where the Receiver's act was certainly irregular and prejudicial to the creditors in accepting a far lower bid at the second sale.

The suggestion that the appellant had no opportunity to file a counter-affidavit in the District Court is not acceptable in view of the entries in the B. diary which show that arguments were heard on three different days. The appeal is dismissed with costs. The costs in the District Court after the remand by the High Court will be borne by the Official Receiver whose act occasioned the Court's interference. The costs of the appeal on the previous occasion are provided for in the lower Court's order and we allow the order to stand in that respect.

V. N. V.

*Appeal dismissed.***NAGPUR JUDICIAL COMMISSIONER'S COURT.**

CIVIL REVISION No. 148 OF 1922.

January 26, 1923.

Present—Mr. Batten, J. C.

DAUDBHAI—APPLICANT

versus

G. I. P. RAILWAY COMPANY—

NON-APPLICANT.

Railways Act (IX of 1890), s. 74—Risk-note—Exemption—Proof of loss or destruction.

A Railway Company in order that it may claim an exemption from a liability to pay damages by virtue of a Risk-note executed in their favour by a consignee must prove that the goods consigned have been lost or destroyed, that is to say, that they are no longer in the possession of the Company and that they are not lying about in their premises or that some kind of search for them was made by the Company. It is not sufficient merely to prove that the goods were not found at an intermediate station and that they are untraceable, in the absence of any evidence that they were loaded at the station of consignment. [p. 376, col. 1.]

Revision against an order of the Judge, Small Cause Court, Betul, dated the 19th April 1922, in Small Cause Suit No. 132 of 1921.

Mr. S. B. Gokhale for the Applicant.

Mr. P. Lobo, for the Non-Applicant.

JUDGMENT.—This is a sequel to Civil Revision No. 231 of 1921. The law on the subject accepted by Dhobley, A. J. C. in that case has now been affirmed by a Bench of this Court in Civil Revision No. 258 of 1921. The opinion of the Bench in that case must be read together with the order referring the case to the Bench. The Railway Company has now been given an opportunity of proving that the five bags of sugar are lost, that is to say, that they are no longer in the possession of the Company, and that they are not lying about in their premises, or at least that some kind of search has been made for them. The goods were consigned from Kidderpur to Betul. All that was pleaded by the defendant Company was that the five bags "were either lost in transit or stolen or dropped." It was also stated that the waggon left Jubbulpore on 1st December 1919 at 18-30 and was received at Itarsi direct on 2nd December 1919 where one side seal was found deficient. The evidence adduced by the Company after remand is very meagre on this point, though they

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have proved that Risk-notes were executed. The evidence of a Guard shows that at Itarsi a seal on the waggon was broken and five bags out of the total consignment were missing there and of course they were also missing at Betul. He also stated that the loss was reported to the Police and to the sending and receiving stations, with the result that the bags are still untraceable. He does not state that he has any personal knowledge as to what efforts were made to find the bags. The Official who gave the Railway Receipt at Kidderpur says Mr. Bose loaded the goods, but Mr. Bose is not a witness. There is no evidence whatever that bags were not duly received at Jubbulpur or that they were in the waggon when it started from Jubbulpur. For all we can tell from the evidence, the five bags may have been unloaded at Jubbulpore, and still be in the Company's possession there, or they may have been wrongly sent to some other destination. The Company, if the bags were really lost, could probably have merely proved in what condition the seals of the waggon were on its arrival at Jubbulpore, and whether the missing bags were or were not in the waggon when it left Jubbulpore, but for some reason the Company appear to have taken no trouble to collect the requisite evidence in the case, and have failed to prove that the bags are really lost, that is to say, no longer in the possession of the Company. It seems unfortunate that more care is not devoted by the Company for the management of its civil suits up-country. The circumstances in which the Company can rely on the Risk-note have, therefore, not been proved. To quote the words of the Bench, the Company have filed "to prove that the circumstances in which the Risk-note is intended to operate and exempt them from liability have occurred, or in other words the goods have in this case been lost or destroyed."

In these circumstances, the plaintiff is entitled to damages, and the case is remanded to the Court of Small Causes to ascertain and decree the amount of those damages. Costs in this Court, in which Rs. 15 will be allowed as Pleader's fees, will be costs in the suit.

G. R. D.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1227 OF 1920.

December 13, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

KOZHIKOT PATINHARE KOVILAGATH THAMBATTI THAMBURATHI
alias VIYATHEN NOTTI alias
VALIZA THAMBURATHI AVERGAL,
MANAGER OF THE KOVILAGAM
(DECEASED) AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

KATTAYAHAT VATAKARA
THEIZHATH TARAVATHIL
KARNAVAN SANKARA MENON
AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, s. 4 (2)—Legal representative—Pleading, repudiation of—Contract Act (IX of 1872), s. 200—Kovilagam property—Previous mortgage—Grant of melcharth by unauthorised person—Ratification.

O. XXII, r. 4 clause (2) of the Civil Procedure Code does not entitle the legal representative of a party to the suit to take up an attitude contrary to that taken up by his predecessor in the pleadings. [p. 378, col. 1.]

Bivendra Kishore Manikya Bahadur v. Akram Ali, 13 Ind. Cas. 513; 15 C. L. J. 194; 39 C. 439; 16 C. W. N. 304, *Rangasami Gounden v. Nachappa Gounden*, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), followed.

The grant of a *melcharth* in Kovilagam properties itself does not of itself terminate the interest of a previous mortgagee. That interest is terminated not solely on account of the grant of the *melcharth* but only if and when the *melcharthdar* also finds money for redemption and pays it to the previous mortgagee. Therefore, where a *melcharth* is granted in property previously mortgaged by a person who has not the authority to do so, there is no bar to the same being ratified under section 200 of the Contract Act by the person who is really competent to grant the *melcharth*. [p. 378, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, South Malabar at Calicut, in A. S. No. 101 of 1919 (A. S. No. 178 of 1919 on the file of the District Court of South Malabar) preferred against a decree of the Court of the District Munsif, Parapanangudi in O. S. No. 620 of 1918.

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Mr. C. V. Ananthakrishna Aiyar and Mr. K. P. Ramakrishna Aiyar, for the Appellants.—Assuming that by reason of Exhibit XI first plaintiff has the right to manage the Kovilagam affairs or to execute any *melcharth* in respect of the *Kavilagam* properties and that she was not restored to management by Exhibit F, still the third plaintiff's statement in the First Court that the *melcharth* executed by first plaintiff in second plaintiff's favour was beneficent to the *Kavilagam* and agreeing to a decree being passed on its basis in second plaintiff's favour amounts to a ratification of the execution of the *melcharth* and validates the same.

Further, the third plaintiff's legal representative cannot in the same proceedings take up a contrary attitude to that taken up by the third plaintiff in his pleadings. See *Birendra Kishore Manikya Bahadur v. Akram Ali* (1) and *Rangasami Gounden v. Nachappa Gounden* (2).

Messrs. C. Madhavan Nair and D. A. Krishna Varlar, for the Respondents.—First plaintiff when she executed the *melcharth* executed it expressly stating that she was the person entitled to execute it. She did not purport to execute it on behalf of anybody else. So no ratification is possible. (See section 196, Indian Contract Act).

Moreover, third plaintiff was not the seniormost male member at the date of Exhibit B. At any particular time, it is the seniormost male member and he alone can execute a *melcharth* in respect of *tarwad* properties.

If at all first plaintiff purported to execute it on behalf of anybody else, it must be on behalf of the seniormost male member and as there was no ratification to him before his death it cannot be ratified by anybody else.

A *melcharth* by a person who is not, but who claims to be, entitled to execute it is also a void document and hence it cannot be ratified. Again, no ratification is possible if the interest of a third party will be affected as that of the prior tenant here. See section 200, Indian Contract Act, and Illustration thereto. In any case, as the present seniormost male member, the representative of the third plaintiff, contests the validity of Exhibit B no decree can be passed on its basis, now.

JUDGMENT.—The facts, so far as they are necessary for the arguments which we propose to consider, are that the second plaintiff, here one of the appellants, is a *melcharthaar* under a *melcharth* given by the first plaintiff, the senior lady of a *Kovilagam*. Third plaintiff was the senior male member of the *Kovilagam*. Many years back, the first plaintiff's predecessor had been removed from management under Exhibit XI. Subsequently, the first plaintiff, as she contends, was restored to management by Exhibit F executed by the senior male member, who had in due course succeeded the person who took office under Exhibit XI. The suit is for redemption of a previous *kanom* of the *Kovilagam* property, and the main question raised is whether the first plaintiff had authority to give the *melcharth*, Exhibit B. There is a subsidiary question as to whether, if she had no authority to give Exhibit B, that was made good by the ratification of her action in doing so, constituted by the third plaintiff's pleadings. And, lastly, there is a question as to the effect of the proceedings and the conduct of the third plaintiff in the lower Appellate Court and of his death during their pendency in this Court and the refusal of his legal representative to follow his original pleadings.

Dealing first with the two points last mentioned, we have the conduct of the third plaintiff in the Appellate Court described in paragraph 5 of that Court's judgment. Third plaintiff's connection with the case began, when he applied to be made a plaintiff in the Court of first instance, stating in his affidavit that he approved of Exhibit B and that a decree for redemption of Exhibit B might be given to the second plaintiff. In the lower Appellate Court, the

(1) 13 Ind. Cas. 513; 15 C. L. J. 1941-39 C. 4391-16 C. W. N. 304.

(2) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. J. 55; 10 L. W. 105; 46 L. A. 72 (P. C.).

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Pleader for the third plaintiff as stated in paragraph 5 of the judgment under appeal, represented that he did not ask for a decree on the strength of title. The language of the lower Appellate Court is not felicitous. But we understand it to have meant that the third plaintiff did not ask for a decree in favour of the *Kovilagam* or himself, not that he in any way withdrew his support of the second plaintiff or his suggestion that a decree should be passed in the second plaintiff's favour. So far, we cannot see how the third plaintiff did anything which in any way detracted from the effect of his previous affidavit as a ratification of the plaintiff's act in giving Exhibit B; whether it did effect a ratification of that act we shall consider in the sequel.

Next, the legal representative of the third plaintiff in this Court was really joined as the legal representative of the second defendant although he does not now rely on that character and has appeared before us only as representing the third plaintiff. His claim to do so is not being disputed by any of the other parties. Mr. Krishna Varior on his behalf states that he desired to oppose the second plaintiff's claim and to repudiate the action of the third plaintiff, in so far as it approved or ratified the grant of Exhibit B. We are not able to understand how this can be justified by O. XXII r. 4, clause 2, or how that provision can be applied to the case of a legal representative whose predecessor never made or could have made a defence at all. In *Brendra Kishore Manikya Bahadur v. Akram Ali* (1) and *Rangasami Gounden v. Nachiappa Gounden* (2) it was laid down as settled law that "he who has the right to complain must do so when the right of action is properly open to him and he knows the facts." We are not able to understand how the present legal representative of the third plaintiff has any different legal character from the third plaintiff himself or any which would enable him to abandon the third plaintiff's contentions in the present proceedings, with which alone we are concerned.

As regards his right to take other proceedings we of course express no opinion. We accordingly deal with the question of ratification as between the first and the third

plaintiffs. Third plaintiff in his affidavit referred to, said that on an examination of the records in the case he has satisfied himself that the *melkanom* deed included in them and this suit are proper, beneficial and profitable to the *Kovilagam* and that all the reliefs asked for in the plaint might be granted to the second plaintiff. There is no doubt that, unless some objection on that ground can be made good, this language constitutes a clear ratification of the first plaintiff's action in giving Exhibit B. It is urged that it does not constitute such a ratification with reference to section 200, Indian Contract Act, on the ground that the grant of a *melcharth*, such as this, would have the effect of terminating a right or interest of third persons, the defendants. We are unable to follow this argument. The grant of a *melcharth* in itself does not terminate the interest of the prior mortgagee. That interest is terminated, not solely on account of the grant of *melcharth* but only if and when the *melcharthdar* also finds money for redemption and pays it to the previous mortgagee.

This failing, we have been referred to section 196, Indian Contract Act, the argument being that there is no ratification, because the first plaintiff did not purport to grant Exhibit B as the agent of any one competent to grant it; and in connection with this argument it has been urged further that the grant of Exhibit B was simply void and on that account could not in any case be the subject of ratification. Exhibit B purports to be granted by the first plaintiff as Valia Tamburathy, the title which she enjoys as the senior lady of the *Kovilagam* who would in the absence of any other arrangement be competent to grant *melcharth*. The properties, the subject of the document, are described as belonging in the *jennu* to the lady's *Kovllagam*, and the document recites that the *melcharth* amount has been received by her for the welfare of the *Kovllagam*. We think that Exhibit B must be read as executed by the first plaintiff in the capacity of the person who was competent to represent the *Kovllagam* and as such to deal with its properties. What is said is that there can be no representation of the *Kovllagam* in the ordinary sense except by the person appointed under Exhibit XI who would

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correspond with the *karnavan* of a *tarwad*; and that on behalf of such a person first plaintiff could not act, because he could not delegate his own delegated authority to her. The fallacy in this argument is that it regards first plaintiff's action as founded only on Exhibit F and not on the ratification which third plaintiff's pleadings afford. Shortly, she can and does plead that she acted not on behalf of, but instead of the person empowered by Exhibit XI and that she acted on behalf of the members of the *Kovilagam*, who third plaintiff now represents, or his predecessor could have acted for; and we can see no objection to her doing so or, after third plaintiff's ratifications of her acts, to their acceptance as valid. It is clearly useless to criticise the argument founded on ratification on the ground that the third plaintiff had no legal right to act on behalf of the *Kovilagam*. For that is exactly the reason why the doctrine of ratification is invoked. It has been urged that the doctrine cannot be invoked where the act generally is in itself void. But the granting of the *melcharth* by a person who is entitled to deal with the mortgaged property is not in itself void. We have been shown no instances in which an act has been held void for the present purpose where the only objection to the validity of the act is derived from its being done without proper authority. In these circumstances, we hold that the grant of Exhibit B. by the first plaintiff was ratified by the third plaintiff and that nothing has occurred since his ratification, which can deprive it of effect.

The result, is the second appeal is allowed, the lower Appellate Court's decision being set aside and the appeal being remanded for disposal according to law with reference to the other issues framed already. Costs to date in the lower Appellate Court and here will be costs in the appeal and be provided for in the lower Appellate Court's decree. The stamp-value on second appeal will be refunded on application. The question of costs at the trial in the Court of first instance will be dealt with by the lower Appellate Court on re-hearing with reference to the result thereof.

V. N. V.

N. H.

*Appeal allowed.***BOMBAY HIGH COURT.**SECOND CIVIL APPEAL NO. 713
OF 1921.

February 9, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
RAMCHANDRA NARAYAN DATAR—
APPLICANT—APPELLANT
versus

T. V. NIPUNGE—OPPONENT—
RESPONDENT.

*Insolvency—Assignment of prospective surplus—
Assignee, rights of.*

An insolvent can assign any prospective surplus that may remain over after his estate has been fully administered in insolvency, such assignment is of a contingent interest and does not give the assignee the right to intervene until it is ascertained whether or not there is a surplus. [p. 381, col. 1.]

Second appeal against the decision of the District Judge, Poona, in Miscellaneous Appeal No. 17 of 1921.

Sir Thomas Strangman (with him Mr. J. R. Gharapur), for the Appellant.

Mr. W. B. Pradhan, for the Respondent.

JUDGMENT.—One Balkrishana Vishnu Ghole was adjudged an insolvent on 6th September 1919 by the Joint First Class Subordinate Judge, Poona, in Insolvency Application No. 9 of 1917. On 12th February 1921 he presented an application to the First Class Subordinate Judge asking that the adjudication might be annulled. That application was dismissed on 21st February 1921. It was first claimed that the petitioner ought not to have been adjudicated an insolvent. But the Court held that he had been rightly adjudicated. Then it was urged that it had been proved that the debts of the insolvent had been paid in full, but it was held that he was not entitled to an order of annulment on that ground. The Judge said:—

"There is no evidence on the point. Neither the petitioner nor the creditors appeared in the witness-box. The petition admits that the mortgage-debts are not paid and that some personal debts are not paid. The petitioner asks the Court to receive a sum of Rs. 1,728 to pay these unpaid debts. That, too, under protest, and he does not admit a creditor's claim for Rs. 1,213 out of it. The Court has no business to accept the sum

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and to disburse it. There is no authority for it. Any how, it clearly shows that the insolvent has not paid his debts in full. To proceed with the petition, it says that a purchaser has been found to purchase the land at Bhamburda for Rs. 38,999 out of which he has paid money or personal debts. But it does not say how much and to whom. It is silent as regards mortgages. At the same time, it says that the insolvent is going to save his house. It is not known whether the insolvent is going to pay mortgages or the purchaser whose name is kept in dark as also identity which is transparent." The Judge, then, after considering the general circumstances surrounding the petition, said: "If the petition be carefully read, it is an attempt to deprive the Receiver of his fees about Rs. 2,400 and to give away in gift 3 acres of land worth Rs. 10,000 to Mr. Patwardhan and his friend and, lastly, to keep in tact the mortgages in order to deprive eventually the insolvent and his sons of all property." Therefore, the petition was dismissed with costs.

An appeal was filed by the insolvent against the order of Mr. Rego, but it was eventually withdrawn. While it was pending an application was made by the present applicant that he should be made a party to the appeal, but that application was dismissed, and we think rightly. After the insolvent had withdrawn his appeal, the applicant applied on his own account for an annulment of the adjudication order. The learned Trial Judge said: "The applicant wants to agitate again the questions that had already been raised and decided on the insolvent's application made under section 35 of the Provincial Insolvency Act, V of 1920. In the judgment elaborately endorsed on that application this Court held (1) that the insolvent was rightly adjudicated insolvent, and (2) that he had not paid his debts in full. The applicant took the transfer long after the adjudication order was passed and the transfer *prima facie* appears to be illegal under section 55 of the Insolvency Act. The proper time, therefore, to adjudicate whether the applicant has acquired any rights under the transfer relied on by him would be after the sale-proceeds came in Court for the benefit of the creditors."

Now, it is possible for an insolvent to assign to a purchaser the prospective surplus that may remain over after his estate has been administered in insolvency. In *Bird v. Philpott* (1) Mr. Justice Farwell said:—"It has been said that *Ex parte Sheffield*, *In re Austin* (2) and *In re Leadbitter* (3), decided that a bankrupt cannot deal with the possibility of surplus until all the debts in the first bankruptcy have been paid and the surplus has been ascertained. I do not think that these decisions decided anything to that effect at all. If they did, they would have overruled prior decisions—of the Lord Chancellor amongst others—which were not referred to and they would be, in my opinion, contrary to the whole spirit and principles on which the Bankruptcy Act is now built. As I read the Bankruptcy Act, the trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy, and that bankruptcy only—payment of principal and interest, and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the surplus. He as a trustee is in a better position than an ordinary trustee to the extent pointed out in *Ex parte Sheffield*, *In re Austin* (2), and *In re Leadbitter* (3), that is to say, the bankrupt has not the ordinary right of a *cestui que* trust to intervene until the surplus has been ascertained to exist, and all the creditors and interest and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration of the estate in any way, but, subject to that and subject to his non-interference with the administration and with the management of the trustee during the bankruptcy in the due course of the execution of his duty, he can, in my opinion, demand the surplus, and he has a right to the surplus—a right which he can dispose of by Will or deed or otherwise during the pendency of the first bankruptcy, even before the surplus is ascertained, although such disposi-

(1) (1900) 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 7 Manson 251; 16 T. L. R. 173.

(2) (1879) 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622.

(3) (1879) 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267.

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tion will, of course, be ineffectual unless in the event there prove to be a surplus upon which it can operate."

It is quite clear, therefore, that even if the insolvent in this case had purported to assign the surplus which might remain over when his estate had been fully administered in bankruptcy, his assignee could not interfere with the administration of the estate by virtue of such assignment. It would be an assignment of a contingent interest which could give no right to the assignee to intervene until it was ascertained whether or not there was a surplus. Whatever arrangement, therefore, was made between the insolvent and the applicant, the sale of the Bhamburda property was absolutely void. Since, after the property became vested in the Receiver, the insolvent could not deal with it so as to give any title to a purchaser. It seems to us that Mr. Rego's judgment dismissing the insolvent's application for the annulment of the adjudication order was perfectly correct. The insolvent having withdrawn his appeal the present applicant has attempted to obtain a review of Mr. Rego's decision by making a fresh application, but whether it was competent or not he could not satisfy the Court that the insolvent's debts had been paid in full. In appeal he again failed and in view of the decisions of the lower Court it would be difficult for us to interfere in second appeal. In our opinion, the whole of the record shows that the conduct of the insolvent and the applicant has not been beyond suspicion, and it is not an unfair inference that there has been an attempt made to defeat the provisions of the Insolvency Act. We think, therefore, that the appeal must be dismissed with costs.

All applications and appeals which are akin to it must also be dismissed.

W. C. A. & N. H.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 179 OF 1919.

October 25, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

NARAYANAN CHETTY *alias* RENGANATHAN CHETTI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

ELAYAPERUMAL, *alias* LAKSHMANAN CHETTI AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Hindu Law—Charitable endowment—Temple site purchased in name of one member of joint family—Other members, right of, to joint trusteeship—Family God installed in new temple—Original founder of worship, position of—Usage of institution, evidential value of.

The mere fact that a site was purchased in the name of one of the members of a Hindu joint family and a temple was subsequently built on that site does not show that that member was the founder of the temple and that his descendants alone, to the exclusion of those of other members, are entitled to the trusteeship of the temple. [p. 383, col. 2; p. 384, col. 1.]

The site of a temple was purchased in the name of one of the members of one of three branches of a Hindu family and a temple was built on it. There was no evidence to show whether that member acted for his branch only or for the whole joint family consisting of all the three branches, or whether they were divided from one another at that period; nor was there any definite evidence as to how the money for the purchase of the site and for the building of the temple was found. Prior to the building of the temple the common ancestor of all the three branches had a place of worship in a temple-house for a deity which was afterwards installed in the suit temple. There was also an effigy in the temple of the original common ancestor. Several temporary arrangements had been made in which one branch recognised the right of the other branches to manage:

Held, that in view of these facts all the three branches were equally entitled to the trusteeship of the suit temple either because the original ancestor was accepted as the real founder or because the member in whose name the site was purchased was acting on behalf of all the three branches of the family. [p. 386, col. 2; p. 387, col. 1.]

Where a family God that is worshipped in a temple-house belonging to a person is afterwards installed in a newly built temple, the new temple must be regarded only as an enlargement of the original institution in the temple house and the latter must be taken as the original foundation and its founder as the founder of the new temple. [p. 384, col. 1.]

Mahomed Ismail Ariff v. Ahmed Moolia Dawood, 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. J. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 295; 24 C. L. J. 198; 4 L. W. 269; 2 Bur. L. T. 141; 8 I. B. R. 517; 43 I. A. 127 (P. C.), followed.

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Where there is no direct evidence as to who was the founder of a temple and what are the rules of succession to the trusteeship, the Court must infer them from the practice of the institution and the conduct of the parties. [p. 384, col. 1.]

Appeal against a decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 5 of 1917.

Messrs. T. Rangachariar, C. S. Venkatachariar, E. Duraiswami Iyer and T. R. Srinivasa Iyengar, for the Appellant.

Mr. A. Krishnaswamy Aiyar, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Temporary Subordinate Judge of Sivaganga in Original Suit No. 5 of 1917. The suit refers to the *hukdarship* or trusteeship of a temple in Ariyakudy in the District of Ramnad, called the Thiruvengadam Udayan temple. Plaintiffs claim that they and defendants Nos. 5 to 11 are the hereditary trustees and sue to recover the temple and its properties and for other subsidiary reliefs. The Subordinate Judge having substantially decreed the plaintiffs' claim, defendants Nos. 1 to 4 have appealed to us and have contended that the suit should have been dismissed.

The relationship of the parties is explained by the genealogical tree attached to the judgment which the Subordinate Judge says in paragraph 8 of his judgment he has prepared from the evidence of the 5th plaintiff. It has been accepted as substantially correct by both the parties; and we shall adopt it for the purposes of this appeal and refer to the various individuals in it in the same manner as the Subordinate Judge has done. It will be seen from it that the original ancestor of the family was one Murugappa. He had among others two sons, Santhappa and Sevuga I, Santhappa's branch does not come into this suit as none of its members is a party here. Sevuga I had 4 sons Murugappa II, Alagiavanna I, and Venkatachala I and one Arunachala who was adopted away from the family, and with him and his branch we are not concerned. The other 3 sons have all left descendants. First to 3rd plaintiffs represent the first branch of Murugappa II. The 1st to 4th defendants and defendants Nos. 5 and 6 represent the second branch of Alagiavanna I;

but the position of defendants Nos. 1 to 4 depends upon the validity of the adoption of the 1st defendant to Alagiavanna II by his widow; 4th to 6th plaintiffs, 8th, 10th and 11th defendants represent the third branch of Venkatachala I. The original 7th and 9th defendants were subsequently transposed as 5th and 6th plaintiffs and so they do not appear among the defendants.

Plaintiffs disputed the adoption of the 1st defendant and treated him and his descendants, defendants Nos. 2 to 4, in their plaint as not being members of the second branch. The Subordinate Judge has, however, held the adoption to be true and valid and though a memorandum of objections has been filed against that finding the adoption was not seriously disputed before us and we have no doubt that the finding of the Subordinate Judge is right. The adoption was over 40 years ago and it was not disputed till 1901; the Subordinate Judge has referred to the numerous documents wherein the adoption has been recognised from 1874 onwards. He has also accepted the oral evidence of the defence witnesses Nos. 1, 3, 7, and 10, who speak to the adoption and we see no reason to discredit them in appeal. We attach no weight to the non-production of Isaipidimanam and Muri in this case in the face of the evidence on the defendants' side. Accepting the finding that the 1st defendant's adoption is true and valid, we treat defendants Nos. 1 to 4 as proper members of the second branch.

On the main question raised, the plaintiffs' case in the plaint is that the site for the plaint temple was purchased by the "forefathers" of plaintiffs and defendants Nos. 5 to 11 and that the temple was built and consecrated by them and that they endowed the temple and were carrying on the management; subsequently, the major members among plaintiffs and defendants were managing as *hukdarson* behalf of all the descendants of the original man Sevuga Chattiari, i.e., Sevuga I. They claim that all the three branches are entitled to the *hukdarship* and they asked that the amicable arrangement made under Exhibit A in 1914 by the three branches jointly by which two representatives of each branch, in all six persons, were to manage the temple affairs in rotation each managing for a year at a time should be

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confirmed. The case of the defendants Nos. 1 to 6, on the other hand, is that the *hukdarship* is confined to their branch alone as the temple was founded by Sevuga II of their branch on behalf of himself and his two brothers.

The Subordinate Judge held, on a consideration of all the evidence, and relying to a large extent on the way in which the parties interested acted with reference to this institution for the last 50 years, or more, that Sevuga I, was its founder and, therefore, all his descendants were entitled to the *hukdarship*. The finding has been attacked before us by the appellants mainly on the ground that the sale-deed, Exhibit I (d), of 1828 for the site of the plaint temple in favour of Sevuga II, was wrongly discredited by the lower Court. Though the observations of the Subordinate Judge with reference to it are not without force, we think he has not correctly appreciated the effect of Exhibit XXVI with reference to it. That was a written statement filed in Original Suit No. 138 of 1903 by a number of members of this family; it is signed among others by the 5th plaintiff and the fathers of plaintiffs Nos. 3 and 6, and as 3rd plaintiff's father died soon after, the 3rd plaintiff has adopted it. In it they refer to a sale by the *mahajanams* 75 years before now (that is 1828) of the temple site to one Savuga Chetti. This by itself no doubt does not fix the reference to be to Exhibit I (d) though the description in it so far as it goes applied to it exactly. In that suit Exhibit I (d) was filed on the very day the written statement was put in as appears from the endorsement on it and it is now produced in the present suit from the file of the District Munsif in that Suit No. 138 of 1903. There can be hardly a doubt that the written statement was referring to Exhibit I (d). That it was the same document that was filed in 1877 is shown by the endorsement on it about the collection of penalty in January 1878. Exhibit XXVI, therefore, does seem to contain an admission on the plaintiffs' side about the truth of Exhibit I (d). The reference in it to Sevuga Chetty is thus clearly Sevuga II. We are, therefore, inclined to think that, in spite of the adverse criticism of the Subordinate Judge, Exhibit I (d) is a genuine document and that the site on which the plaint temple

stands was purchased in Sevuga II's name. The temple was subsequently built on that site.

The question then is, "Does it follow from these two facts that Sevuga II, was the founder of the temple, and only his descendants are entitled to the *hukdarship*?" We do not think so. To draw such an inference several assumptions will have to be made for which there is no warranty. There is no deed of foundation in this case. To give exclusive rights to his descendants, we will have to assume that Sevuga II, himself paid his own moneys for buying the site and for building the temple; that he got it consecrated as a new institution and not as the continuation of an existing one, and that he acted for himself in all these matters and that he left no rules or instructions to regulate the succession to the trusteeship. We cannot assume all these things without evidence particularly as such an assumption is inconsistent with the conduct of the parties which we shall refer to presently. In the first place, it is not the appellants' case that Sevuga II, acted entirely for himself in getting the temple established, for they say that he acted on behalf of himself and his brothers, Arunachala II and Ramasami VII. In Exhibit I (d) there is not a word about the purchase being on behalf of any others or as the manager of any joint family. Whether that joint family consisted of Sevuga II and his two brothers only or of the members of all the three branches there is no direct evidence to show. Exhibit I (d) is, therefore, quite inconclusive about the nature of the foundation and the rights of the partition in the *hukdarship*.

The 5th plaintiff, who seems to be well acquainted with the family, has given an account of this foundation from which it would appear that it was originally a *kovil vidu* or temple house where Sevuga I used to carry on the worship of the family deity. This *kovil vidu* is referred to in Exhibit XXVI. He says that Sevuga I used to go to Tirupati, another famous temple in Southern India dedicated to the same god, to hand over the money offerings he received in his *kovil* to the deity there and that on a certain occasion an Archaka in Tirupati who had an inspiration told him that thereafter it was the Tirupati god's

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wish that a temple should be built for him in Aiyakudi and that from it the idea of building the plaint temple originated. He also says that Sevuga I died before the plaint temple was built out of subscriptions collected by the members of the family. The same family god that was worshipped in the *kovil vidu* was installed in the new temple. If this is true, and there is nothing to contradict it, it would seem that the new temple was only an enlargement of the original institution in the *kovil vidu* and, according to *Mahomed Ismail Ariff v. Ahmed Moolla Dawood* (1), the *kovil vidu* of Sevuga I, should be taken as the original foundation and he as the founder. We think, however, it would be safer to take this case as one in which there is no direct evidence of who the founder is and what the rules of succession to the trusteeship are and we must, therefore, infer them from the practice of the institution and the conduct of the parties.

The earliest document after Exhibit I (d) is Exhibit VII, a deed of purchase of certain lands for the temple in 1855 by Arunachala II, the brother of Sevuga II, from Venkatachella VII. The identity of the parties appears from the oral evidence. This deed shows that by that time Arunachala had apparently become the manager of the temple but in what right he so became, we do not know whether as the seniormost of the second branch or of all the three branches put together. That this purchase was from the funds of the temple appears from the extracts from the *nam* register Exhibit XXVIII (c) paragraph II; and also from Exhibit XXVIII which shows that the lands were purchased for the temple in the names of Srinivasa Iyengar and Arunachala Chetty, both described as servants of the temple. Exhibit XXVIII (a) shows that as early as 1849 an endowment was made to the temple by one Sathappa Chetty. See paragraph 5 in it. The lands purchased from temple funds for the temple will naturally be in the name of the manager or *hukdar* and Exhibit VII, therefore, merely

shows that Arunachalam II, had probably succeeded Sevuga II, in the management. The next documents, the extracts from the *nam* register, have already been referred to.

The next piece of evidence we have is Exhibit K series. Exhibit K is a plaint filed by Arunachala II, and in it is joined as 2nd plaintiff Sevagu III of the third branch and he is described as *hukdar*. It is dated 1866. The suit was on a mortgage executed to the 1st plaintiff, probably on behalf of the temple, and it is very significant that in that suit a member of the third branch, described as a *hukdar* in the same manner as Arunachala, was added. Exhibit K-2 is the judgment and in it the same description appears. Exhibits K-3, K-4 and K-5 refer to another suit of a similar kind of 1870 where Sevuga III is again the 2nd plaintiff and he is described in it also as *hukdar*. There is no reasonable explanation why Sevuga III of the third branch was added as a party and described as the *hukdar* if, as defendants contend, the *hukdarship* was confined to their second branch. These proceedings in Court clearly show that Sevuga III was recognised as a *hukdar* so early as 1866.

We have also about this time, in January 1871, a sale-deed in favour of Arunachala II, Sevuga III, and Ramasami IV; representatives of all the three branches, Exhibit M-1, wherein they are all described as *hukdars* (according to the correct translation of the deed) for some lands bought for the temple. Again, in Exhibit M Venkatachala VII is described as *hukdar*.

Now it is argued that Arunachala II's action in joining the other branches should not be given much weight because in 1874 in his Will, Exhibit I (d), he repudiated their rights and that he tried also in the same year to bring in the members of Sathappa's branch as well, who, according to both plaintiffs and defendants, have no rights in the pointed out disputes arose between the parties in 1872 as Exhibit G indicated. Any action of Arunachala after that against the other two branches cannot be treated as of much weight or as affecting his previous admissions. In Exhibit G itself Sevuga III was admitted as a party to the suit as a *hukdar* though the 2nd petitioner Ramasami IV of the first branch was not. As the Subordinate Judge notices Exhibit

(1) 35 Ind. Cas. 301 43 C. 1085, 14 A. L. J. 741 (1916) 1 M.W.N. 4601 20 C.W.N. 1118; 20 M. L. T. 110; 18 Bom. L.R. 611 31 M. L. J. 2901 24 C. L. J. 1981 4 L. W. 2691 9 Bur. L. T. 141 8 L. B. R. 5171 43 I. A. 127 (P. C.).

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M-1 was not apparently filed in that suit; if it has been possibly Ramasami IV may also have been added as a party.

Now it appears from Exhibit H-2 to H-4 of 1872 that Sevuga III and Ramasami IV tried to resist the opposition of the second branch to their rights to *hukdarship* in the temple by getting the *raiya*s on to their side and by collecting the rents due for the temple lands; they tried also to exclude the second branch from management altogether as the Subordinate Judge explains in paragraph 19 of his judgment.

At this time in 1874 Arunachala II died and left the Will, Exhibit I (b), already referred to. In it he asserted that Sevuga II consecrated the plaint temple and that he was the *darmakartha* of the trustee and after his death his son Ramasami (No. 8) should be the *darmakartha*. We have already dealt with the value of this document as a piece of evidence. After Arunachala's death Ramasami VIII applied for succession certificate in 1875 for outstandings due to the temple, *vide* Exhibit R-13. Sevuga III and Ramasami IV and Viravan of Sattappa's branch were made counter-petitioners and though these opposed the grant of the certificate to the petitioner, the District Judge held that as Ramasami VIII was admitted to be the heir and personal representative of the deceased while two of the counter-petitioners were divided cousins and the third a yet more distant *dayadi*, the certificate should go to the petitioner. He did not consider the question of *hukdarship* of the temple at all as the proceeding before him was a summary one. In fact, the certificate was given to collect "debts due to the estate of said Arunachala Chetty, deceased," and not statedly of the temple, *Vide* Exhibit VI-a. This order cannot be treated as of much value against the first and third branches as there was no adjudication in it even in a summary way as to the rights of *hukdarship*.

In 1876 Venkatachala VII and Sevukan III, describing themselves as *hukdars*, brought a suit, Original Suit No. 570 of 1876, on the mortgage, Exhibit M, and similarly they and Ramasami IV brought Second Civil Suit 1892 of 1876 excluding the second branch. Under Exhibits M-12 and K-10 and we also find Sevugan III executing a Will, Exhibit N, in the same year asserting

that the temple site was bought by the ancestors of his family, he and his elder brother and his son built the temple and endowed it. He gives the *hukdarship* to his adopted son Lakshamana. Similarly, in 1879 Ramasami VIII also executed a Will, Exhibit I (c). Except as evidence of assertions of right, these Wills are of little value in this case.

The disputes went on between the parties, as fully explained by the Subordinate Judge in paragraphs 21 to 29 of his judgment, it is hardly necessary to repeat what each party did in detail again. In the meanwhile, we find several properties of considerable value purchased and endowed to the temple by the first and third branches, Exhibits M-2 of 1873, and M-3 to M-11 from 1875 to 1888. Suits were brought sometimes by 1 and 3 branches alone and sometimes by all the three and sometimes by strangers against them. See Exhibit R series as an example of the last where only 1 and 3 branches were added. In 1886 a criminal complaint was filed by a servant of Srinivasan Chetty, the 5th defendant, against the 5th plaintiff, Ramanathan Chetty, and his men and in that case the Magistrate found that the possession of the temple properties were with Ramanathan. The disputes culminated in a regular suit brought by the 1st defendant through his agent, Original Suit No. 14 of 1901, Exhibit XI for rent in which he asserted Sevakan II was the man who purchased the temple site and built the temple. Soon after, fearing a breach of the peace on account of these disputes, the Magistrate interfered under the Criminal Procedure Code to prevent it and locked up the doors of the temple so that no *puja* could be done there. When matters came to such a pass, the parties seem to have come to an amicable arrangement by Exhibit XII in June 1901 at the mediation of the important members of their community. It is signed by 1st plaintiff, and by the father of 3rd plaintiff of the first branch, by the first defendant for himself and as guardian of Ramasami IX by his agent, Vengusami Iyengar, and the 5th defendant of the second branch and by the 5th plaintiff and father of 6th plaintiff of the third branch. They are all admitted to be *hukdars*. By it they appointed three strangers as trustees to take charge of the temple and its properties.

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and carry on the worship till they could all unite together and take over the management themselves. The suit, Original Suit No. 14 of 1907, was to be withdrawn and the key of the temple to be obtained from the Magistrate and Ramasami IX was to refund Rs. 2,800 collected by him. This arrangement, however, was declared invalid by the Courts as it amounted to an alienation of the trusteeship to 3rd parties. Nevertheless, the acknowledgment by the representatives of all the three branches of the right of *hukdarship* in the other branches in a solemn deed loses none of its force.

As the transaction fell through, the third branch brought Original Suit No. 58 of 1911 to recover the properties from the three stranger trustees, *vide* Exhibit XVI and in it the members of the first and second branches were made parties. The suit was based on the existence of the rights of *hukdarship* in all the branches which was expressly asserted and yet the members of the second branch did not care to deny it and allowed the case to go *ex parte*. The decree, Exhibit B, was in favour of all the branches jointly but it was executed and possession obtained by the third branch.

Then, in 1914, the parties again met together and made an arrangement, Exhibit A, for the management of the temple affairs temporarily. The nature of the arrangement has already been referred to. Though the scheme they adopted was a temporary one till a proper scheme was settled by Court, still Exhibit A is based on an admission as to the rights of *hukdarship* of all three branches.

We have now referred to all the important documents in connection with the management of this temple. The appellants have adduced some oral evidence of the temple servants and others to show that in spite of all disputes the members of their second branch always continued in management. The Subordinate Judge has refused to accept this evidence or attach importance to it in the face of the documentary evidence showing that each party was trying to assert its rights ever since 1871 when the quarrel began; and we agree with him. There is further a series of *his* receipts for temple lands all in the name

of the 5th plaintiff of the third branch, Exhibit O series.

To sum up the evidence, we have the sale-deed for the site of the temple in the name of Sevuga II and the temple was built on it during his time. Admittedly, he acted on behalf of himself and others but there is no direct evidence to show whether he so acted only for his branch or for the whole joint family consisting of all the three branches. There is no evidence that the three branches had become divided from one another at that remote period. The earliest reference we have to any division is in Exhibit VI (b) of 1875. There is also no definite evidence as to how the money for the purchase of the site and for the building of the temple was found. There is some evidence that, prior to the building of the plaint temple, Sevuga I, the common ancestor of all the three branches, had a place of worship for the same deity as was afterwards installed in the plaint temple in a *kovil veedu* or temple house and that the idea of building the new temple probably arose with him though he was not able to carry it out and it is not unlikely that the new temple was treated as an enlargement of the old institution. The fact that there is an effigy of Sevuga I in the temple while there is none of any other ancestor of Sevuga II has some significance in this connection.

It is, however, clear on the evidence that the rights of *hukdarship* in the first and third branches were recognised by Arunachala II of the 2nd branch, so long ago as 1866 and this state of affairs continued till at least 1871, when quarrels began and each side tried to oust the other. During that period we find numerous documents where the rights of 1 and 3 branches were asserted. The quarrels were once settled by Exhibit XII each branch recognising the right of the other branches but, unfortunately, the arrangement fell through. Again, a settlement was made on a singular footing, Exhibit A, and though it was a temporary one it is still in force and will continue so till the Court frames a scheme.

Now on all this evidence we are inclined to hold that the plaintiffs have established their case that they and the defendants are all equally entitled to the *hukdarship* of the plaint temple either because Sevuga I

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was accepted as the real founder as the Subordinate Judge has found or because Sevugan II was acting on behalf of all the three branches of the family.

The learned Vakil for the appellants contended that the second alternative was not put forward in the plaint and if it is to be allowed to be raised he should have an opportunity of meeting that case. The plaintiffs merely stated in their plaint that their "forefathers" purchased the land and built the temple and consecrated it and that subsequently all the descendants of Sevugan I were managing the temple affairs as *hukdars* under hereditary right. They did not confine their case to proving that Sevugan I bought the site and built the temple. In the written statement, though it is asserted that Sevugan II bought the land and built the temple, the issue framed, *viz.*, the first part of Issue No. 1 is quite general in its terms; it is "whether plaintiffs and defendants Nos. 7 to 11 are hereditary trustees" no doubt the Subordinate Judge says in his judgment that the question turns upon whether the temple was founded by Sevugan I or II. As he was finding that Sevugan I was the founder there was no other question for him to consider. Though we are not dissenting from his finding we have considered that the case might be put on the alternative ground also, namely, that if Sevugan II was to be treated as the founder he was acting on behalf of not only his brothers but all the members of the three branches who apparently were then a joint family. The case was made in the lower Court and is not a new case; for otherwise there would have been no need to adduce the volume of evidence that has been adduced regarding the conduct and admissions of the parties. It is not suggested by the appellants that there are any new documents or other evidence which they could have produced but did not meet the alternative case. We think the objection is unsubstantial and we overrule it.

We agree with the Subordinate Judge in his finding that plaintiffs and defendants are all entitled to his *hukdarship* of the plaint temple.

The learned Vakil for the appellants did not argue any other point before us

but the learned Vakil for the plaintiffs argued that the question of the right to the trusteeship of the plaint temple was *res judicata* between the second and third branches by reason of the decision in Original Suit No. 58 of 1911. In the view we have taken of the case, it is not necessary to decide this question. We have already dealt with the question raised in the memorandum of objections. In the result, the appeal and the memorandum of objections both fail and are dismissed with costs of 1st and 4th plaintiffs in the appeal and of the defendants No. 1 to 4 in the memorandum of objections.

V. N. V.

Appeal dismissed,

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1786 OF 1922.

February 3, 1923.

Present:—Mr. Justice Campbell.

WAHID BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALTA PERSHAD—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 177, 181—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of defendant—Failure to apply within time for substitution—Abatement—Failure to object, effect of.

Where no application is made within the time prescribed by law for bringing the legal representatives of a deceased respondent on the record, the appeal abates, and no failure by the persons concerned to object to action taken on an application presented after expiry of the time limited by law would alter the fact of abatement. [p. 389, col. 2.]

Article 177 of Sch. I to the Limitation Act has no applicability to an application for bringing on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death. Such an application is governed by Art. 181 of Sch. I to the Act. [p. 390, col. 1.]

Second appeal from the decree of the District Judge, Multan, dated the 17th May 1922, reversing that of the Munsif, First Class, Multan, dated the 28th April 1915.

Kanwar Dalip Singh, for the Appellants.

Lala Badri Das, R. B., for the Respondent.

WAHID BAKHSH v. LALTA PARSHAD.

JUDGMENT.—This second appeal is the outcome of a suit instituted so long ago as the 13th August 1912 by Wahid Bakhsh and others against Lalta Parshad. In 1907 Lalta Parshad purchased a plot of one *kanal* one *marla* field No. 6781 in Taraf Mubarak, a suburb of Multan, and proceeded to build a house. Wahid Bakhsh and others based their suit on the allegation that Lalta Parshad had encroached to the extent of 16 *marlas* on the adjoining field No. 751 of Taraf Ismail of which they asserted themselves to be the proprietors. They asked for a decree for possession of those 16 *marlas* and for an injunction requiring Lalta Parshad to demolish his structures erected upon a portion of the encroachment and restraining him from building upon the rest of it.

Lalta Parshad pleaded that he was not in possession of any land which did not belong to him, and issues were framed, (1) whether the land in suit belongs to the plaintiffs and has been taken possession of unlawfully by the defendant, and (2) whether the plaintiffs are entitled to an injunction.

The first Court decreed the claim. Lalta Parshad appealed to the District Judge, Sheikh Amir Ali, and in that Court the following statement was made on his behalf:—

"The defendant is willing that a decree may be passed in plaintiffs' favour for possession of 16 *marlas* more or less, by demolition of the buildings, if necessary, which may be found in the possession of defendant out of *Khasra* No. 1751 in Taraf Ismail. This will be decided by actual measurements through a Revenue Officer in execution proceedings."

The plaintiffs-respondents agreed and the District Judge passed a decree accordingly.

The Executing Court appointed a *Naib Tahsildar* to take measurements who reported an encroachment by the defendant of 4 or 5 *marlas*. As the result of a personal visit to the spot with two *patwaris*, each of which arrived at a different estimate of the measure of the encroachment, the Munsif eventually ordered the plaintiffs to be placed in possession of 16 *marlas*. The defendant appealed to the District Judge (Mr. Coldstream) who also visited the scene, found the problem an exceedingly

ly difficult one to unravel, and reduced the area to be given to the plaintiffs to 12 *marlas*.

The plaintiffs came to the High Court on second appeal and Lalta Parshad lodged cross-objections which pointed to an opinion expressed by the District Judge that the decree of his predecessor was not a decree at all and urged that this opinion was correct and that the so-called decree should be held incapable of execution. A Single Judge held that in the decree there was no adjudication which determined conclusively the rights of the parties with regard to any of the matters in controversy before him, that it was not a decree at all, that it was not based on a compromise within the meaning of O. XXIII, r. 3, Civil Procedure Code, since the so-called agreement between the parties did not result in the adjustment of the suit either in whole or in part, and that the agreement should not have been recorded. The learned Judge accepted the appeal, set aside the whole proceedings in execution and rejected the plaintiffs' application for execution. He added "the effect of this order will be that the order of Sheikh Nasir Ali, Munsif, of the 28th April 1915 (the original Trial Court) will remain in force and that the appeal lodged against that order in the Court of the District Judge will be considered still pending and must be decided by that Officer." This judgment was upheld on Letters Patent Appeal by a Division Bench.

A third District Judge (Lala Ganga Ram) proceeded to decide the appeal afresh. He declared the points for decision to be, (1) whether Lalta Parshad had encroached upon the land of field No. 1751, and if so to what extent, and (2) whether the plaintiffs are owners of the land which is found to have been encroached upon.

On the first point he issued a commission to the Revenue Assistant and in accordance with his report decided that the defendant had encroachment on 16 *marlas* of fields No. 1751. On the record he held that the plaintiffs had failed to prove that they are owners of the land encroached upon. The appeal was accepted and the plaintiffs' suit was dismissed.

The plaintiffs have again preferred a second appeal to this Court and urge (1) that owing to the death of Mohammad Zaman,

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one of the plaintiffs, on 16th October 1918 and the failure by the defendant-appellant to apply within the time limited by law for the substitution of his legal representative, the appeal has abated, and (2) that Lala Ganga Ram had no business to go into the question of the ownership of field No. 1751 and the right of the plaintiffs to obtain a decree against the defendant for any portion of it found in his possession, since this had never been contested by the defendant and had, moreover, been waived expressly by him in the plaintiff's favour before Sheikh Amir Ali.

As regards the point of abatement the facts are these:

Sheikh Amir Ali's decree which has been declared to be no decree was passed on 8th November 1916. The Munsif's order in execution was passed on 4th June 1918. Mr. Coldstream's order in appeal is dated 14th April 1919. The Single Bench decision of this Court is dated 4th February 1920, and that of the Letters Patent Appeal Bench 13th November 1920. Muhammad Zaman was reported by a process-server on 4th November 1918 to have died and it is not disputed that he was dead on that date. O. XXII, r. 4, Civil Procedure Code, is by rule 12 of the same Order not applicable to proceedings in execution of a decree and no application was made for bringing Muhammad Zaman's legal representative on the record of those proceedings. In the memorandum of second appeal to this Court against Mr. Coldstream's order it was contended, though wrongly, that the Court below had had no jurisdiction to decide the case without bringing Muhammad Zaman's representative on the record, and the Single Judge did not touch the point.

In the Letters Patent Appeal judgment it was remarked that the fact of Muhammad Zaman's death had been brought to the notice of the Court, that the question of abatement did not require decision then, and that it could be agitated before the Appellate Court in the ordinary course.

On 2nd June 1920 between the dates of the two High Court judgments, and well within six months of the Single Bench decision, Lalta Prashad applied to the District Judge under O. XXII, r. 4 for the legal representatives of Muhammad Zaman

to be made a party. No order was passed on the application as the record was in the High Court. On 10th March 1921, after the return of the record, Lalta Prashad repeated the application which was granted and the Court ordered notices to issue to Ghulam Yasin and others the representatives named. The notices were served and these persons appeared before the District Judge through Counsel, who consented to the issue of the commission to the Revenue Assistant and does not appear at any stage of the appeal to have raised the objection of abatement. The question now for decision is simple, and is whether, within the time limited by law, application was made under O. XXII, r. 4 (1) for the legal representative or representatives of Muhammad Zaman to be made a party or parties. If no such application was made, the appeal abated, and no failure by the persons concerned to object to action taken on application presented after expiry of the time limited by law would alter the fact of abatement.

An application was made, as already stated, by Lalta Prashad on the 20th June 1920. Muhammad Zaman died not later than 4th November 1918 and, according to Art. 177 of the Limitation Act, in its form previous to 1st January 1921, an application for making the legal representative of a deceased defendant or respondent a party had to be made within six months of the date of the death of the deceased defendant or respondent. Muhammad Zaman, however, was not a deceased defendant or respondent either on the date of his death or on any date within six months of that occurrence. It is true that this Court ordered on 4th February 1920 (and the order undoubtedly is final) that the appeal against the original decree of the Munsif should be considered still pending, but this does not alter the hard fact that Muhammad Zaman was not a respondent to any appeal when he died. I cannot accept for a moment the argument put forward with much confidence by Mr. Dalip Singh for the plaintiffs-appellants that this Court's order, whether right or wrong, rendered abatement an inevitable result of Muhammad Zaman's death. If an application had been presented to the Courts below within six months of Muhammad Zaman's death for the substitution

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of his legal representatives as parties in his place to the proceedings then in progress, namely, proceedings in execution of a decree, the application would not have been one under O. XXII, r. 4 (1) for that rule does not apply to proceedings in execution of a decree. Art. 177, therefore, does not govern the case and the only other Article which can apply is Art. 181 which allows a period of three years from the date when the right to apply accrues. It is unnecessary to determine whether that date was the date of Muhammad Zaman's death or the date of the High Court's order setting aside the execution proceedings and declaring that the appeal was to be considered as still pending, since the 20th June 1920 is within 3 years of either date.

The learned Counsel for the present respondent and appellant in the Court below, Lalat Parshad, has two alternative arguments which need not now be considered, namely, (1) that if the appeal abated, the order of the District Judge making the representatives of Muhammad Zaman parties read with the facts that abatement was alleged in both appeals to the High Court, that no further objection was made to the District Judge, and that the latter proceeded with the appeal and decided it must be taken to be an order setting aside the abatement passed under O. XXII r. 9, and (2) that the District Judge's order continuing the appeal with these persons as parties was not appealable under section 105, Civil Procedure Code.

The second point urged in appeal that by consent of the parties the question did not arise before Lala Ganga Ram of the plaintiffs' ownership rights in the portion of field No. 1751 encroached upon by the defendant is also without force. In his original pleadings the defendant denied that the plaintiffs were owners in Taraf Ismail and the question was distinctly put in issue whether they were owners of the land in suit. In his statement before Sheikh Amir Ali the defendant agreed to a decree being passed in the plaintiff's favour for any portion of field No. 1751 that he might be found in possession of in execution proceedings but that admission was made for a special purpose to shorten proceedings and avoid further litigation and it cannot be held to be binding in the face of the finding by the

High Court that the agreement before Sheikh Amir Ali was not an agreement within the meaning of O. XXIII, r. 3, and did not adjust the suit either wholly or in part.

Nor does it operate as an estoppel, since it is not shown to have caused the plaintiffs to act upon the belief that their ownership of the whole of field No. 1751 had been recognized. The terms of Lala Ganga Ram's judgment make it clear that the question was argued on its merits before him by both sides, and that waiver and estoppel were not alleged by the plaintiffs. The statement before Sheikh Amir Ali was at the most an admission which could constitute a fresh piece of evidence coming up for consideration for the first time in the Appellate Court. There is nothing on the record to show that it was formally produced and admitted under O. XLI, r. 27, but, if it was, it must have been considered, for the statement is reproduced in *extenso* in Lala Ganga Ram's judgment.

A final plea is taken by the plaintiffs-appellants that Lala Ganga Ram has drawn wrong inferences from the facts and should have presumed that the appellants were entitled to possession because the land is recorded as *abadi deh* and is, therefore, *Shamilat* of Taraf Ismail, and because the appellants are owners in that *Shamilat*. It was held, however, on a consideration of all the evidence, that the appellants were owners only of certain portions of field No. 1751, which were acquired by them separately in three groups and which did not include the land encroached upon, and that their ownership rights were confined to those portions. This finding of fact cannot be touched in second appeal.

When the proceedings before Sheikh Amir Ali had been declared null and void, the defendant was fully entitled to adhere to his original position which was that, even if he had encroached upon field No. 1751, the plaintiffs could not turn him out without proving that they had a better right to the land encroached upon than he had.

The appeal fails, and is dismissed with costs.

Z. K.

Appeal dismissed.

SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 27, 1923.

Present.—Viscount Finlay, Lord Dunedin,
Lord Atkinson, Sir John Edge and Mr.
Ameer Ali.

SATISH CHANDRA CHATTERJI, SINCE
DECEASED, NOW REPRESENTED BY BON
BEHARI CHATTERJI AND OTHERS
—APPELLANTS

versus

KUMAR SATISH KANTHA ROY AND
OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O.
XXVI, r. 1—Commission to examine witness—
Court, duty of—Pleadings—Fraud, allegation of—
Evidence required.*

Evidence taken on commission should only be
used when the witness is proved to be too ill to
give evidence in Court, or is absent, for other suffi-
cient reason. [p. 393, col. 2.]

Charges of fraud and collusion should be
proved by those who make them—proved by
established facts or inferences legitimately
drawn from those facts taken together as a whole.
Suspicious and surmises and conjecture are not
permissible substitutes for those facts or those
inferences, but that by no means requires that
every puzzling artifice or contrivance resorted to
by one accused of fraud must necessarily be
completely unrevealed and cleared up and made
plain before a verdict can be properly found
against him. [p. 394, col. 1.]

Appeal from a decree of the Calcutta
High Court, dated the 8th July 1919, and
published as 55 Ind. Cas., 689, reversing that
of the Subordinate Judge, Fourth Court of
the 24-Parganas, dated the 2nd April 1917.

Messrs. *De Gruyther, K. C.*, and *Parikh*,
instructed by Mr. *Dalgado*, for the
Appellants.

Messrs. *Dunne, K. C.* and *Wallach*, in-
structed by Messrs. *Watkins* and *Hunter*,
for the Respondents.

JUDGMENT.

Lord Atkinson.—This is an appeal
from a decree, dated the 8th July 1919,
of the High Court of Judicature at Fort
William in Bengal, which reversed a decree,
dated the 2nd April 1917, of the Subordinate
Judge, Fourth Court of the 24-Parganas.

The main question for decision in the
appeal is whether or not a sale of a revenue-
paying estate purporting to have been
carved out under the Bengal Revenue Sales
Act, XI 1859, in respect of unpaid
arrears of revenue, and purchased by the
appellant, Satish Chandra Chatterji, (now

dead), was good and valid. The Subordi-
nate Judge before whom the case was tried
decided this question in the affirmative;
the High Court decided it in the negative
and made the decree hereafter mentioned.

For convenience sake, the several parties
to the suit may be thus denoted: the ap-
pellant by his first name, Satish; the first
four respondents by their family name of
Roy; the fifth respondent by the name of
Akshoy; the sixth by that of Sitanath;
and the formal respondent by the name
of Kali Dasi.

The facts out of which the appeal has
arisen are somewhat complicated. They
may be stated as briefly as is needful as
follows. The estate purported to be sold
was the Towzi No. 2402. It was entered
on the Roll of the Collector of the 24-Par-
ganas as subject to the payment to the
Government of an annual revenue of
Rs. 398-9. It comprised two villages,
Atpur and Panditnagar. It was held jointly
by one Hemada Kantha Roy, the father of
the formal respondent, and the Roys. The
estate had never been formally or legally
partitioned nor the entire revenue apportion-
ed, but the co-owners arranged among
themselves to pay to the Government sepa-
rately their respective appropriate shares
of the revenue. Hemada paid separately
one-third, and the Roys together two-thirds.
Hemada had, some years before the sale
complained of, mortgaged his one undivided
third of this *zemindari* to a certain *shebait*,
living in the vicinity, who subsequently as-
signed this mortgage to the Roys, the mem-
bers of that family thus becoming owners
of two undivided thirds of the Towzi and
mortgagees of the remaining undivided
one-third. At the date of the alleged sale
a sum of Rs. 3,655 odd was due upon this
mortgage. In the month of January 1915,
if not for some time earlier, Hemada was
very ill. In the early days of that month
he was confined to bed, and died on the
10th day of it. Hemada for some con-
siderable time had had in his employment
as manager of his estate Sitanath, the sixth
respondent. This manager—not from want
of funds, that is not suggested—left unpaid
the instalment, due in the month of Septem-
ber 1915, of the revenue payable in res-
pect of his employer's share. This instal-
ment only amounted to the paltry sum

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of Rs. 26-4-8. It is charged that Sitanath withheld the payment of this instalment deliberately with the design of bringing about a sale by the Government of the whole Towzi, the revenue never having been apportioned, with the result that the mortgage held by the Roys would, if the sale took place, be annulled, to their great pecuniary loss. The revenue being thus in arrear, the Collector, acting under the powers conferred upon him by the provisions of the Bengal Revenue Sales Act, XI 1859, on the 8th January 1915, put up for sale the interests of all the joint co-owners in the entire Towzi, and sold it to Satish, who was apparently the highest bidder at the auction for a sum of Rs. 9,200. The Roys immediately appealed from the order of the Collector, declaring Satish the purchaser, to the Commissioner. It is said that they based their application to have the sale set aside on the ground of fraud as well as of irregularity in the mode in which the sale was constituted and conducted. No evidence has, however, been given to establish this, nor have the Board been referred to any authority to show that the Commissioner would have had jurisdiction to inquire into such a charge, and the terms of the order made by the Commissioner on the 1st June 1915, strongly indicate that no question of fraud was raised before him. The crucial part of the order runs as follows:—

"It does not appear that there was any irregularity in this case which would justify me in annulling the sale, under section 25 of Act XI of 1859. It also appears from the Collector's report, No. C 257-6-5, dated the 21st May 1915, that there is no ground of hardship or injustice on which I could recommend annulment of the sale under section 26. This appeal is, therefore, dismissed.

"F. J. MONAHAN,
"The 1st June 1915." Commissioner."

It appears to their Lordships to be very strange indeed that no reference is made to the charge of fraud if it had, in fact, been put forward.

On the 18th August 1915 the Roys accordingly instituted the suit out of which this appeal has arisen. They made the following persons defendants: Satish, No. 1;

Akshoy, No. 2; Sitarathi No. 3; and Kali Das No. 4, as a formal defendant.

The causes of action set forth in the plaint are substantially the following, that the Mouzah Atpur, being situated on the bank of the River Hoogly, afforded good sites for Jute Mills, that it was, in its then state, worth Rs. 15,000 that it was worth much more than Rs. 9,200, that Sitanath, with the object of inflicting pecuniary loss upon the plaintiffs and serving his own pecuniary interests, in violation of his duty to his employer, entered into a conspiracy with Akshoy (an enemy of the plaintiffs with whom they had been engaged in litigation) and Satish to purchase the aforesaid Towzi at the auction-sale for the benefit of Sitanath, Satish and Akshoy; that with this end in view and to effect this purpose Sitanath abstained from depositing with the proper officer the sum of Rs. 26-4-8; that in further pursuance of this conspiracy these three co-conspirators caused the notices and proclamations of the sale proper to be given and made in such sales to be suppressed and false returns to be filed, thereby preventing the *gomasta* of the plaintiffs and also the general public from knowing anything about the wilful withholding of the aforesaid instalment of the Government revenue or of the impending sale by auction, by reason whereof no local purchasers attended the sale, and the *zemindari* was sold at an undervalue—Rs. 9,200. The relief claimed was: (1) that the sale should be set aside as invalid; (2) that if in the opinion of the Court the sale was not liable to be set aside that a decree might be passed ordering the defendant Satish to convey to the plaintiffs and to the daughter and heiress of Hemada the *taluk* sold at the auction sale; (3) that an *ad interim* injunction might be granted restraining the taking possession of the *taluk* by the purchaser and for general relief.

These are serious and damaging charges. It appears to their Lordships difficult to understand how any man, even with the feeblest feeling of honour or sense of shame, could, if he were innocent, abstain from filing a defence to such accusations and at the earliest moment availing himself of the opportunity of going into Court to meet his accusers face to face. Well, in this plaint Sitanath did not file any written

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statement or give any evidence. Akshoy, a man of wealth, as he has admitted to be, did not file any written statement, and he and his two sons only gave evidence when, by the wise and peremptory action of the High Court, they were forced to do so.

Satish, on the 10th January 1916, did, four months all but eight days from the filing of the plaint, file a written statement. The evidence which he contrived to have substituted for testimony in open Court, in the presence of his accusers, will be presently referred to. In this statement he traverses all the allegations of fraud contained in the plaint, denied that he is related in any way to Akshoy as therein alleged, and alleges that the property purchased by him was not worth more than Rs. 9,200 that he purchased it for his own use and benefit without any connection with Akshoy or Sitānath. On the 15th January 1916 issues, eight in number, were settled on these pleadings. Of these only four seem of importance at this stage. They are: (1) Have the plaintiffs any cause of action, and does the plaint disclose any cause of action against the defendant No. 1 (*i.e.*, Satish)? (2) Is the suit, in its present form, maintainable? (3) Was the revenue sale brought about by collusion and fraud on the part of defendants? (4) Is the sale liable to be set aside as illegal and *ultra vires*? The trial did not come on till the 28th February 1917 over thirteen months after the issues had been settled. Satish was in no hurry to vindicate his character. On his behalf three adjournments were obtained for the filing of his own written statement. On the 21st June 1916 an order, signed I. G. Goswami S. J. was made which runs thus:—

"I think the defendant should not be compelled to attend Court for deposing as he has got a big hydrocele from which watery substance comes, and he is not in a position to move to a distance from his house. It will be for the Presiding Officer of this Court to consider whether it would be possible for him to examine the witness at his house or to issue a commission for his examination. The learned Pleader for the plaintiffs urges strenuously for the examination of the witness before the Court in the interests of justice. That is the reason

why the order is passed in the form given above."

On the 12th December 1916 a definite order is made directing a commission. It runs thus:—

"I have again heard the Pleaders on both sides. The defendant has been suffering from an ugly disease. He has got an unmanageable secreting tumour, and the medical certificate shows that he is unable to come to Court to give evidence here. There is nothing to controvert the fact. I should, therefore, confirm the order of my predecessor. On the 5th December 1916 a Commissioner is appointed and directed to submit his report before the 19th December 1916."

The date of the medical certificate mentioned in this order of the 2nd December is not given. No such document is to be found in the printed book, but in the list of omitted exhibits at p. XX is to be found this description: "Medical certificate given Satish Chandra Chatterji, dated 19th July 1916." The trial commenced on the 28th February 1917, and the Commissioner only sent in his report on the 15th February the evidence having been taken on the 21st and 27th January, and 4th and 5th February, 1917, previous.

The plaintiffs filed a petition objecting to the reading of this deposition. The objection came on the 23rd March 1917 when it was read in evidence. Nothing could be more unsatisfactory than this mode of procedure. The principal defendant gives his evidence before the plaintiffs' case has been opened or the evidence of their witnesses given. The Court which has to decide has no opportunity of judging of the veracity of the witness from his conduct and demeanour. All the advantage of confronting a witness accused of a fraud, such as Satish is accused of, with his accusers is lost. Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in Court or is absent for other sufficient reason. If Satish went to the Court he could, and presumably would, have been accommodated with a seat. Moreover, unless several of the witnesses who have been examined are utterly mistaken Satish at this time was quite able to drive

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about and walk from his carriage into houses. The whole procedure in this matter strongly suggests that it was his aversion to undergo the ordeal of an examination in open Court, in the presence of those who knew him, rather than ill-health, which kept him from the witness-box.

Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicious and surmises and conjecture are not permissible substitutes for those facts or those inferences but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape. Turning to the evidence given before the Subordinate Judge, the first witness of the plaintiffs, Satinda Chandra Bose, does not give any evidence of importance. The same may be said of the second witness, Kalibar Mitter, save that he gives a description of Sitanath and Akshoy, mentions their respective residences and says that the market-value of the property sold was Rs. 50,000 to Rs. 60,000. The fifth witness, Hriday Nath Ghose, only gives evidence as to the service of the notices and proclamations of the sale. The sixth witness, Uguundra Nath Sarkar, merely tells what Panchanan Mitter told him. (Why he was allowed to give this evidence is strange). He says that after the auction Panchanan Mitter told him that Sitanath fraudulently caused the sale to be held by not paying the arrears of revenue; that Akshoy, Sitanath and Satish jointly purchased the *taluk*. He said Panchanan did not tell him the shares which they bought, but gave the dates of the purchase and the price. The witness said he did not inquire who supplied the purchase-money, and that Panchanan did not give him any information on the subject. The eighth and ninth witnesses examined for the plaintiffs only dealt with the service of the notices of sale. The tenth gives no evidence touching the formation of the alleged conspiracy, nor the

alleged joining in it by Satish or the occurrences at the sale.

The eleventh witness, Rajendra, the twelfth Ashutosh, and the Maharaja Sir Pradyot Kumar Tagore only deal with the admission of Satish made after the sale; and Sarat Chandra Roy, the thirteenth witness, only with the absence of notices and proclamations of the sale. It is obvious, therefore, from this analysis of the evidence of the witnesses, other than Panchanan Mitter and Pray Nath Ghose, that it affords no proof whatever of the formation of any conspiracy between Sitanath and Akshoy touching any subject. But both the Subordinate Judge and the High Court have found that there was a collusive arrangement between Akshoy and Sitanath to injure the plaintiffs and that in order to effect this end they agreed that Akshoy should bid at the sale by auction of the aforesaid *Towzi* in his own name, and that, if declared the purchaser, he (Akshoy) would convey a half-share of the property purchased in favour of Hemada, that Akshoy did bid at the sale, that he was outbidden by Satish, and that the nefarious plan hatched by these two defendants thus failed. The High Court in reference to the same matter said, "that it was indisputable that the default in the payment of the instalment of Hemada's share of the Government revenue with the object of injuring the plaintiff was, as the Subordinate Judge has found, deliberately made by Sitanath and that this step was taken in collusion with Akshoy, who it was agreed should purchase the *zemindari* at the auction free from encumbrances." The High Court proceeded: "There is some discrepancy as to the exact proportions in which the spoil was to be divided amongst the conspirators, but the details of the proposed distribution are not very material for present purposes;" they (the Court) need only observe that the story seems very plausible; that the third defendant Sitanath looked forward to a share for himself and another for his master; that the complicity of the second defendant, Akshoy, in what the Subordinate Judge described as a nefarious plan, was proved beyond challenging. Thus there are, in effect, two concurrent findings of these two Courts upon an issue of fact, namely, the formation of the corrupt and fraudulent conspiracy between Sitanath and

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Akshoy of the character and with the aims described. But the only evidence given on behalf of the plaintiffs to sustain these concurrent findings is that of the two witnesses passed over in the above analysis, namely, Panchanan Mitter and Prya Nath Ghose. Neither the Subordinate Judge nor the High Court had any other evidence upon which either could have found as they have found, and it is quite obvious that they could not have based the conclusion at which they have arrived on the evidence of these witnesses unless they believed that *quoad* the matters on which they so found, these witnesses were truthful and reliable. Panchanan, however, in his evidence goes beyond these matters. He brings Satish into touch with the alleged conspiracy, proves that he entered into it, and deliberately assisted the other conspirators in the carrying out of the objects of their conspiracy. His evidence may be divided into two parts.

The first deals with what occurred up to the time they left Akshoy's house on the evening of the 7th January, and the second with what occurred from that time till after the sale. The High Court accepted both parts of Panchanan's evidence. The Subordinate Judge accepted the first part of it, but, for reasons which will be shown to be quite inadequate, rejected the second part of it. As it is this second part which implicates the appellant, Satish, it is necessary to deal with all Panchanan's evidence at length.

Panchanan Mitter was examined on the 2nd and 3rd March 1917; he deposed that he was 38 years of age, was, and for two years had been, clerk to a Jessore Pleader named Babu Nibaran Chandra Bose (who happens to be the Pleader of the plaintiffs) and was for 14 or 15 years previously the suddar of Hemada, deceased; that he remained in the latter's service up to his death; that Sitanath was Hemada's manager up to that time, that he, the witness, used to write out and send the revenue payable by Hemada by money-order to the Collector; that Sitanath calculated the dues on the land; that Hemada had one-third of the Atpur Panditnager Estate; that the plaintiffs had the remaining two-thirds; that there was ill-feeling between Hemada and the plaintiffs, as they had many law suits between them; that before Hemada's death his *taluk* was

sold by auction by arrears of revenue; that Sitanath, the manager, caused it to be sold by refraining from paying the instalment of the revenue which fell due in respect of the September revenue for 1914, and deliberately withheld it; that Hemada had mortgaged his interest in his share to the *shebait* of Dashmahab'dya for Rs. 2,000; that this mortgage was purchased by and assigned to the plaintiffs; that on inquiry from Sitanath the latter told him that he would take steps to suppress the publication of the necessary processes (*i.e.*), presumably, notices and proclamations) in the Mufassil preparatory to the sale; that Sitanath and he were present at the Atpur Collector's at the time of the sale; that Prya Nath was the Karjyakarak of Akshoy; that Sitanath told the witness he had relations with Prya Nath (*i.e.*), presumably, was related to Prya Nath; that Sitanath came from Jessore to Calcutta four or five days before the auction-sale; that some two days before the sale he, the witness, came to Calcutta, met Sitanath there and stayed with him at the Sealdah Hotel; that Hemada was then in Calcutta on his death-bed; that Sitanath told the witness that his, Sitanath's son-in-law would not give security for bidding at the sale, so that the two must go to Akshoy for the purchase-money; that the day before the sale the two went, between 9 and 10 A.M., to Akshoy's house, 112, Amherst Street, Calcutta, but found he was away, from home at Puri; that they met Prya Nath and Akshoy's two sons, Taradas Babu and Shyamadas Babu; that it was not then settled who was to bid at the auction-sale, but that it was arranged to telegraph to Akshoy in Puri to ascertain his views; that a telegram was accordingly sent and a reply received that was as follows:—

“ To

“ AKSHOY KUMAR CHATTERJI,
Sagarika, Puri.

“ Kumar's Satish Khiroda Hemada are joint proprietors of Towzi No. 2402 *mahal* Atpur 24-Parganas on Ganges near Kidlerpore. Hemada did not pay revenue and will cause the sixteen annas *mahal* to be sold tomorrow. Hemada represents total income as Rs. 1,200 and requests us to buy the same in auction within ten thousand rupees and

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sell half to him; going out to ascertain facts. Wire permission.

"TARADAS CHATTERJI."

"112, Amherst Street, Calcutta"

"May bid less or more amount if income is as you represent."

"AKSHOY."

The telegram was received at 13-30 and the reply received at 16-40.

The witness then stated that Sitanath and he returned to Akshoy's house in the afternoon; that Sitanath suggested that the property should be purchased *benami*; that one-half of it should remain with Akshoy and the other half be transferred to Hemada (the dying man) in *benami* of Sitanath by a *kobala* without any condition; that the whole purchase-money should be paid on behalf of Akshoy, that Akshoy had several holdings under the plaintiffs and that there were several litigations between them and him, and that, therefore, the property should be purchased *benami* of Sitanath. The witness further stated that Sitanath, Prya Nath, Shyamadas and he himself went then to Satish's house. He corrects this in his cross-examination. In this statement the witness is in error, and says that Prya Nath only went half-way and then descended from the carriage and went to do some other business. The witness states that when they went to Satish's house the latter was informed that, under the circumstances mentioned, which were stated to him, the property should be purchased in his *benami*; that Satish replied that a share should be given to him; that Sitanath agreed to this, and that it was settled that Sitanath, Satish and Akshoy should each get a third share; that the property should be bid at the sale up to Rs. 12,000, and that Sitanath said that the price offered should at least be Rs. 9,000; that in that state of things Sitanath, Panchanan and Shyamadas started for Satish's house to interview him; that Prya Nath accompanied them—not, however, with any intention of going to see Satish—half-way, then descended from the vehicle they were in and went off on some business of his own. Though Prya Nath corroborates Panchanan substantially in the latter's description of what occurred up to his separation from the three persons named *en route* to Satish's house, there are some trifling but immaterial discrepancies between these

stories, but they are discrepancies of the character that strengthen rather than weaken the evidence of witnesses, since the diversity repels the idea of concocted uniformity.

But Panchanan is corroborated and his evidence strengthened in other ways in addition. He is corroborated by the telegram already referred to with the reply to it. He is corroborated by the silence of Sitanath, by the silence of Akshoy's two sons, Taradas and Shyamadas, until they were, by the insistence of the High Court, forced into the witness chair. All the three were accused of being involved in the deliberate commission of a base and contemptible fraud. The elder of the two is a legal practitioner, the younger an engineer and contractor, educated at the Government Industrial College; presumably each an intelligent man. Their silence might have been wise if they were guilty and ashamed of what they had done, apprehensive of disgrace and punishment. It was idiotic and cowardly if they were innocent. When Shyamadas does appear he commences by swearing what is absolutely incredible, namely, that he did not know in connection with what suit he was summoned as a witness. He made no allusion to the alleged meeting at his father's house; never denied it had taken place there, or the making of the arrangement there deposed to by Panchanan and Prya Nath.

He denied, no doubt, that he visited Satish's house the night before the sale. He is asked if he knows Satish, and his reply is rather peculiar. He answers "No; I never had any connection with him *before*," but that statement is followed by two others which are also incredible. He says he did not know he had a rival bidder at the sale and did not ask who the other bidder was, but he *pretends* to tell all this rival bidder did, though he never asked his name.

Well, Taradas, when produced, begins by refusing to admit that he sent a telegram, the copy of which is produced to him. He says he has no cause of doubt or any cause of belief he did. He does not deny that Sitanath was at his father's house before he sent the telegram or that both were present there later in the evening. He says that Prya Nath Ghose was not there, that the Chandra Raja estate officer,

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i.e., Sitanath, was there, that he asked them to sell half of the property, but nothing was settled about the price; that he, Sitanath, asked the witness, Taradas, to send a telegram like that produced; that no arrangement was made as to the purchase-money to be paid to his father for the sale of the half share; that this officer stated to him what the income was and he stated that in the telegram. He says he does not know Satish. He was then asked if, to his knowledge, his father was served, as defendant in this suit, with a copy of the writ. His reply is that his *gomasta* told him that a summons had been left with him with a copy of the plaint. He is then asked if he meant to suggest that this *gomasta* did not show it to him within a reasonable time. His reply was he does not understand reasonable time, not that very day nor the next day, he might have shown it months or days after. He is asked if the signature on the summons is in his father's handwriting, and he replied it looks like it but is in pencil, and is not exactly like his; some portion of it is written in the hand of a lady which he never writes.

He is then asked if it is inaccurate to say he got a copy of the summons. And his reply is:—

"It may have been served on him (*i.e.*, his father) but I got this (*i.e.*, the summons) some time later, and I thought I ought not to take any steps. I did not consult my father regarding it. I might have said to him 'you have been made a party.' I do not remember whether I said anything or not. I might or I might not have said anything. I refer only important matters to him. I did not consider this matter to be important, because we had no connection with this property. I thought we should do nothing."

He is then asked, did he think it was important that his father should be charged with fraud and that he should be defended, and his reply was, "I did not think so at that time." He is then asked, "You thought that connection with the property was all important?" and his reply is, "Yes, I do not remember any charge of fraud."

Taradas added that he did not know Satish. He is asked what instructions he gave his brother, Shamadas, about the

auction-purchase. His answer is, "Probably I gave him the same instructions I received from my father." Then he was asked, "Was your instruction merely reading out the telegram you received from your father?" His answer is, "No; I gave him more instructions." Then he is asked what was it. And he replied, "I do not remember, he might not understand the telegram fully. I might have told him to go and bid up to Rs. 12,000." Then he is asked, "How much money did you send with your brother Shyamadas?" His reply was, "I do not remember; it might be one-fourth of the amount." Then the question is put to him, "That is one-fourth of Rs. 12,000, equals Rs. 3,000." He is then asked when his brother came back from the sale, "Did you put it to him that if somebody bid higher than your brother why he did not ask permission to bid still higher?" and his answer was, "I do not remember whether I asked him."

It appears to their Lordships strange that any legal practitioner could suppose that clumsy, stupid and transparent prevarication such as this witness indulged in could impose upon any legal Tribunal worthy of the name, much less upon one of the ability and distinction of the High Court of Calcutta. In their Lordships' view this man's testimony is utterly unreliable, and the evidence of Panchanan is quite unshaken by it. The Subordinate Judge, however, held that this latter witness's evidence is rendered unreliable by another particular matter. It is this. On his direct evidence this witness Panchanan undoubtedly swore that Prya Nath accompanied the rest of the party to Satish's house on the evening before the sale. On cross-examination he corrected that, and stated that Prya Nath only came with the others half the distance, then descended from the vehicle in which they were and went away on other business. On the face of it, this correction looks quite innocent, the mistake being one which a man might well make at night under the circumstances deposed to, but the learned Subordinate Judge, though Panchanan was not asked a single question touching the alteration in his evidence, considered that it showed a dishonest attempt on the witness's part to alter his evidence so as to reconcile it with Prya Nath's,

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and, therefore, deprived him of all credit. In their Lordships' view that he is not a reasonable construction of the incident, and they concur with the High Court in thinking that Panchanan's evidence is not shaken by it and that he is, notwithstanding it, worthy of credit on this as on the antecedent parts of his testimony.

In the second part of his evidence Panchanan says that he himself, Prya Nath, Satish, Shyamadas and a *durwan* of Akshoy attended the sale; that a bid was made in the name of Satish, that Rs. 2,300 were deposited in Court that day; that the money was with Prya Nath, who paid it to Shyamadas, and Satish deposited it with the Collector. He said that Hemada owed some money to Sitanath and that if the property was transferred to Sitananth by Akshoy, the money due to him would be realised; that this was the second object of causing the property to be sold. Shyamadas, he said, paid the purchase-money to Satish in notes and gold. He does not remember to whom Satish paid it. Shyamadas bid on behalf of Akshoy; that Satish and Shyamadas stood there side by side. He was not present when the *chalan* for the money was written. He does not remember whether Satish said to the Collector, "I have not now with me more than Rs. 1,000, and may I be given time for the balance?" That he came downstairs as soon as the sale was over, and waited there for half an hour; that one-fourth of the purchase-money was deposited with the Collector; that it was settled that Satish should pay half the purchase-money in order that he might get a one-third share of the property; that according to the arrangement made Akshoy was to advance the whole of the purchase-money in the first instance, and Satish was to pay him back half of it when it was settled. It is obvious that the ultimate pecuniary benefit to Satish under this arrangement would be the same as if he advanced the entire amount of the purchase-money in the first instance and Akshoy paid back half. This latter mode of procedure would, doubtless, look to the officials more as if Satish was the real purchaser than the other, and in either case Satish could say with equal truth, as is sworn he did say to the Maharaja, that he had co-sharers in the property, and that Akshoy was one of them.

The mere fact that Satish found in the first instance the money to pay the purchase-money is not at all, therefore, such a crucial fact as Mr. DeGruyther contended it was. Akshoy could, doubtless, re-pay him half the money at any time. The witness then explained and excused with fair success, their Lordships think, the part he had taken in the business.

Some unfavourable comment was made upon this witness's evidence owing to the fact that he did not enumerate the particular sums which, together, made up the sum (Rs. 2,300) deposited, but treated it as having been deposited in one sum. That, no doubt, is so, but if that be a discrediting incident, he shares the discredit with Satish himself, who in his cross-examination said:—

"On the day of the sale, having put in notes to the amount of Rs. 2,500 into the Collectorate, I took a refund of Rs. 200 and thus deposited Rs. 2,300 only; this sum of Rs. 2,500 was in notes of the value of Rs. 1,000 and Rs. 500 only. I borrowed those notes from the house of Tarak, my cousin." No mention whatever is made of the Rs. 1,000 it is now alleged he brought with him to the sale, and he represented that the borrowing of the Rs. 2,500 was one transaction. Tarak Nath Banerji, the money-lender, says precisely the same. He said "some two or two and a half years ago, in January he borrowed from me Rs. 2,500 in two hand-notes, one hand-note for Rs. 1,000, the other for Rs. 2,500. The amount of the first remains due, the other was paid. Satish owes money to me, my mother and my sisters also. I have no accounts of my loan transactions. I did not enter the payment of Rs. 2,500 to Satish Babu as debts."

Prya Nath's evidence as to what occurred at the sale is not so full as Panchanan's, but it is quite consistent with the latter's. He mentions two important matters. He says that it was thought that the relationship with Satish would not be easily ascertained, and so he was chosen to be a fit person to bid at the sale and purchase the property. (It is not very clear what this means.) He also said that he went to Kulna three days after the sale and saw the entry of the purchase-money in the *rokar* after coming back.

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Now, who and what was Satish? He was a feeble invalid, afflicted with painful and unpleasant disease. Up to seven or eight months before he was given to drink, and since then, by way of information, had become an opium-eater. That is the description he gave of himself. He was asked at the end of his cross-examination if he was addicted to intoxicants. His reply was

"Yes, formerly. I gave up the habit seven or eight months ago." (He was speaking on the 11th February 1917.) "I have drunk wine up to the value of Rs. 13-8 per bottle. I never drank anything costlier than that; the price of the same bottle to-day is Rs. 30 to Rs. 32. I have poured out to the goddess of drink Rs. 50,000 or Rs. 60,000. I eat opium twice a day now. As I have got the rheumatism, one *bola* of opium lasts me 14 or 15 days, eating twice a day."

For the last twenty-three years, he said he had been purchasing *taluks* at revenue sales, certificate sales and Civil Court sales. He said he did not know Sitanath or Akshoy and never had any conversation with either of them. His debts, he said at the time he was examined, amounted to Rs. 18,000 or Rs. 19,000. Before buying this property, he said, he did not ascertain even where the property was situated or make any inquiries about it. After the institution of the suit he made no inquiry as to the extent of Hemada's share in the property or as to whether he had an officer called Sitanath, or as to the truth of the charges made against him or whether any officer of Hemada's fraudulently or otherwise, caused the *zemin-dari* to be sold by auction by withholding the revenue. Nor did he make any inquiry as to who Akshoy was. On seeing the bid sheet two or three hours after the sale, for the first time, he never knew Akshoy's name. He said he never made up his mind to purchase the property till after he had seen the bid sheet. He did not know Taradas nor Kaledas, sons of Akshoy; that he never went to Akshoy's house up to the day he spoke, 4th February, 1917, and never inquired what are the quantities of *lakraz* lands or *mal* lands in the *taluk*. The excuse he made for this amazing indifference and ignorance was that he did not send his officers there to make inquiries touching these matters because there was a criminal

case once and if he sent them to inquire there might be another criminal case, which would cost money. He then added:—

"Therefore, I am waiting till the case is over. I am not in very affluent circumstances, you, yourself, see. I have purchased property by borrowing money. How can I then say I am in affluent circumstances?"

The plaint was filed on the 18th August 1915; Satish was examined on the 21st, 27th and 28th January 1917. It seems to their Lordships quite incredible that for one year and four months he would have abstained from making any inquiries touching a property which he, an embarrassed man, alleged he bought, or have ignored so completely the charges made against him. His conduct as to the property might not be unnatural if he was merely a sham bidder put forward by Akshoy, but it certainly is inexplicable if he was the real purchaser.

Akshoy was examined on the 7th May 1919, he states that his income is about Rs. 30,000 to Rs. 40,000 per annum, that he had houses in Calcutta and elsewhere, and about a lakh of rupees in Government Promissory-Notes, most of it made by his own enterprise and speculation; that he had known the Chandra Rajas (*i.e.*, the plaintiffs) since he was at school; that they were the landlords of his family at Khulna; that there were lots of law suits between his family and the Rajas, about a portion of their property, which ended about a year previous, *i.e.*, in 1917. He said he heard before he got the summons to give evidence that a suit was going on with the Chandra Raja about properties sold for arrears of Government revenue; that somebody had purchased it; that the suit was going on in the Alipur Court; that this was all he knew. He did not know who the purchaser was; that he was not aware he was a defendant in the suit to set aside the purchase till the day before yesterday (*i.e.*, till the 7th May 1917), when he heard; that he first heard of the institution of the suit to set aside the sale from Satish's *gomasta*. He had no information about the property he bid for except his son's telegram. After the sale he had some information. He was asked whether on receipt of the telegram from his son he thought

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it a *bona fide*, honest proposition, and he answered:—

"I never thought whether it was reasonable or not, or whether it was proper or not for me to bid at the sale; as the property was going to be sold by auction. I thought as a business matter I *could enter* it. Whether it was right or wrong I did not think at the time, because the revenue was not paid and the property was going to be sold. The only thing was that I had to sell half to him."

He was then asked did he buy any other property in auction-sale, and he answered "of course, I bought the tenants' holdings. When they failed to pay the rent they (presumably the holdings) were sold by auction."

He admitted he had a talk with the *gomasta* of Satish soon after the litigation was instituted; that the *gomasta* told him they were going to apply to set aside the sale. This man did not tell the witness at that time that he was a defendant in the suit; "that between Satish and ourselves (i.e., Akshoy and his people) a suit was pending, and he used to come from time to time in reference to this matter, but he never told me I was a defendant in this suit, though I had occasional talks with him." He said his sons told him that they had not purchased at the auction; that they wrote about it; that they did not tell him who it was who purchased it; that since then he had come to know that Satish purchased it. At that time he did not care to know the name. His sons might have mentioned the name of Satish the first time or afterwards. He denies that he is helping Satish to buy the property. This witness appears to their Lordships to be quite unreliable. He was a defendant in the suit out of which this appeal arises. He was charged with fraud. Service of the plaint must have been effected upon him, and yet, he says, he was never told the nature of the suit. That appears to their Lordships to be quite incredible. They think, judging from all the probabilities, he must have been told of these things; but being resolved not to play the part of an innocent man and come boldly into Court and defend himself, he thought it wiser to lie low and remain silent, and is

now professing this ignorance to excuse his conduct.

Mr. Dunne, in his argument on behalf of the respondents, criticised in detail the evidence of the appellants as to the persons from whom and the mode by which he found the purchase-money of the property he purchased. Damaging as that criticism was, their Lordships prefer to rest their conclusions in the main on the somewhat broader aspects of the case, including the relative positions of the two most interested men, Satish and Akshoy. The latter, a very wealthy man, so anxious to acquire, though he should have to part with half of it, yet trusting to the information contained in the telegram which Sitanath must have supplied. Himself a tenant of the Roys, yet ready to join in their undoing by forwarding this auction-sale provided only this could be effected without his co-operation being disclosed. And on the other side one has a diseased, intemperate and crippled man, accustomed to attend revenue and other sales by auction, but apparently at this time without an anna of his own available to pay for anything he might buy, obliged in this case to borrow every rupee of the purchase-money (Rs. 9,200), in some instances at high rates of interest; and further obliged, according to his own story, to pledge to a relative the anticipated compensation which he might receive for the compulsory purchase of some of his property in order to raise Rs. 8,500. If Akshoy had desired to procure the service of a tool to buy for him this property at this auction, giving him, however, an interest in the property bought as a reward, and with the help of Shyamadas giving to a sham competition at the auction the appearance of reality, he could scarcely have found a person more qualified to fill the role than Satish. The question is, did he fill that role or a role something like it, or did he buy this property entirely for himself, for his own use and benefit. There is available evidence which, in their Lordships' view, is much more consistent with his having filled the first of these roles than the second. It is the following: Rajindra Nath Banerji, the *Nalb* on the estate of the Maharaja Pradyot Tagore named Mulajore, who says that this estate lies to the south of the Roys' estate of Atpur; that he knows the district well, including

SATISH CHANDRA CHATTERJI v. KUMAR CHANDRA KANTHA ROY.

the *taluk* in dispute; that in 1915 Satish had purchased it at an auction-sale, that his employer, the Maharaja, was anxious to purchase it; that he, the witness, went to Satish's house to propose to buy it on behalf of his master; that he met Satish and had a talk with him on the subject; that Satish said that he was not in a position to say whether he could sell the *taluk*; that he, the witness, then brought Satish to the Maharaja's house in Calcutta; that Satish there gave no final answer but said that he would have to consult one or two persons who had an interest in the property purchased. He did not mention the names; that he, the witness, pressed him very much in the matter; that Satish then took him to the house of another person named Chatterji; that Satish entered the house, remained there for some time while the witness remained outside in the carriage; that after an interval Satish returned and said he could not sell the property; that Chatterji was unwilling to part with it. (The full name of Akshoy is Akshoy Kumar Chatterji.)

The Maharaja Sir Prodyot Kumar Tagore was examined on commission. He says he knows the villages of Atpur and Mulpore; that he is a *zemindar*; that after the auction he heard of the sale; that had he known before it took place that it was about to take place he would have attempted to purchase it. He heard from his *amlas* that the value of the property was from Rs. 25,000 to Rs. 30,000. He heard the name of the person who purchased the property at the auction. He tried to purchase it from him and sent word of that to Satish by Rajindra, the officer of this *debuttar* estate. After that interview, Satish had a talk with witness at his, the witness's, own house. The witness was asked "what did he say to their proposal" and he replied: Satish said he had a partner named Akshoy, and other partners too, and that he was unable to say anything without consulting them; that conversation took place in August or the beginning of September 1915, as well as he could recollect. The negotiations progressed no further; his officer told him it would not come off. The witness said that he had not seen Satish before; he had no personal knowledge of him. The witness was asked to describe the man he spoke to; he said he was about

45 years of age, rather stout, of dark complexion; stood rather uncomfortably, and spoke to him, the witness, in Bengali.

A number of quite irrelevant questions were put to the Maharaja which may be passed by.

The next witness is Ashutosh Bhattacharji. He was examined on the 7th March 1917. He states that he was only Superintendent of the Raja Kishori Lal Gossain of Serampur; that his head office is at Serampur; that his master was a member of the Executive Council of the Governor of Bengal; that he himself is an undergraduate, an Honorary Magistrate of the Bhatpara Bench, and a Municipal Commissioner of Bhatpara Municipality; that he has served as Superintendent for twelve years. He knows Atpur. He knows the Taluk No. 2402; that he knew of the sale of it in Baisakh from middle of April to middle of May 1915. Had he known of it before it took place he would have tried to acquire it for his master; that on his master's behalf he tried to purchase it several times from Satish. First he sent Mukhtar Tarpadi Dutta, to the knowledge of his master, on two or three occasions to Satish. After that he, witness, went in the middle of May. He said the case for setting aside the auction-sale was then pending before the Commissioner, and that he must consult Akshoy. The witness then went to the house of Akshoy Chatterji on three or four occasions in July or August. He went to Satish for the last time in October 1915. After the disposal of the case he, Satish, said he could sell the property for Rs. 50,000. The witness says he then offered him Rs. 25,000. On cross-examination, the witness said that he, Satish, had a mind to sell as far as he understood him. He said he stayed at Satish's house about ten or fifteen minutes; that he did not know Akshoy before he went to his house in connection with this matter; that Satish gave him Akshoy's address; that he did not do or say anything to induce Satish to sell the property. On the first day he, the witness, saw Akshoy he expressed his willingness to sell the property. He saw him when the appeal before the Commissioner was over and he then demanded Rs. 50,000.

The learned Subordinate Judge has criticised unfavourably the Maharaja's evi-

1 ADA JINAPPA VAGIANI v. YESU bin SAKHOB A UGARE.

dance, but he bases his criticism on the most surprising error; "He says the conversation with the Maharaja took place, according to Rajendra, in Jaishtha, i.e., which means from the middle of May to the middle of June; that there was an appeal to the Commissioner pending, which was disposed of on the 1st July; that the present suit was instituted on the 18th August 1915; that Satish is an astute man of business; that it is highly improbable that he would make such admissions of fraud on his part when in the appeal to the Commissioner his complicity with defendants Nos. 2 and 3 was distinctly alleged and the matter was being fought out between them." It has not been shown to this Board that the charge of fraud was made before or could be entertained by the Commissioner. He gave no decision whatever upon such a charge if made. His decision is entirely confined to the irregularity of the sale, but it is strange that the learned Subordinate Judge did not take the trouble to verify his dates before he made such a charge as this against such a person as this Maharaja, based entirely on the assumed fact that the Commissioner's judgment was delivered on the 1st July. Had he done so, he would have found that the Commissioner delivered his judgment not on the first July 1915, as he assumes, but one month earlier, namely, the 1st June 1915. The criticism based upon this blunder, therefore, falls to the ground.

Now, if Satish and Akshoy had admitted that they had had these interviews with the persons named, but that these latter had mistaken what they said; or that they were so pressed to sell that they said what they were alleged to have said as an excuse to get rid of the pressure, there might be something to say on their behalf. But they do nothing of the kind; they say these interviews never took place; that the whole thing is a myth, a work, it is to be supposed, of the perverted and diseased imagination of these three witnesses. Their Lordships are as unable as the High Court are to take that view. They think, on the contrary, that these three witnesses are reliable and their evidence most convincing. They believe that if this large sum of Rs. 25,000 or Rs. 30,000 was within the reach of this needy man Satish, then in debt to the extent of Rs. 15,000 to Rs. 18,000, he would have

eagerly grasped at and gladly sold the property he purchased in order to procure it. The fact that he did not do this can only be accounted for on the assumption that he was not the absolute owner of this property, free to dispose of it as he might, but that his action was dominated and controlled by the wealthy co-owner he named to whom gains of Rs. 10,000 or Rs. 20,000, had not such a strong attraction. Their Lordships are, therefore, of opinion that the respondents-plaintiffs, have established the cause of action in which they sued, and that the appeal fails. The appeal having been dismissed, it is not necessary to discuss the matter further, as there is no cross-appeal. The respondents are apparently content with the decree which has been pronounced by the High Court, and as their Lordships think it does substantial justice between the parties in the circumstances of the case, they will merely humbly advise His Majesty that the appeal be dismissed with costs.

W. C. A.

Appeal dismissed.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 183 OF 1922.

February 6, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
DADA JINAPPA VAGIANI—PLAINTIFF
—APPELLANT

versus

YESU bin SAKHOB A UGARE AND
OTHERS—DEFENDANTS—RESPONDENTS.
Hindu Law—Joint family—Decree against father.

DADA JINAPPA VAGIANI V. YESU bin SAKHOBA UGARE.

Family property sold in execution—Sons, position of—Civil Procedure Code (Act V of 1908), s. 47—Decree against father of Hindu joint family—Suit to make son's interest liable, maintainability of—Suit, whether maintainable.

In the absence of any objection by any member of a Hindu joint family, when joint family property is put up for sale in execution of a decree against the manager, it may be inferred that the intention was to pass the interest of all the members in the family, though it may be open to other members of the family to dispute that intention and to satisfy the Court either that the alienation was not binding on them or that the debt incurred by their father was not binding on them or that in any way possible their interest in the family property had not passed to the auction-purchaser.

Sripat Singh v. Prodyot Kumar Tagore, 39 Ind. Cas. 252; 44 I. A. I.; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.), followed.

Where in the case of a Hindu joint family consisting of a father and his sons, the family property is sold in execution of a decree against the father, the auction-purchaser can, if the sons contest his right, bring a separate suit for recovery of possession. Such a suit is not barred by section 47 of the Civil Procedure Code as the sons cannot be considered to be the representatives of their father.

Sadashiv Mahadu v. Narayan Vitthal, 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661, distinguished.

Second appeal against the decision of the District Judge, Satara In Appeal No. 405 of 1920.

Mr. K. N. Koyaji, for the Appellant.

Mr. P. B. Shingne, for the Respondents.

JUDGMENT.—The plaintiff in this suit is the brother of one Devendra, who obtained a decree in Suit No. 34 of 1905 against the 1st defendant. In execution of that decree the suit house was sold and purchased by Devendra. But no possession was obtained. Consequently, after Devendra's death, the plaintiff had to file this suit. The issues in the Trial Court with their answers were:—

(1) Does plaintiff prove the auction-purchase of 1st June 1907? Answer—Yes.

(2) Does he prove he succeeds Devendra? Answer—Yes.

(3) Does defendant No. 1 show that the transaction was not to be acted upon? Answer—No.

(4) Is plaintiff's suit barred by time? Answer—Yes.

The result was, that the plaintiff's suit was dismissed by the Trial Judge on the ground that section 47, Civil Procedure Code, was a bar to the suit, and though this suit could have been treated as an execution proceeding, execution was barred before the date of the suit. The learned Judge thought that the decision in *Mahadu Sadashiv v. Narayan Vitthal* (1) was directly in point. There, in execution of a redemption decree, the decree-holder (mortgagee) himself purchased the property at the Court-sale. After the confirmation of the sale the legal representatives of the decree-holder (mortgagee auction-purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the mortgagors judgment-debtors) contended that the question involved in the suit related to the execution of the decree, therefore, the suit was not maintainable under section 47, Civil Procedure Code. It was held that the suit was barred by section 47, Civil Procedure Code, and that the decree-holder, by becoming a purchaser at a Court-sale, did not cease to be a party to the suit within the meaning of section 47, Civil Procedure Code.

But, although the plaintiff's brother by becoming the auction-purchaser in execution of his decree would not thereby cease to be a party to the suit, the question was, whether defendants Nos. 2 and 3, sons of the original defendant, were representatives of the 1st defendant in that suit. Their claim was, that their interest in the property was not affected by the plaintiff's brother's purchase, and although they were, up to a certain time, joint with their father, they were not representatives of their father, as they could not be treated as parties to the previous suit. The plaintiff, in order to get possession of the property, which his brother purchased at the auction-sale, could not take out execution proceedings making defendants Nos. 2 and 3 parties to those proceedings, as they were not parties to the suit, and they could not be placed on the record as representing any party. Therefore, a suit was necessary if the plaintiff wished to recover the property from defend-

(1) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661.

DADA JINAPPA VAGIANI v. YESU BIN SAKHOBA UGARE:

ants Nos. 2 and 3. The question is whether defendants Nos. 2 and 3 could resist on the contention that all that the vendor purchased was the interest of their father. The learned Judge seemed to consider that they were separated from their father, and that their shares were not affected by the decree. But when the decree was passed they were joint with their father, and, in certain circumstances, a decree against the head of a joint family governed by *Mitakshara* law would be binding upon his sons, though they might take proceedings to prove, in the case of an alienation by their father, that the alienation was not justified, or in the case of a suit for a debt, that the debt was not incurred for a proper purpose.

However, these questions do not arise here. The decree was passed on a mortgage effected by the father of defendants Nos. 2 and 3 in favour of Devendra. It has never been alleged that that mortgage was not for a proper purpose, or that it was not binding on the family property. No attempt has been made in this suit to suggest that defendant No. 1 had not properly pledged the family property. Therefore, it must follow in the ordinary course, when the decree was passed against defendant No. 1, and defendants Nos. 2 and 3 raised no objection that it was not binding on them, that when the family property was put up for sale in execution of the decree the whole interest passed.

That was decided in *Sripat Singh v. Prodyot Kumar Tagore* (2). The property of a joint *Mitakshara* family, consisting of a father and two sons, was sold in execution of a decree against the father, the order and notices providing for the sale of the "right, title and interest," of the judgment-debtor. It appeared from the circumstances in which the above words had been inserted, from the conduct of the sons, and from the price paid by the execution-creditor, who became the purchaser, that the intention was to sell the whole property over which the father had a disposing power. In a suit insti-

tuted by the sons to set aside the sale as to two-thirds of the property, both Courts in India held that the decrees were for debts binding upon the joint family. It was held by the Privy Council, that the substance, and not the technicalities, of the transaction should be regarded, and that the entire property passed to the purchaser.

Therefore, we deduce from that decision, that, in the absence of any objection by any member of the family, when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property, though it may be open to other members of the family to dispute that intention, and to satisfy the Court either, that the alienation was not binding on them, or that the debt incurred by their father was not binding on them, or on any other ground, that their interests in the family property had not passed to the auction-purchaser. In this case no attempt has been made to prove any of the necessary facts which would entitle these defendants to succeed. They really attempted to rely entirely upon technicalities which, as their Lordships point out in the case we have just cited, could not be regarded.

The result is, that the appeal succeeds and plaintiffs are entitled to possession of the suit property with costs throughout.

Appeal allowed.

S. R. P. & N. H.

(2) 39 Ind. Cas. 252; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 250; 44 C. 524 (P. C.).

MOHAMED YASIN v. BIMOLA PROSAD.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 457 OF 1922.

August 16, 1922.

Present—Justice Sir N. R. Chatterjea,
Kt., and Mr. Justice Panton.

Moulvi MOHAMED YASIN—DEFENDANT

No. 3—PETITIONER

versus

BIMOLA PROSAD MUKHERJEE AND

OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 16,

proviso—"Defendant," meaning of.

The word "defendant" in the proviso to section 16 of the Civil Procedure Code means "all the defendants" where there are more than one defendant in the suit. [p. 406, col. 2.]

Rule against the order of the Sub-Judge, Second Court, 24-Parganas.

Babu Charu Chandra Biswas (with him Babu Manindra Kumar Bose), for the Petitioners.—The defendant No. 3 is the petitioner. The matter arises out of a suit for specific performance of an agreement to grant a mining lease against four defendants. The defendants Nos. 1 and 2 are executors to the estate of Kundan Lal Kapur. The defendant No. 3 is the petitioner. I claimed to have obtained a lease from Kundan Lal. The defendant No. 4 is the widow of Kundan Lal and is the same as defendant No. 1. The Rule was ganted calling upon the opposite parties to show cause why a suit instituted at Alipore should not be transferred to Burdwan. The Alipore Court has no jurisdiction to try the suit. The defendant No. 1 only resides within the jurisdiction of the Alipore Court. The rest of the defendants reside at Burdwan. The properties in suit also are situate at Burdwan. On the preliminary issue as to jurisdiction the learned Judge has held that the suit might be instituted in either Court. Refers to section 16 (d) of the Code of Civil Procedure. Here the property is not held by the defendants Nos. 1 and 2. Therefore, the proviso to section 16 does not apply. It is an admitted fact that the defendant No. 3 is in possession. The relief sought cannot be entirely obtained through the personal obedience of defendants Nos. 1 and 2. Refers to *Rangayya Goundan v. Nanjappa Rao* (1); *Narayana Kavirayan*

(1) 24 M. 491; 6 C. W. N. 17; 3 Bom. L. R. 799; 8 Sar. P. C. J. 117; 28 I. A. 221 (P. C.).

v. *Kandasami Goundan* (2); *Nathu v. Budhu* (3); per contra; *Sreenath Roy v. Cally Doss Ghose* (4); *Land Mortgage Bank v. Sudurudeen Ahmed* (5); *Jagadis Chandrn Deo Dhabal v. Satrugan Deo Dhabu* (6); *Ebrahim Ismail Timcl v. Provas Chandar Mitter* (7); *Nistarini Dasi v. Bonomali Chatterji* (8); *Satya Prashad Pal Chowdhury v. Motilal Pal Chowdhury* (9). Refers to O. 31, r. 2., of the Code of Civil Procedure; section 12 of the Letters Patent. I submit "defendant" in section 16 of the Code of Civil Procedure means "defendants." See *Hadjee Ismael Hadjee Hubbeeb v. Hadjee Mohamed Hadjee Joosub* (10);

Mr. N. U. Sen (with him Babus Probodh Kumar Das, Bireswar Bagchi and Khitish Chandra Chakraborty), for the Opposite Parties.—My point is whether the present application is maintainable under section 115 of the Code of Civil Procedure. The matter has not been finally decided. The application was first presented before Richardson and Suhrawardy, JJ. They directed an application to be filed for transfer of the case. Subsequently, they made an application to Chatterjee and Panton, JJ., and leave to withdraw was given with liberty to apply for transfer on the ground of jurisdiction. I submit the application was barred. My third point is that the Subordinate Judge had no jurisdiction to try the issue. The points now raised were not raised in the Court below. It is not a suit for land. It, therefore, comes under section 20 of the Code of Civil Procedure. If you hold otherwise, then my point is that the suit comes under the proviso to section 16 of the Code. The cause of action arose within the jurisdiction of the Alipore Court. Refers

(2) 22 M. 24; 8 M. L. J. 147; 8 Ind. Dec. (N. S.) 18.

(3) 18 B. 537; 9 Ind. Dec. (N. S.) 867.

(4) 5 C. 82; 2 Ind. Dec. (N. S.) 663.

(5) 19 C. 358; 9 Ind. Dec. (N. S.) 683.

(6) 33 C. 1065 at p. 1075; 4 C. L. J. 238

(7) 1 Ind. Cas. 472; 36 C. 59.

(8) 4 C. 941 at p. 942; 4 C. L. R. 278; 2 Shome L. R. 252; 2 Ind. Dec. (N. S.) 595; (F. B.)

(9) 27 C. 683; 14 Ind. Dec. (N. S.) 448.

(10) 13 B. L. R. 91 at p. 100; 21 W. R. 303.

MAHOMED YASIN v. BIMOLA PRASAD.

to *Hara Lal Banerjee v. Nitambini Debi* (11). *Vaghoji Kuwerji v. Camaji Bomanji* (12). We have based our suit on the contract only and have not even prayed for possession. It is not, therefore, a suit for land. I submit it is not a case under section 16 of the Code, but under section 20. This is not a case in which you could interfere under section 115 of the Code.

Babu Charau Chandra Biswas in reply—Section 20 does not apply. See *Nalum Lakshimikantham v. Krishnasawmy Mudaliar* (13); *Keshav v. Vinayak* (14).

JUDGMENT.—The opposite party No. 1 in this Rule instituted a suit in the Court of the Subordinate Judge at Alipore for specific performance of a contract for lease of a certain property situated in the District of Burdwan. The contract is said to have been originally entered into by one Kundan Lal Kapur of Burdwan and the defendants Nos. 1 and 2, who are the opposite parties Nos. 2 and 3 in the present Rule, are the executors under the Will of Kundan Lal and took out Probate of his Will. It was alleged in the suit that, subsequent to the agreement of granting a lease in favour of the plaintiff, the defendant No. 1, on the 22nd August 1920, granted a lease to defendant No. 3 who took it with notice of the prior agreement in favour of the plaintiff. The plaintiff accordingly prayed for specific performance of the agreement to grant him the mining lease on declaration that the defendant No. 3 acquired no right, title or interest under the lease of 22nd August 1920.

The defendant No. 3 *inter alia* pleaded that the Alipore Court, where the suit was instituted, had no jurisdiction to entertain it. A preliminary objection was accordingly raised but it was decided in favour of the plaintiff and, therefore, this Rule was obtained by the defendant No. 3.

The learned Subordinate Judge was of opinion that as between the plaintiff and the principal defendants, by which we think

he meant the defendants Nos. 1 and 2, there was no question of determination of any right to the property and that the main relief for specific performance of the contract could be obtained through the personal obedience of the defendants and as such the suit could be tried by the Alipore Court having regard to the proviso to section 16 of the Civil Procedure Code. Then the learned Subordinate Judge says: "The only point that can be urged against this view is that it is also prayed that defendant No. 3's right be declared to be a nullity. This point, however, arises incidentally in the case." But so far as the prayer against the defendant No. 3 is concerned, the case comes under section 16 of the Code and the proviso to that section cannot apply to defendant No. 3 as he does not reside within the jurisdiction of the Alipore Court.

Then, again, the defendant No. 2 does not reside within the jurisdiction of the Alipore Court as he is a resident of Burdwan. The proviso to section 16 uses the word "defendant" but that means "all the defendants" where there are more than one defendant in the suit (see *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (10), a case under clause 12 of the Letters Patent. It is contended on behalf of the plaintiff-opposite party that the defendant No. 1 who resides within the jurisdiction of the Alipore Court as one of the executors is entitled to act alone and that, therefore, it is immaterial whether or not the defendant No. 2 also resides within the jurisdiction of that Court. But the question whether one of the executors has power to act alone would depend upon the terms of the Will (see section 92 of the Probate Act). There was no suggestion in the lower Court that the defendant No. 1 alone was entitled to act and the suit for specific performance was directed against both the defendants Nos. 1 and 2. The question was not gone into in the lower Court; because, as stated above, the plaintiff proceeded upon the footing that both the defendants Nos. 1 and 2 were to perform the contract.

In these circumstances, we think that the proviso to section 16 of the Code does not apply to this case.

(11) 29 C. 315.

(12) 29 B. 249 at p. 256; 6 Bom. L. R. 958.

(13) 27 M. 157.

(14) 23 B. 22; 12 Ind. Dec. (N. S.) 15.

SARSUTI PRASAD V. EHTISHAM ALI.

It is contended on behalf of the plaintiff-opposite party that section 20 of the Code is applicable because the cause of action arose within the jurisdiction of the Alipore Court.

But, in the first place, in the plaint the cause of action is stated to have arisen on the 22nd August 1920, which is the date on which the defendant No. 1 granted a mining lease to defendant No. 3, and there is no question that the lease was executed at Burdwan. In the next place, the cause of action may be said to have arisen within the jurisdiction of the Alipore Court only in so far as it concerns the claim for specific performance against defendants Nos. 1 and 2. So far as defendant No. 3 is concerned, we do not see how the cause of action could be said to have arisen within the jurisdiction of the Alipore Court. The property is situated in the District of Burdwan and the cause of action, so far as defendant No. 3 is concerned, arose at Burdwan.

We think, therefore, that the Alipore Court had no jurisdiction to entertain the suit, as framed and that the order complained of must, therefore, be set aside and the plaint returned to the plaintiff for presentation to the proper Court and we direct accordingly.

The petitioner is entitled to costs of this Court. We assess the hearing fee at 2 gold mohurs.

N. H.

*Order accordingly.***ODDH JUDICIAL COMMISSIONER'S COURT.**

PRIVY COUNCIL APPLICATION No. 9 OF 1922.

August 11, 1922.

Present :—Mr. Kanhaiya Lal, J. C., and Mr. Simpson, A. J. C.

**SARSUTI PRASAD AND OTHERS—
DEFENDANTS—APPELLANTS**

versus

**Munshi EHTISHAM ALI—PLAINTIFF—
RESPONDENT.**

*Civil Procedure Code (Act V of 1908), s. 110—
Construction of document—Substantial question of law.*

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial questions of law within the meaning of section 110 of the Civil Procedure Code. [p. 408, col. 2.]

Babu Udairaj Singh v. Raja Bhagwan Bakhsh Singh, 10 O. C. 308, relied on.

Mr. P. C. Gupta, for the Appellants.

Mr. Haider Hussain, for the Opposite Party.

ORDER.—This is an application for leave to appeal to His Majesty in Council in a suit which was brought by the plaintiff-respondent for the redemption of certain mortgages and deeds of further charge and for the recovery of the surplus profits. The value of the property in dispute, as assessed in the plaint, was Rs. 3,000. The amount of surplus claimed was not estimated but it was asserted that the entire mortgage money due on the said deeds had been paid up from the usufruct and that there was a large surplus to which the plaintiff was entitled.

The principal amount secured by the mortgages and the deeds of further charge was Rs. 2,073. The Trial Court held that the entire mortgage-money had been paid up from the usufruct and that a surplus of Rs. 9,012-12-8 was due to the plaintiff by the mortgagees. That Court accordingly awarded a decree for possession and for the recovery of that surplus amount. The defendants-mortgagees appealed claiming to be relieved of the sum of Rs. 9,012-12-8, awarded to the plaintiff on account of the said surplus, and further claiming a sum of Rs. 2,073 on account of the principal moneys secured by the mortgages and the deeds of further charge in question. They originally valued their appeal at Rs. 2,073

SARSUTI PRASAD V. BHITSEHAM ALI.

only; but on a report made by the office that the amount of surplus awarded to the plaintiff ought to be added to the valuation if the defendants wanted to get rid of their liability to pay that amount they paid the deficit Court-fee and agreed to the valuation being treated as amounting to Rs. 11,085-12-9. On the hearing of that appeal it was held by this Court that the plaintiff had no right to sue for redemption and on that ground the decree of the Trial Court was set aside. The plaintiff then went on appeal to His Majesty in Council, valuing his appeal at Rs. 11,085-12-9 being the total of the amount of the principal moneys he was claiming and the surplus profits, the liability to which defendants were contesting. Their Lordships of the Privy Council allowed the appeal and remanded the case to this Court for determination on the merits.

The matter first came up before two learned Judges of this Court who differed as to the order in which the surplus profits were to be credited towards different deeds and a reference was ultimately made to a third Judge, in accordance with whose opinion a decree was passed, allowing the plaintiff a sum of Rs. 7,910-11-7 on account of surplus profits. The effect of the decree of this Court was that the plaintiff became entitled to possession of the mortgaged property on redemption without any payment and to recover Rs. 7,910-11-7 on account of surplus profits from the defendants-mortgagees.

In their present petition of leave to appeal to His Majesty in Council the defendants-applicants value their appeal at Rs. 10,910-11-7; that amount consists of Rs. 7,910-11-7, being the surplus profits awarded to the plaintiff the liability to which is contested by the defendants, and a sum of Rs. 3,000, which is stated by the learned Counsel for the defendants-applicants to represent the value of the mortgaged property as originally laid in the plaint. In the memorandum of appeal the amount claimed by the defendants-applicants, on account of the deeds of mortgage and further charge in question, judged by the valuation of the appeal, was Rs. 2,073 and that being so, it is difficult to understand the valuation given in the present petition, which arises

out of that appeal. The defendants-applicants are virtually reiterating their claim for Rs. 2,073 on account of the principal sums secured by the mortgage and the deeds of further charge and seeking to contest their liability for the surplus profits amounting to Rs. 7,910-11-7 awarded by this Court to the plaintiff. The valuation of the present appeal, therefore, stands at Rs. 9,983-11-7 which is clearly insufficient to justify us in granting leave to the defendants-applicants as a matter of right. The valuation of the mortgaged property cannot be taken into consideration, because the decree for possession is not challenged. The defendants-applicants virtually claim an amount described in their memorandum of appeal to this Court as Rs. 2,073 which has not been awarded to them by this Court or by the Court below, and seek to relieve themselves of a liability for surplus profits, which have been awarded against them. It is not alleged that the appeal affects indirectly a question relating to property exceeding Rs. 10,000 in value because the actual value of the property is not stated to be over Rs. 3,000. That being so, no leave to appeal can be granted under section 110 of the Code of Civil Procedure, although the decree of this Court varies the decree of the Court below.

It is further urged that there is a substantial question of law involved in the appeal, the determination of which would settle the method of accounting which ought to have been adopted in a case of this kind. The question is, however, one of interpretation of the terms of different deeds of mortgage and further charge to which effect has to be given in applying the surplus as it accrued due year after year; and, as held in *Babu Udairaj Singh v. Raja Bhagwan Bakhsh Singh* (1), mere questions of construction of particular documents cannot be treated as questions of general importance of substantial questions of law within the meaning of section 110 of the Code of Civil Procedure.

The application, therefore, fails and is dismissed with costs.

N. K.

Application dismissed.

(1) 10 O. C. 308.

RAMASWAMI CHETTY v. DORAISWAMI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 354 OF 1921.

November 24, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

A. RAMASWAMI CHETTY—

DEFENDANT—APPELLANT

versus

DORAISWAMI alias LATCHUMAN

CHETTY AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 4—Suit against minor—Guardian ad litem, appointment of—Officer of Court, when can be appointed—Notice to minor and natural guardian—Failure of guardian to produce evidence—Decree, whether binding on minor.

In respect of the appointment of a guardian for a minor defendant, O. XXXII, r. 4, of the Civil Procedure Code does not impose an obligation on the Court to insist on the plaintiff to produce an affidavit to the effect that there is no other person fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendant before appointing an officer of the Court. [p. 410, col. 2; p. 411, col. 1.]

Under O. XXXII, r. 4, of the Civil Procedure Code an officer of the Court can be appointed guardian when there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of each case. [p. 411, col. 1.]

O. XXXII, r. 3, clause (4) of the Civil Procedure Code does not require any notice of the proceedings to the minor; nor is separate notice of a proposal to appoint a Court guardian necessary to the father or other person in whose care the minor is, when such father, guardian or other person is a party to the proceedings and is aware of the proposal. The absence of such notice is, in any case, a mere irregularity, which does not affect the validity of the proceedings, in the absence of proof of fraud or gross negligence on the part of the person appointed. [p. 411, cols. 1 & 2.]

Munnu Lal v. Ghulam Abbas, 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.), followed.

Rashid-un-nisa v. Muhammad Ismail Khan, 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.), distinguished.

A decision obtained against a minor represented by a guardian cannot be set aside in the light of fresh evidence which was not produced at the previous trial unless it can be shown that the failure to produce such evidence was the result of gross negligence or fraud on the part of the guardian *ad litem*.

Second appeal against the decree of the Court of the First Additional Subordinate

Judge, Coimbatore, in Appeal Suit No. 66 of 1920 (Appeal Suit No. 71 of 1920 on the file of the District Court of Coimbatore) presented against the decree of the Court of the Additional District Munsif, Coimbatore, in Original Suit No. 992 of 1918.

Mr. C. S. Venkatachariar, for the Appellant.—The second defendant who purchased in execution of the decree is the appellant. Plaintiffs now sue to set aside the decree itself on the ground that it is void against them. Both the lower Courts have decreed their claim. The findings are not clear as to whether the previous decree was void for improper representation or for fraud. There is a presumption in these cases that the appointment was proper. *Munnu Lal v. Ghulam Abbas* (1). There has been no evidence that the plaintiff in the previous suit was aware of the existence of the maternal uncle.

[Ramesam, J.—There was a recent judgment to which I was a party in which this point was discussed.]

In Appeal Suit No. 251 of 1920 which your Lordships Krishnan J., and Ramesam J., decided recently, the affidavit was found to be false because the defendant had knowledge of the existence of the maternal grandfather. It is not necessary that there should be a statement that there is no other next of kin, if the Court in the particular instance is satisfied about the propriety and necessity of a Court guardian being appointed. The father who refused to act never took the trouble to inform the plaintiff as to who was the proper man to safeguard his minor son's interests. There must be a limit to the extent of the enquiry into the next friends of minor defendants which it is legally obligatory upon a plaintiff.

[Ramesam, J.—In the majority of the cases it is the fraud of a deceitful father that brings about such situations.]

This is one such case. There is no proof of negligence on the part of the Court guardian. He engaged a High Court Vakil and cross-examined. It has not been shown what evidence then available on behalf of the minors was not let in.

(1) 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.).

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Mr. *Patanjali Sastri*, for Mr. *A. Krishnaswami Aiyar*, for the Respondents.—The whole proceedings in the previous suit as regards the appointment of guardian was illegal. The provisions of O. XXXII were not complied with. Under the Civil Procedure Code, notice should go to the minors as well as to the natural guardian with whom the minors are living.

Mr. *C. S. Venkatachariar*.—Under the power vested in the High Court, the rule has been changed and no notice to the minor is now necessary so far as the Madras Presidency is concerned. R. 4 of O. XXXII was altered in 1917 by the Madras High Court itself to its present form long before the previous litigation.

Mr. *Patanjali Sastri* cited *Nachiaypa Chetty v. Chunniah Ambalam* (2) and contended the father ought to have had notice in this petition also. There were no materials properly placed before the Court for the appointment of a Court-guardian. There was sufficient in the case to put plaintiffs on enquiry. The findings of fact of the lower Court conclude the case against the appellant.

JUDGMENT.—This second appeal arises from a suit for partition by the plaintiffs against their father the first defendant the second and third defendants, second defendant being an alienee of certain property under a decree against the first defendant and the plaintiffs. The question is, whether that decree binds the plaintiffs inasmuch as it is said that it was obtained against them, when they were minors in circumstances which make it invalid. Those circumstances were set out in the plaint as being that the decree was obtained by fraud and was not binding on the minor plaintiffs.

The fraud in question was not further specified in the plaint. Primarily, however, we are concerned with the grounds, on which the lower Appellate Court has given judgment in the plaintiff's favour. Those grounds are not that there was generally any fraud in the obtaining by the third defendant of the decree or in the purchase by the second defendant at the subsequent Court sale, but that

the 2 to 5 defendants then in that suit (plaintiffs) were not represented by any guardian legally appointed, the Head Clerk of the Court, who was on the record as their guardian, not having been legally appointed as such. The lower Appellate Court held that the plaintiffs were not properly represented and the proceedings are not binding on them. It, therefore, went on to re-try the issues in the previous case on their merits.

The objection to the appointment of the Head Clerk, which the lower Appellate Court has sustained, was (as we understand it) that there was no affidavit alleging there was no other person fit and willing to act as the guardian of the plaintiffs and no attempt was made to appoint the uncle of the plaintiffs as their guardian *ad item*. "Though evidence was taken for the purpose of passing a decree against the plaintiffs also, the plaintiffs were practically undefended, for no evidence was tendered on their behalf after first defendant's oath was accepted. Even the evidence on record throws a certain amount of suspicion on the claim then made. Merely because another was appointed the guardian of the plaintiffs in the place of first defendant, who refused to act, it cannot be said that the plaintiffs had been properly represented in that suit." This statement of the grounds of the lower Appellate Court's decision is taken from its judgment. But it is little difficult to understand and in particular the reference to the absence of any evidence adduced for the defence in the previous suit, especially in view of its finding that the guardian appointed was careful and diligent and properly conducted the defence and was not negligent. We shall, however, return to that point in the sequel.

At present we deal only with the objection that there was no proper appointment of the Head Clerk as guardian. The main grounds on which the lower Appellate Court held the appointment invalid, were the absence of an affidavit alleging there was no other person fit and willing to act as guardian and of any attempt to appoint the uncle of the plaintiffs. There is no obligation imposed by the relevant portion of the Code, O. XXXII, on the Court to insist or on the plaintiff to produce an affidavit to the effect that there is no other per-

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son fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendants before appointing an officer of the Court. O. XXXII, r. 4 clause 4 says only that an officer of the Court may be appointed only where there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of the case. Here the plaintiff lived in a different district from that of the minors or their father, then and now first defendant. The plaintiff attempted first to appoint the first defendant as guardian. He refused to act and apparently did not co-operate in any way. We cannot hold that a plaintiff is entitled to proceed with a Court guardian only at his own risk and unless he can demonstrate affirmatively that he has made absolutely exhaustive enquiries and that there is, in the words of the rule, not merely no other relative but also "no other person fit and willing to act as guardian." Putting a reasonable construction on the rule, we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have been shown) on the record regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interests in the minor's affairs or, what is more important, regarding any subsequent attempt by him to protect their interests. Another objection made is that there was no notice to the minors themselves of the proceedings. That is based on a misapprehension. For O. XXXII, r. 3, clause 4 had been amended before the proceedings on the 19th May 1910 by the omission of the words "to the minor." and it is also pointed out that under O. XXXII, r. 3, clause 4 notice was necessary to the father or other natural guardian, or where there is no father or natural guardian to the person in whose care the minor is. In the present case there was no doubt no distinct notice to the father of the proposal of the Court guardian, but the father was himself a party to the proceedings at one of the hearings at which the appointment was made, and the father had refused to act himself. It does not seem to us that a separate notice was necessary of an incident of which the

father must have been aware. It is further material that the father never during the proceedings took the smallest objection to the conduct of the minor's case by the Head Clerk.

As regards the law, the absence of notice to the father of the appointment of the Head Clerk would, in any case, be, in our opinion, an irregularity which would not affect the validity of the proceedings in the absence of proof of fraud or gross negligence on the part of the person appointed, the present case not resembling *Rashid-un-nisa v. Muhammad Ismail Khan* (3) but *Munnu Lal v. Ghulam Abbas* (1).

The lower Appellate Court's ground of decision that the appointment of the Head Clerk was illegal and the proceedings conducted by him, therefore, are not binding on the minors failing, we must consider the argument attempted here that the appointment being irregular for want of notice, the proceedings were in fact fraudulently or grossly negligently conducted and the decision resulting from them must be set aside. The lower Courts have no doubt in the present case reached a decision on the merits in the plaintiff's favour. But that is not sufficient, unless it can be shown that the failure to produce the evidence which was not produced at the first trial was the result of gross negligence and fraud. It is sufficient that there is nothing in the judgment of the lower Appellate Court to justify us in finding to that effect nor, it may be added, in the judgment of the District Munsif. The lower Appellate Court's characterisation of the conduct of the case by the Head Clerk as careful and diligent and not negligent has already been referred to. The fact that no evidence was given for the defence on behalf of the minors is in no way decisive, when there was no evidence which the Head Clerk is shown to have then been able to adduce or ought to have known to be available. The new evidence now produced does not come within either of those descriptions.

(3) 3 Ind. Cas. 864; 31 A. 572.; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 B. N. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

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In these circumstances, we must adopt the lower Appellate Court's finding that there was neither fraud nor negligence. The result is that the decision as regards the decree in Original Suit No. 783 of 1913 and the sale to second defendant must be set aside. The result of our decision sustaining the decree and sale will be that no properties are available for partition, since the properties sold are the only properties set out in the plaint schedule. We, therefore, allowing the second appeal, set aside the decrees of the lower Courts and dismiss plaintiff's suit with costs throughout of the second defendant.

V. N. V.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 384 OF 1921.

February 6, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice; and Mr. Justice Crump.

SITARAM PANDURANG DESHMUKH
—PLAINTIFF—APPELLANT*versus*GANPAT DAULATRAO DESHMUKH—
DEFENDANT—RESPONDENT.

Hindu Law—Hindu—Illegitimate offspring by Muhammadan mistress, whether Hindu.

Under the Hindu Law a man cannot be regarded as a Hindu by birth unless both his parents are Hindus, consequently an illegitimate offspring of a Hindu by a Muhammadan mistress would not be a Hindu.

Lingappa Goundan v. Esudasan, 27 M. 13, relied on.

Second appeal against the decision of the Assistant Judge, Sholapur, in Appeal No. 206 of 1919, confirming the decree passed by the Subordinate Judge at Pandharpur in Civil Suit No. 375 of 1918.

Mr. S. Y. Abhyankar, for the Appellant.
Mr. P. B. Shingne, for the Respondents.

JUDGMENT.—The plaintiffs instituted this suit to recover possession of certain property on the ground that it was *aeshmukhi*

vatan service *inam* land, and, therefore, could not devolve upon the defendant, who was a daughter of one Dada, the illegitimate son of Venkatrao, by a Muhammadan mistress. The pedigree appears at page 1 of the print. Venkatrao, the last owner of the *vatan* property, sold it to one Fazal Ali in 1865. After Venkatrao's death in 1871, Baburao, the illegitimate son of Venkatrao, purchased the property from Fazal Ali and enjoyed the property till he died. Then he was succeeded by his brother Dada who left a widow Pyara, and a daughter, the present defendant. Pyara died in 1906 when her daughter, the present defendant, took possession of the property. It was urged in the lower Courts on behalf of the plaintiffs that Babu Rao and Dada were the heirs of Venkatrao as his *dasi-pulras*, and hence they were in possession until their death, and that after the death of Pyara, the widow of the survivor, the *vanta* would go to them. The appellants have not been able to place before us any case in which it has been laid down that an illegitimate offspring of a Hindu by a Muhammadan mistress would be a Hindu. That is contrary to one's notions of the law on the subject, which is very clearly laid down in *Lingappa Goundan v. Esudasan* (1) it being held that a man cannot be regarded as a Hindu by birth unless both his parents are Hindus.

The result must be that Venkatrao left no Hindu heir to succeed him, and the illegitimate son's holding adversely to Venkatrao's heirs became entitled to the property as against them. The appeal fails and must be dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 27 M. 13.

RADHA MOHAN v. M. C. WHITE.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 130
OF 1922.

January 31, 1923.

Present:—Mr. Justice Walsh and Mr.
Justice Ryves.RADHA MOHAN AND OTHERS—
APPELLANTS

VERSUS

M. C. WHITE AND ANOTHER—
RESPONDENTS.*Provincial Insolvency Act (V of 1920); ss. 28 (5), 66 (2)—Civil Procedure Code (Act V of 1908), s. 60 (1) (i) (iii)—Insolvent—Half-salary divisible amongst creditors—Allowance to insolvent.*

Where the property of an insolvent which becomes divisible amongst the creditors is his half-salary, the other half being protected by section 28 (5) of the Provincial Insolvency Act and section 60 (1) (i) (iii) of the Civil Procedure Code, read together, it is open to the Insolvency Court under section 66 (2) of the Insolvency Act to make, out of the divisible half of his salary, such an allowance as it may think just to the insolvent for the support of himself and his family. [p. 413, col. 2; p. 414, col. 1.]

Debi Prasad v. J. A. H. Lewis, 43 Ind. Cas. 984; 40 A. 213; 16 A. L. J. 107, dissented from.

First appeal from an order of the District Judge, Allahabad, dated the 21st April 1922.

Mr. *Lalit Mohan Banerji*, for the Appellants.

Mr. *E. A. Howard*, for the Respondents.

JUDGMENT.—This is an appeal by a body of creditors against an order of the District Judge of Allahabad making a personal allowance to the insolvent out of his property for the support of himself and his family, under section 66, sub-section (2), of the Provincial Insolvency Act, V of 1920. One difficulty in delivering a clear judgment in a case of this kind is that the enumeration of the appropriate sections has been altered from time to time by various amending Acts. We will confine our observations to the sections of the present Act. Leave was required under the Act, as the Counsel for the insolvent rightly objected, and was not applied for until a late stage of the proceedings and the matter of leave was referred to the Court hearing the appeal. As the case has been argued as one of principle, and appears to us to require careful consideration in view of certain existing decisions, we have granted the necessary leave, it being clearly a case in which it would have been granted, if

applied for at once by any Court appreciating the point involved.

The insolvent is an Engine-driver on the East Indian Railway in receipt of a fixed salary of about Rs. 250 with various monthly allowances and accretions due to overtime, and other matters which increase his monthly salary sometimes to nearly Rs. 500 and roughly to an average exceeding Rs. 400. The factors which must be taken into account in reducing this gross sum in order to arrive at the actual net income really enjoyed by the insolvent are not very clearly before us, and, in the view, which we take, do not become important. But these two facts may be stated as representing, at any rate, the minimum of what is shown, namely, that half his gross salary would be at least Rs. 200 and that the sum directed by the District Judge to be paid to the creditors, namely, Rs. 120 is certainly less than any just estimate of the actual half of the net income actually enjoyed by this Engine-driver. As will appear when we come to consider the relevant sections, the expression, "directed to be paid to the creditors" is not really an accurate method of expressing it. A more accurate method is that the learned Judge has granted an allowance out of the property *prima facie* divisible amongst the creditors, amounting to such a sum as, when deducted from his half salary, leaves a balance of Rs. 120 divisible amongst the creditors.

There is no doubt that in the case of a person in India in receipt of a salary or pension, the maximum which is divisible amongst the creditors is half. That maximum is fixed by Statute. Section 28, the ordinary vesting section, makes the whole of the property of the insolvent on adjudication divisible amongst the creditors, but except by sub-section (5) from the property so divisible, any property which is exempted by the Code of Civil Procedure from attachment. Section 60, Civil Procedure Code, in the case of this Engine-driver exempts half his salary from attachment. The combined operation, therefore, of section 28 (5) of the Provincial Insolvency Act and section 60 (1) (i) (iii) is to make only half his salary divisible amongst the creditors. The creditors in this appeal contend that that amount is not only the maxi-

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imum but the minimum. In other words, that the personal allowance which section 60, Civil Procedure Code, leaves to the enjoyment of the ordinary debtor by exempting it from attachment, is the only sum which a Court in insolvency can allow an insolvent under its jurisdiction to enjoy for the support of himself and his family. So stated, the contention sounds reasonable. But the difficulty of accepting it is this. Section 66, sub-section (2), provides that the Court may from time to time "make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, and such allowance may, at any time, be varied or determined by the Court." If both the maximum and the minimum are fixed by Statute, this provision is nugatory and might as well be struck out of the Act in every case in which a man is earning his income by salary to which section 60 of the Code is applicable. Indeed, the contention is that this sub-section of the Insolvency Act is unworkable in the case of a person paid by salary and, therefore, cannot be held to apply to him at all. But if it was intended to fetter the discretion of the Insolvency Court in the case of a man who is earning his money by salary and his half salary was already protected by the operation of section 60, Civil Procedure Code, the Legislature ought to have said so. The argument really invites us to legislate, rather than to interpret. The language of the sub-section itself, namely the use of the word "property" without qualification, clearly includes that part of his property; or, in other words, his half salary which by the joint operation of the two sections already referred to becomes divisible amongst the creditors under section 28 of the Insolvency Act. Three cases have been cited to us which seem to support the contention of the creditors although they may, if one were disposed to enlarge upon fine distinctions, be said to be not strictly in point. But in substance it does appear to have been decided that the amount which an insolvent may be allowed for maintenance is irrevocably fixed by section 60, Civil Procedure Code. We are not satisfied that either of the Courts in the cases cited really intended to go to that length although they used language which appears to produce

that result. If they meant that the amount fixed by section 60, Civil Procedure Code, so fettered the discretion of the learned Judge that he could not depart from it we find ourselves unable to agree with that view, because we think that it is equivalent to a refusal to apply the express language of section 66, sub-section (2). But, really, the argument pushed to its logical conclusion must come to this, that inasmuch as section 60 fixes the sum both as regards maximum and minimum in all cases of salary, the Court of Insolvency has no jurisdiction under section 66, sub-section (2) to touch the matter. In other words, section 60 has removed it from the Insolvency Court's cognizance, and that any attempt by the Insolvency Court to alter it by one pice would be *ultra vires*. That is the contention of Mr. L. M. Banerji, who is always logical, in pressing the view of the appellants, and that is the inevitable result of the argument, but we are not satisfied that the Courts in the cases relied upon intended to go to that length.

It is only necessary to refer to the decision of our brother Rafique in a revision case reported as *Devi Prasad v. J. A. H. Lewis* (1). In that decision he followed and adopted the view taken in the two previous cases mentioned by him in his judgment, holding that section 60, Civil Procedure Code had fixed the proportion immutably at half, and he did not consider what, under these circumstances, was the meaning which ought to be given by an Insolvency Court to section 66, sub-section (2). We hold that the law in India is precisely the same as in England on this matter. Indeed, historically, it is correct to say that the sub-section in question, namely section 66(2), is taken direct from the English Legislation on the subject and that the Insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by section 60, have an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent, out of the remaining half which is otherwise divisible amongst the

(1) 43 Ind. Cas. 984; 40 A. 213; 16 A. L. J. 107.

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creditors, and that on this ground the appeal fails.

We think it right to add that we entirely approve of the thoroughness, and of the methods and considerations applied to the decision of the question, and of the result arrived at by the learned Judge in this case. In any event, he is the best, and indeed almost the only Judge, provided he has all the materials before him. His notes and his order alike show that he examined into the position very closely. He found, as is the case, that if the insolvent keeps up the payment which he has hitherto done regularly of Rs. 120 per month, all the creditors will receive payment in full within a period very little more than two years from the order of adjudication. If this happens, they will have done extremely well. It is very rare that in an insolvency, creditors ever get paid in full at all, and it is largely due to the salutary provisions by which salary can be attached and deducted in this country, that in this particular case the creditors have a reasonable hope of being paid in full. It is not suggested that the insolvency has been brought on by any misconduct, or reckless conduct in the insolvency sense of these words, on the part of this Engine-driver. It looks as if he had fallen into the somewhat easy temptation towards extravagance in the ordinary affairs of life, such as dress and necessities, although it is true there is one large claim by a money-lender, as the result of the conduct of the creditors themselves. Trades people who, either in the stress of business, or out of kindness of heart, encourage persons in a humble condition of life to go on purchasing on credit in a way which they must know is beyond their means, have only themselves to thank if in the end they lose their money altogether, and if they are merely delayed in payment as these creditors seem likely to be. They suffer no loss because the ordinary risks of trade which occur through bad debts and unwilling payers, fall as a rule, as every body knows, upon the honest consumers who pay promptly and whose charges must include the loss of the tradesman who would otherwise have to shut up shop. No body wishes to discourage a tradesman from giving credit or such credit as he is satisfied the customer can stand

but a tradesman who continues to supply goods after it is obvious that the customer is unable to pay or unwilling to pay for the arrears which are due, brings upon himself such loss as he may suffer, and in our view a Judge, sitting in Insolvency, has to consider these matters, that is to say, the conduct of the creditors as well as the conduct of the debtor in the general public interest, to serve which the bankruptcy law has been devised. On the whole, we think the order complained of in this case was really generous to the creditors. At any rate, there is nothing to complain about in it, and the appeal must be dismissed with costs.

M. A. A.

Appeal dismissed.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 23 OF 1922.

February 15, 1923.

Present.—Sir Norman Macleod, Kr., Chief Justice, and Mr. Justice Crump.

**SHANKAR RAMCHANDRA KULKARNI
AND OTHERS—DEFENDANTS—APPELLANTS**

versus

RAMCHANDRA ANNAJI KULKARNI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitration—Property of deceased testator, division of—Reference during pendency of Probate proceedings, legality of.

Where the parties concerned with the Will of a deceased person refer to private arbitration the question how the properties of the deceased should be divided, the reference would not be rendered illegal by the mere fact that it was entered upon during the pendency of an application for the grant of Probate of the Will of the deceased and before the Probate proceedings had come to an end.

Appeal from an order by the First Class, Subordinate Judge at Dharwar, in Suit No. 56 of 1919.

Mr. G. N. Thakor, (with Mr. G. P. Mureshwar), for the Appellant.

Mr. H. C. Koyajee (with Mr. A. G. Desai), for Respondents Nos. 1 & 2.

JUDGMENT.—This is an appeal from the decision of the Subordinate Judge who pronounced judgment in terms of the award

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Exhibit 22. One Gurunath Balaji died on September 30, 1918 leaving a Will. Probate proceedings with regard to the Will were pending in the District Court at Dharwar, instituted by the first defendant, in whose favour the Will in question had been passed. On January 5, 1919, the parties concerned with the Will executed a submission paper, Exhibit 23. What was submitted to the arbitrators was the dispute with regard to the estate of Gurunath Balaji. The arbitrators made an award, which is Exhibit 22, by which, after it was recited that in order that the two parties should not ruin themselves unnecessarily by going to litigation in respect of this dispute existing between them with reference to the estate of Gurunath Balaji, the disputes were referred, various properties were allotted to the disputing parties. Clearly, although the submission paper was in a general form, it was never considered that the arbitrators were to decide whether Gurunath had, as a matter of fact, executed a Will. It is apparent, on the face of the award, that the arbitrators were in no way ousting the jurisdiction of the Court before which Probate proceedings were pending. They made no attempt whatever themselves to decide whether or not Probate should be granted. Obviously, that could not be decided by them.

But it is contended by the appellant that, because Probate proceedings were pending, therefore, the award was illegal. No authority was cited for that proposition. But the appellant relied upon the decision of this Court in *Manilal Motilal v. Gokaldas Rowji* (1). That decision could only be applicable if there had been a suit pending between the parties, the issues in which had been referred to arbitration without the intervention of the Court. There was nothing whatever to prevent the parties going to arbitration with regard to the division of the estate, leaving the Court to decide whether or not Probate should be granted of the Will. That was a question entirely outside the functions of the arbitrators, while the actual questions regarding the division of properties in dispute between the parties could properly be referred to them.

) 59 Ind. Cas. 53; 22 Bom. L. R. 1048; 45 B. 45.

The simple test in this case would be to consider what would have happened if the parties had waited until Probate had been issued to refer to arbitration the question how the properties of the deceased should be divided. It could not possibly be said then that the submission to arbitration would be illegal. The mere fact that it was entered upon before the Probate proceedings had come to an end cannot possibly affect the question of its legality or illegality. The order of the lower Court was right and the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 753 OF 1921.

August 10, 1922.

Present:—Justice Sir Asutosh Mookerji, Kt., and Mr. Justice Rankin.

MONMOTHA NATH KAR—DEFENDANT

—APPELLANT

versus

PROBODH CHANDRA RATARHI—

PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 50 (2)—Presumption, whether applicable to suit for ejectment—Landlord and tenant—Transfer of holding—Demand of rent from transferee of holding, effect of—Construction of document—Admission of executant, value of.

Section 50 of the Bengal Tenancy Act is by its terms limited in its application to suits or proceedings under the Bengal Tenancy Act, but even in cases where the section is not directly applicable the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference. [p. 418, col. 1.]

Rasamoy Purkait v. Srinath Moyra, 7 C. W. N. 132., *Sarat Chandra Ghose v. Shyam Chand*, 10 C. W. N. 930, *Nityananda Pal v. Nanda Kumar Chowdhuri*, 10 Ind. Cas. 163; 13 C. L. J. 415; *Buzlul Karim v. Satish Chandra Giri*, 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752, and *Prau Krishna v. Mukta Sundari*, 21 Ind. Cas. 544; 8 C. L. J. 193, referred to.

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The presumption contained in section 50 of the Bengal Tenancy Act applies whether the rent is payable entirely in cash or partly in cash and partly in kind or entirely in kind, and the same principle applies to suits or proceedings to which the rule embodied in section 50 is extended by analogy. [p. 418, col. 2.]

Dina Nath Pal v. Rajar Sati Prasad, 72 Ind. Cas. 663; 36 C. L. J. 220; 27 C. W. N. 115; (1923) A. I. R. (C.) 74, followed.

A demand by the landlord for rent from the transferee of a holding professing to be in occupation of the holding as a tenant is good evidence of mutual consent to the creation of a tenancy unless the landlord is able to explain that the demand was not unqualified and should be differently interpreted. [p. 419, col. 1.]

Underhay v. Read, (1888) 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298; *Brown v. Storey*, (1840) 1 M. & G. 117; 1 Scott (N. R.) 9; 9 L. J. C. P. 225; 4 Jur. 319; 133 E. R. 270, relied upon.

Deonandan Pershad v. Meghu Mahton, 5 C. L. J. 181; 11 C. W. N. 225; 34 C. 57, distinguished.

The admission of the executant of a document cannot be utilised to contradict the document. Evidence cannot be admitted to show the intention of the executant which is not disclosed by the authorised channel, namely, the words which he himself selected. [p. 418, col. 2.]

Great Western Railway v. Bristol Corporation (1918) 87 L. J. Ch. 414; 16 L. G. R. 393, relied on.

Appeal against a decree of the Subordinate Judge, Second Court, Midnapore, dated the 13th December 1920, reversing that of the Munsif, Second Court, at that place, dated the 13th of November 1919.

Dr. Dwarkanath Mitter (with him Babu Pyari Mohan Chatterji), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit to recover possession of two non-transferable occupancy holdings on the allegation that the same had been purchased by defendants in execution of a money-decree in 1917. The defence is that the holdings are one and a consolidated rent is payable and has been recorded as such in the Record of Rights, that they are *raiyats* at fixed rates and that the rent has been uniformly paid for 20 years. A portion of the holding was not mortgaged and hence plaintiff was not entitled to re-enter. The First Court dismissed the suit. On appeal that decision has been reversed. I submit the landlord recognised me. The sale certificate clearly shows that the entire holding did not pass by sale. The evidence shows that for 30 years the same rent has been paid part in

cash and part in paddy. That entitle me to a presumption under section 50, Bengal Tenancy Act.

Babu Lalit Mohan Mittra, for the Respondent.—The plea of recognition was not definitely taken. The finding is conclusive that there was no recognition. See *Deonandan Pershad v. Meghu Mahton* (1). Rent in kind cannot be treated as fixed rent. See *Baneswar Mukherji v. Umesh Chandra* (2), *Pran Krishna Saha v. Mukta Sundari Dassya* (3). He is also precluded from raising the question under section 115, Bengal Tenancy Act. See *Pirithi Chand Chowdhury v. Sheikh Basarat Ali* (4).

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land upon establishment of title. The plaintiff is the landlord of the disputed property, which, according to him, comprises two non-transferable occupancy holdings and was purchased by the defendant on the 21st August 1917 at a sale in execution of a mortgage decree. The defendant contended, first, that the holdings belonged to a *raiyat* at fixed rent and were consequently transferable under section 18 of the Bengal Tenancy Act; secondly, that what had been mortgaged and was brought to sale was not the entire land of the two tenancies, so that he was the purchaser of a portion of the holding and was consequently not liable to be evicted; and, thirdly, that he had been recognised as tenant by the landlord, who had, after his purchase, demanded rent from him. The Trial Court held that the tenancy could not be deemed to consist of holdings at fixed rent, as the rent was payable partly in cash and partly in kind. The Court further held that there had been, no recognition by the plaintiff of the purchase of the tenancy by the defendant. But the Court upheld the contention that what had been mortgaged and sold was less than the entire land of the tenancy. In this view, the claim for recovery of possession was dismissed; *Daya-*

(1) 5 C. L. J. 181; 11 C. W. N. 225; 34 C. 57.

(2) 7 Ind. Cas. 875; 37 C. 626.

(3) 12 Ind. Cas. 544; 18 C. L. J. 193.

(4) 3 Ind. Cas. 449; 10 C. L. J. 343; 13 C. W. N. 1149; 37 C. 30 (F. B.)

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moyl v. Ananda Mohan Roy (5). Upon appeal, the Subordinate Judge has reversed this decision. He has affirmed the finding of the Court of first instance upon the question of the nature of the tenancy and the plea of estoppel. The Subordinate Judge has, however, held that the sale certificate covers the entire lands of both the holdings. In this view, he has concluded that the holdings had been abandoned by the original tenants, with the result that the plaintiff was entitled to re-enter. Upon the present appeal, the decision of the Subordinate Judge has been challenged on three grounds; namely, first, that the holdings constituted tenancies at fixed rents, notwithstanding that the rent was payable partly in cash and partly in kind; secondly, that the question, whether the defendant has made a valid purchase of all the lands of the holdings must be determined with reference to, not the sale certificate, but the mortgage-deed; and, thirdly, that the question of recognition has not been properly decided.

As regards the first question, the evidence, it is urged, makes it abundantly clear that the holdings have been held at rent which has not been changed for many years. It is not disputed, however, that the rule of presumption embodied in section 50 (2) of the Bengal Tenancy Act is not by its terms applicable. That section is, by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not fall within that description *Sarat Chandra Ghose v. Shyam Chand* (6), *Rasamoy Purkait v. Srinath Moyra* (7). But it has been ruled that even in cases where section 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference; *Nityananda Pal v. Nanda Kumar Chowdhuri* (8), *Buzlul Karim v. Satish Chandra Giri* (9), *Pran Krishna Saha v. Mukta Sundari Dassya* (3). Now, in respect of section 50, it has been recently

held, in the case of *Dina Nath Pal v. Raja Sati Prosad* [S. A. No. 2108 of 1920] (10) [decided by Mookerjee and Chotzner, JJ., on the 7th August 1922] that the presumption applies whether the rent is payable entirely in cash or partly in cash and partly in kind, or entirely in kind. The same principle plainly applies to suits or proceedings where the rule embodied in section 50 is extended by analogy. It follows that the Courts below have erroneously held that the disputed holdings could not be tenancies held at fixed rents merely because the rent was payable partly in cash and partly in kind. The relevant facts must accordingly be investigated and the Court must determine whether the tenancies have been held at a uniform rent or rate of rent for such a length of time as to justify the inference that they must have been in their inception holdings at rents fixed in perpetuity; in other words, *mourasi moharrari* holdings.

As regards the second question, it is plain that the Subordinate Judge has not examined the matter from the correct standpoint. The root of the title of the defendant is the mortgage-deed. With reference to the boundaries set out therein, compared with the entries in the Record of Rights, the Trial Court came to the conclusion that one plot, that is, No. 996, was not included in the mortgage. This finding has not been expressly reversed by the Subordinate Judge; but he has proceeded on the assumption not founded on the evidence that there may have been a mistake in the Record of Rights. We are of opinion that this point requires re-consideration. We may add that whatever title may have vested in the defendant, must be traced to the mortgage-bond and cannot be rested on an admission of the tenant himself. The question clearly is not, what the tenant intended to mortgage but what was conveyed by virtue of the description actually inserted therein. The admission of the tenant cannot be utilized to contradict the document and it would be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel, namely, the words which he

(10) 72 Ind. Cas. 663; 36 C. L. J. 220; 27 C. W. N. 1151 (1923) A. I. R. (C.) 74.

(5) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

(6) 10 C. W. N. 930.

(7) 7 C. W. N. 132.

(8) 10 Ind. Cas. 163; 13 C. L. J. 415.

(9) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.

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himself selected. This does not require elaboration and reference need only be made to the decision of the House of Lords in *Great Western Railway v. Bristol Corporation* (11) where the earlier authorities will be found reviewed.

As regards the third point, we are of opinion that the question of recognition has not been properly examined. The evidence indicates that the plaintiff demanded not from the defendant, with full knowledge that the latter was in possession as purchaser of the tenants' rights in the land. *Prima facie* this is evidence of an intention, unless otherwise explained, to recognise the title of the purchaser, and unless repudiated would constitute the relationship of landlord and tenant. The observations in *Deonandan Pershad v. Meghu Mahton* (1) where on the authority of *Evans v. Elliot* (12) and *Towerson v. Jackson* (13), it was stated that mere demand for rent is not sufficient to create the relationship of landlord and tenant, unless followed by assent in response thereto, do not affect the case before us. Here the defendant purchased the holdings on the assumption that they were transferable and he professed to be tenant in occupation. In such circumstances, demand by the plaintiff for rent is good evidence of mutual consent to the creation of a tenancy unless the plaintiff is able to explain that the demand was not unqualified and should be differently interpreted; see *Underhay v. Read* (14) which refers to *Brown v. Storey* (15). This aspect of the case has not been investigated by the Courts below.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remanded to him for reconsideration. Costs will abide the result.

Z. K.

*Appeal allowed ;
Case remanded.*

- (11) (1918) 87 L. J. Ch. 414; 16 L. G. R. 393.
(12) (1838) 9 A. & E. 342; 48 R. R. 520; 1 P. & D. 256; 8 L. J. Q. B. 511; 112 E. R. 1242.
(13) (1891) 2 Q. B. 484; 61 L. J. Q. B. 36; 65 L. T. 332; 40 W. R. 37; 56 P. J. 21.
(14) (1888) 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298.
(15) (1840) 1 M. & G. 117; 1 Scott (N. R.); 91 9 L. J. C. P. 225; 4 Jur. 319; 133 E. R. 270.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 292 OF 1921.

February 16, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

CHUNILAL ASHARAM—PLAINTIFF—

APPELLANT

versus

KASHIBHAI NATHABHAI—

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Defendant against whom suit dismissed, whether party to suit—Objection by such defendant to attachment, nature of—Court, duty of.

P. instituted a suit against C. and D, father and son, and obtained a decree against the son D alone. P then applied to attach D's property whereupon C applied to the Court not to execute the decree against the property which he alleged belonged to himself. The Court, after considering affidavits filed by the parties, granted C's application, and referred P to a regular suit to have it declared that the property was the property of his judgment-debtor and was liable to be attached and sold in execution of his decree. On appeal:

Held, (1) that although the suit against C had been dismissed he was still a party to the suit within the explanation to section 47 of the Civil Procedure Code, and any question arising between him and P with regard to the execution of the decree would have to be determined by the Court executing the decree and not by a separate suit; [p. 420, col. 1.]

(2) that C's application was premature and ought not to have been entertained, that the application could only be made when the property had actually been attached and the applicant's rights interfered with, and that the question in C's application should be decided upon evidence and not upon affidavits. [p. 420, col. 1.]

First appeal from the decision of the First Class Subordinate Judge, at Ahmedabad, in application in Darkhast No. 382 of 1919.

Mr. G. S. Rao, for the Appellant.

Mr. G. N. Thakor (with him Mr. R. J. Thakor), for the Respondent.

JUDGMENT.—This is an appeal from an order of the First Class Subordinate Judge on an application of a very curious nature. The plaintiff filed a suit against two defendants, who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against properties which he alleged belonged to him,

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but if the Court had granted execution and attached his properties, the attachment should be raised. The learned Judge allowed affidavits to be filed and came to the conclusion that the first defendant had proved his case for the purpose of the application, and that the relief of the decree-holder was to bring a regular suit and get it declared therein that the property was of the judgment-debtor and liable to be attached and sold. So he ordered that the property should not be attached, and if the view were taken that they were already attached, as the Court had passed an order for attachment, he ordered that the attachment should be raised and that the plaintiff should get it first declared in a regular suit that the properties he sought to attach were of his judgment-debtor and liable to be attached in execution of his decree.

Now, if the claimant, the first defendant, had been an outsider he would have had to prefer a claim against the attachment which would have been investigated under O. LVIII. The decision of the Court on that application would not be appealable. The remedy of the dissatisfied party would be by a suit, and it would certainly seem from the remarks of the Judge in the Court below that he thought he was making an order under O. XXI, r. 60. But as the first defendant, although the suit had been dismissed against him, was still a party to the suit within the explanation to section 47, any question arising between him and the plaintiff with regard to the execution of the decree would have to be determined by the Court executing the decree, and not by a separate suit. Therefore, the first defendant's claim to the property would have to be determined by the Court executing the decree.

But the real question is whether this application came within the provisions of section 47 of the Code. It was open to the first defendant to ask the Court to hold that a question had arisen between the parties and to decide it. But the first defendant was exactly in the same position as any ordinary outsider claiming against an executing plaintiff with regard to his cause of action. An outsider could not prefer a claim to the property until injury had resulted to him by the property which he claimed to be his having been attached. He could not ask the Court to decide any question relating

to the property until his property had been attached. The order directing that the property should be attached effected nothing against the interest of the first defendant. His application was in effect a *quia timet* application to prevent that happening which he was afraid would happen of the Court after making an order for attachment of his property actually detained his property. No authority has been cited to us which sanctions such an application. In our opinion the application was premature and ought not to have been entertained by the Court. When the property had actually been attached, then the first defendant could complain that his rights had been interfered with and ask the Court to remove the attachment.

We should like to point out that the question which may arise with regard to this property between the plaintiff and the first defendant, and which may have to be tried by the Court executing the decree, is not a question which could possibly be tried by affidavits. Evidently the Court considered, in dealing with the first defendant's application, that it was competent to deal with the matter in a summary manner, the question between the parties having to be ultimately decided by a regular suit, so that if this matter comes eventually before the Court, it will have to deal with the question on evidence, and that evidence would have to be taken in the same way as in a regular suit. The appeal must be allowed and the application dismissed with costs throughout.

W. C. A.

Appeal allowed.

BUBBY HURRY & CO. v. HERTZ & CO.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1559 OF 1918.

February 28, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Fforde.MESSRS. BUBBY HURRY & CO.,
THROUGH HARI RAM OF AMRITSAR—
DEFENDANTS—APPELLANTS

versus

MESSRS. M. HERTZ & CO., LTD.,
MANCHESTER, ENGLAND—PLAINTIFFS
—RESPONDENTS.*Construction of contract—Sale of goods—C. I. F. contract, incidents of—Purchaser, whether can refuse payment except on delivery.*

One of the clauses in a contract for the sale of goods provided that the vendor shall draw upon the purchaser through any Bank in sterling for the total amount of the invoice at 60 days' sight, the Bills of Lading and shipping documents to be handed to the purchaser on payment of the draft. The purchaser further bound himself to accept such drafts for presentation and pay at maturity notwithstanding any objection he may have on account of any variation whatever from the terms of the indent, such objections, if any, to be settled privately or by arbitration. The purchaser also agreed not to raise any claim in respect of the transaction unless he had accepted and retired the draft or drafts:

Held, that on a true construction of the agreement the purchaser was bound to accept the drafts upon presentation on tender of the Bills of Lading and shipping documents, and no claim could be raised by him, nor arbitration invoked until such payment had been made. [p. 422, cols. 1 & 2.]

When goods have been sold upon C. I. F. terms, the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must be tendered within a reasonable time from the time agreed upon for shipment of the goods which they represent. If the contract of sale provides that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft on tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the Bill of Lading, Charter-party, Invoice and Policy of Insurance. Upon payment he can, upon arrival of the ship demand the goods themselves, and should these not be forthcoming, or, when forthcoming, not be of the nature contracted for, all his remedies at law are then open to him. [p. 423, col. 1.]

Clemons Horst Co. v. Biddell Brothers, (1912) A. C. 18; 81 L. J. K. B. 42; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42, *relied on*.

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 30th April 1918.

Lalas Sardha Ram and Jagan Nafh, for the Appellants.

Mr. Philip Morton, for the Respondents.

JUDGMENT.—This is an appeal of the defendants against the judgment of the Subordinate Judge of Amritsar in an action brought to recover damages for breach of contract arising out of an agreement, or agreements for the sale of certain goods. The facts are fully set out in the judgment of the Court below and we will only re-state them so far as is necessary for the purpose of making our reasoning clear.

On the 23rd of December 1909 the defendants-appellants entered into a contract in writing with the plaintiff-respondents whereby the former agreed to buy and the latter to sell certain goods upon the terms and conditions therein contained. This document contains 23 clauses and concludes with a statement that the parties shall "accept the above contract as the basis of the agreement between them."

Clause 2 of the document provides that the vendor shall draw upon the purchasers through any Bank in sterling for the total amount of the invoice at 60 days' sight free of interest, the Bills of Lading and shipping documents to be handed to the purchasers on payment of the draft. The purchasers further bind themselves to accept such drafts upon presentation and pay at maturity, notwithstanding any objection they may have on account of any variation whatever from the terms of the indent, such objections, if any, to be settled privately or by arbitration.

Clause 8 contains the provisions as to arbitration and commences with the statement that the purchasers shall not raise any claim in respect of the transaction unless they have accepted and retired the draft or drafts.

The goods are to be shipped on purchasers account and risk and all offers and prices are deemed to mean "Free Karachi Harbour."

On the 31st December 1912 the appellants wrote to the respondents three letters, the

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first ordering 20 cases of prints, the second 5 bales of *khaki*, and the third 5 cases of white mulls, upon certain terms which need not be fully referred to.

The first two letters expressed terms to be *C. I. F.* Karachi Harbour, and all three opened with the phrase "please supply the following goods on our usual terms and conditions."

The respondents contend that the words "our usual terms and conditions" mean the terms and conditions contained in the agreement of the 23rd December whereas the appellants' contention is that these words refer to the course of business actually transacted between themselves and the respondents and have no reference to the document of the 23rd December which applied only to a specific transaction of that date. The appellants further contend that even if that document does in fact govern the contracts in dispute it does not bear the construction placed upon it by the respondents.

The contest between the parties is mainly concerned with clauses 2 and 8 referred to above.

The respondents claim that under those clauses they are entitled to payment for goods shipped to the order of the defendants upon tender of the shipping documents, and that no question as to quality or condition of the goods can be raised by the purchasers until payment has been effected by the retirement of the drafts. The appellants, on the other hand, maintain that even if these clauses govern the contracts of sale, they are entitled to reject goods which are not up to sample; or of the nature ordered, without retiring the drafts. They also contend that under the arbitration clause they are entitled to refer to arbitration any dispute which may arise as to nature or quality of goods shipped to their order, before any payment need be made. The respondents deny that arbitration can be invoked until the drafts have been retired.

So far as the agreement of the 23rd December is concerned, we have no doubt at all that upon the true construction of that agreement the purchasers are bound to accept the drafts upon presentation, on tender of the Bills of Lading and shipping documents; and that no claim by the

purchasers can be raised, nor arbitration invoked, until such payment has been made.

The further question then arises as to whether or not this document governed the transactions in question. This question would have been material but for the fact that the transactions in dispute are expressed to have been, and obviously were, upon the usual cost freight and insurance contract—a form of mercantile dealing, the principles and legal effects of which have been so exhaustively defined by judicial decisions that no room is left for any doubt or ambiguity whatsoever whenever that form of contract has been adopted.

That it has been adopted in the cases before us is clear beyond question, even if we leave the document of the 23rd December out of consideration. Not only did the letters of the appellants ordering the goods expressly state the terms to be *C. I. F.*, but if any further assurance were required on this point it is provided by the Bills of Lading themselves, which bear on their face the following terms;—

C. I. F. Karachi Harbour draft 30 days' sight.

"Through the Chartered Bank of India, Australia and China.

"Documents against payment
"Insured for £ 75."

No clearer evidence of a *C. I. F.* contract could be found.

The appellants, indeed, admit that the contract was a *C. I. F.* one, but still contend that this does not take away their right as purchasers of specific goods to reject those goods on arrival at the port of destination if they are not up to sample. They maintain that the rights of examination and rejection before payment are implied in *C. I. F.* as in other contracts for the sale of goods. In support of this contention Counsel for the appellants has referred us to the decision of the Court of Appeal in the well known case of *Biddell Brothers v. E. Clemens Horst Company* (1) It was there held by Vaughan Williams, L. J., and Farwell, L. J., (Kennedy, L. J., dissenting) that on a *C. I. F.* contract "terms net cash" the buyers were not bound to pay for certain hops on tender of the shipping

(1) (1911) 1 K. B. 934; 16 Com. Cas. 197.

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documents but were entitled to refuse payment, until upon the arrival of the hops they had been given an opportunity for inspection of them.

Apart from the fact that the contract in that case materially differed from the one before us in that it contained no term expressly providing for a payment against shipping documents—an omission which went to the root of the decision of Farwell, L. J., the decision of the Court of Appeal was unanimously reversed by the House of Lords on appeal *Clemens Horst Co. v. Biddell Brothers*.⁽²⁾ and the dissenting judgment of Kennedy, L. J., adopted with very strong expression of approval. The effect of that and a number of subsequent judgments is to make it clear beyond all possibility of doubt that when goods have been sold upon *C. I. F.* terms the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must of course be tendered within a reasonable time from the date agreed upon for shipment of the goods which they represent. If the contract of sale provides, as it does in the present case, that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the Bill of Lading, Charter-party, Invoice and Policy of Insurance. Upon payment he can, upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or, when forthcoming, not be of the nature contracted for, all his remedies at law are then open to him. So far, therefore, as this part of this case is concerned we are satisfied that the appellants' contentions are unsustainable. The shipping documents and the drafts were duly tendered to them

and they refused to pay, and they have accordingly failed to perform their part of the contract. The respondents, treating this refusal—as they were quite entitled to do—as a breach of the contract, then proceeded to sell the goods by private treaty after having given to the appellants due notice of their intention to do so, and the only matter which remains to be considered is whether or not the respondents had, under the circumstances, a right of re-sale and, if so, whether that right was properly exercised?

That they had the right to re-sell the goods cannot be seriously disputed. If the parties were bound by the terms of the agreement of the 23rd December, the right of sale is governed by clause 3 of that document, which provides that upon failure by the appellants to accept the draft on presentation or pay at maturity, the respondents may sell the goods by public auction or private sale after giving ten days' notice of intention to do so, the appellants undertaking to make good any deficiency or loss sustained and waiving any profit on such sale should there be any.

If the appellants' contention that they are not bound by this agreement be accepted, the right of re-sale is conferred upon respondents by section 107 of the Indian Contract Act (corresponding to section 48 (3) of the English Sale of Goods Act, 1893) which is in all material respects identical in effect with clause 3 of the agreement. Indeed, this clause was obviously based upon section 107 of the Statute. The only difference between respondent's right to re-sell under the Statute and their rights under the agreement is that in the former case it could only be exercised if the property in the goods had passed to the appellants at the time of the breach of contract, while in the latter case it could be exercised irrespective of whether such property had or had not passed. The distinction in the present case is not material as the property undoubtedly passed to the appellants at the latest at the moment of tender of the shipping documents. The only question, therefore, which remains to be considered is whether the sale was a proper one or not. Upon the answer to that question depends

⁽²⁾ (1912) A. C. 18; 81 L. J. K. B. 42; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.

TIMMAPPA ANNAYA & MANJAYA JATTAYA:

the respondents' right to the amount of damages claimed in the present action, namely, the difference between the contract price and the price realised by the sale. As to this, the appellants say that the sale was collusive and fictitious and at an under value. It is true that the manner in which the transaction was carried out was not all that it ought to have been. A person of more than doubtful reputation in commercial matters was selected as commission agent to negotiate the sale, and a good deal of mystery surrounds the identity of the actual purchasers; and, moreover, the evidence as to market-value of the goods at the time of sale is lamentably deficient. But the fact remains that the price actually obtained was higher than an offer made by the appellants themselves. They had ample opportunity to investigate the validity of the transaction at the time and neglected or failed to do so. They have not produced any satisfactory evidence to show that the price realized was an under-value. This question was closely inquired into at the trial, and the Court below has held that the goods realized a proper price and that there was nothing collusive or improper in the manner in which the sale was effected.

Although we may not entirely agree with the learned Subordinate Judge on this particular finding, yet we cannot on the evidence before us hold that he was not reasonably entitled to find as he did.

For the reasons we have given we have no alternative but to dismiss the appeal, the parties to pay their own costs in this Court.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 733 OF 1921.

February 6, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

TIMMAPPA ANNAYA BHATTA—

PLAINTIFF NO. 2—APPELLANT

versus

**MANJAYA JATTAYA SHETTI AND
OTHERS— DEFENDANTS AND**

PLAINTIFFS NOS. 1, 3 AND 4—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II,
r. 2—Tenancy-in-common—Suit for profits—
Subsequent suit for partition, maintainability of.*

Where there is a tenancy-in-common, there is always a constantly recurring right for each tenant to demand partition from the other. Therefore, it is always open at any time, as long as the tenancy-in-common continues, for one tenant to file a suit for partition irrespective of any suit or suits which may have been filed for a share of the profits previously.

The fact, therefore, that in a suit by a joint tenant for a share of his profits he did not sue for partition, would not bar a subsequent suit for partition, as the causes of action not being the same O. II, r. 2, Civil Procedure Code, would not apply.

Second appeal against the decision of the District Judge, Kanara, in Appeal No. 114 of 1922.

Mr. G. P. Murdeshwar, for the Appellant.

Mr. S. V. Palekar, for Respondents
Nos. 2 to 6 and 8.

Mr. Alex A. Pais, for Respondents
Nos. 9, 13 and 14.

JUDGMENT.

Macleod, C. J.— The plaintiffs sued for partition and separation of their half share in the plaint lands. The first issue was, whether the suit was barred by O. II, r. 2, Civil Procedure Code. That issue was found in the affirmative by the Trial Court, and the plaintiffs' claim for partition was disallowed, but a decree was passed against certain of the defendants for Rs. 150, being the plaintiffs' share of the profits of the suit property. An appeal against that decree was dismissed. It has been found that the plaintiffs were entitled to a moiety of the *mulgent* lease relating to the land, and in the Record of Rights of 1909, the plaintiffs were entered as *mulgenidars* along with the defendants' family.

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Then, in 1916, the plaintiffs claimed to have let their moiety of the *mulgenti* to defendants on *chalgenti* for Rs. 50 a year, and they claimed five years' accumulation of unpaid rents. The Court held that there was no evidence of any *shalgenti*. But it held also that plaintiffs and defendants were tenants-in-common, and as the defendants could not prove exclusion, they had to pay the plaintiffs their half share of the mesne profits.

In this suit they asked for partition, in addition to the profits belonging to their share. Now, it will be seen that the cause of action on which the plaintiffs relied in the suit of 1916 was a *chalgenti* lease. It was found that there was no such lease. The Court, however, gave them something which they did not ask for, namely, profits belonging to their share as *mulgenidars*. It is difficult to see, then, how it could possibly be said that the cause of action in the present suit has any connection with the cause of action in the suit of 1916. But even if the plaintiffs in that suit had claimed a half share of the profits in the suit property, which belonged to them and the defendants as tenants-in-common, without suing for partition, I cannot see how such a suit would bar a later suit for partition under the provisions of O. II, r. 2. It is always open to a tenant-in-common to claim his half share of the profits of the land which is jointly owned, and there is no obligation lying on him in his suit for profits, also to claim partition. The cause of action in a suit for profits would be the fact that there is a tenancy-in-common, the fact that one of the tenants has collected the whole of the rents, and the fact that the other tenant is entitled to his share, and the relief which could be claimed on that cause of action would be half a share of the profits. There must always be a constantly recurring right for each tenant to demand partition from the other. Therefore, it would always be open at any time, as long as the tenancy-in-common continued for one tenant to file a suit for partition irrespective of any suit or suits which had been filed between them for a share of the profits during the continuance of the tenancy-in-common. Therefore, it is clear that O. II, r. 2, does not apply to this case,

and the claim for partition must be tried on its merits. The appeal must be allowed and the suit returned to the Trial Court for disposal. The appellant will be entitled to his costs in this Court and in the lower Appellate Court. The costs in the Trial Court will be costs in the cause.

Crump, J.—It seems to me clear that the cause of action in the previous suit is not identical with the cause of action in the present suit. The words "cause of action" must, I think, be interpreted with reference to those facts which the plaintiffs set out as grounds for the relief he claimed. In the previous suit he sued as a landlord to recover rent. In that suit it is difficult to see how he could have claimed partition of the property. That in the course of that trial it was held that he was jointly interested in certain properties and was, therefore, entitled to a share in the profits does not alter the cause of action on which the suit was based. The cause of action for the later suit is the co-tenancy which was held proved in the former suit; and it is clear that those two causes of action are not identical; and, therefore, O. II r. 2 has no application here. Indeed, it would be unfortunate if we were compelled to dismiss the suits on any such grounds, for that would clearly lead to most inconvenient results.

W. C. A.

*Appeal allowed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 361 OF 1920.

February 20, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Florde.**Musammât ZAINAB AND ANOTHER**
—PLAINTIFFS—APPELLANTS*versus***GHULAM RASUL AND OTHERS—**
DEFENDANTS—RESPONDENTS.*Limitation Act (IX of 1908), Sch. I, Arts. 123, 144—Muhammadan Law—Succession—Suit to recover share—Limitation.*

ZAINAB V. GHULAM RASUL.

The joint family is not an institution of the Muhammadan Law. [p. 426, col. 1.]

On the death of a Muhammadan each of his heirs becomes entitled to claim his or her share and limitation begins to run against each under Art. 144 of Sch. I to the Limitation Act. [p. 427, col. 1.]

There is no presumption in such a case that the male heirs hold the shares of the female heirs on behalf of the latter as managers of a joint family. [p. 427, col. 1.]

Nasiruddin Shah v. Lal Bibi, 89 P. R. 1888, *Murad Khatun v. Muhammad Bakhsh*, 33 Ind. Cas. 742; 84 P. R. 1916; 85 P. W. R. 1916, followed.

Khadersa Hajee Bappu v. Puthen Veetil Ayissa Ummah, 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447, referred to.

Second appeal from a decree of the District Judge, Multan, dated the 17th December 1919, reversing that of the Junior Subordinate Judge, Multan, dated the 23rd December 1918.

Mr. *Abdul Rashid*, for the Appellants.

Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—This order will dispose of three connected second appeals from the decrees of the District Judge of Multan, dismissing the suits of the plaintiffs in three cases as barred by time.

The pedigree table of the parties will be found printed at page 10 of the paper-book in Civil Appal No. 361. The house of which portions are in dispute in each of the three cases belonged to Nur Mohammad, the common ancestor of the parties, who died some 40 years ago. From the plan put in by the plaintiffs it appears that the house is in possession of the three sons of Khuda Bakhsh or of their descendants on approximately equal shares. The eastern portion is in the possession of the sons of Karim Bakhsh, the western portion in the possession of the sons of Peer Bakhsh and the central portion was occupied by Ali Muhammad during his life time. Ghulam Rasul had Ali Muhammad's house attached in execution of a decree against Ali Muhammad. *Musammal Zainab*, the daughter of Nur Muhammad, and Murad Bakhsh, his daughter's son, plaintiffs in Case No. 39, objected to the attachment but their objection was disallowed, and they, therefore, sued for a declaration that they were owners of half of the house attached in execution of the decree against Ali Muhammad. Similarly, Ghulam Rasul got the portion of the house occupied by Karim Bakhsh's sons

attached in execution of a decree against his three sons. This house was also attached by Kaura Lal in execution of his decree against Faiz Bakhsh. *Musammal Khairan*, *Musammal Bakht Bhari* and *Musammal Murad Khatun* objected to the attachments and claimed a share in the house and, their objections having been disallowed, they instituted Suits Nos. 40 and 102 to establish their rights. The plaintiffs claimed that they were governed by Muhammadan Law. The lower Appellate Court, without deciding definitely whether the parties were governed by Muhammadan Law or by custom, held that, on the assumption that they were governed by Muhammadan Law, all the suits were barred by time under Art. 123 of the Indian Limitation Act. It further held that the plaintiffs in the suits out of which Civil Appeals No. 362 and 364 have arisen have no *locus standi* because Karim Bakhsh, from whom they claim, died in the lifetime of his father Khuda Bakhsh, and, therefore, his daughters and widow could not claim any share in the house under Muhammadan Law. In second appeal it is urged by Mr. Rashid on behalf of the appellants that Art. 123 of the Indian Limitation Act does not apply and in support of his argument he relies upon the case of *Khadersa Hajee Bappu v. Puthen Veetil Ayissa Ummah* (1) wherein it was held that where a Muhammadan dies intestate his estate at once vests in his heir as tenants-in-common and there is no one charged by law with its distribution and in a suit by one of the heirs to recover his share, Art. 123 of the Limitation Act does not apply. The learned District Judge referred to this authority which he admitted was in favour of the view that the suits were within time but he considered himself bound to follow *Nasiruddin Shah v. Lal Bibi* (2) which was approved in *Murad Khatun v. Muhammad Bakhsh* (3). In *Nasiruddin Shah v. Lal Bibi* (2) the learned Judges pointed out that the joint family is not an institution of Muhammadans governed by

(1) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447.

(2) 89 P. R. 1888.

(3) 33 Ind. Cas. 742; 84 P. R. 1916; 85 P. W. R. 1916.

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Muhammadian Law and that in that particular case it could not be concluded that there was any joint holding after the death of the proprietor whose estate was in dispute, and further that it could not be presumed that the male relations were holding as managers of an admittedly joint family. They went on to say, at page 240* of the Record, "each sharer became entitled, on Ghulam Nabi Shah's death, and on Kabir Shah's death, to a share, and limitation runs against each." They did not definitely mention Art. 123 of the Indian Limitation Act but held that the suit was barred because of the rule of 12 years' adverse possession. Again, in *Murad Khatun v. Muhammad Bakhsh* (3) at page 257† of the Record, the learned Judges remarked: "There is no proof of the existence of a joint family, and it is manifest that each heir was entitled to claim his or her share on the death of the owner, whose estate was in dispute. Yar Mohammad, Umar, Ramzan and Kadir Bakhsh died more than 12 years prior to the suit, and limitation began to run from the date of each owner's death. It is clear that the right of inheritance of other persons became barred after the lapse of 12 years, vide *Nasiruddin Shah v. Lal Bibi* (2) which is on all fours with the present case." It appears to us that both these cases were decided under Art. 144 of the Indian Limitation Act and, premising that this Article applies to the present case, we have no doubt that the claim of the plaintiffs is barred by time. The learned District Judge has found that the plaintiffs had never been in joint possession of the house along with their male relatives. This is a finding of fact which cannot be contested in second appeal. It is quite clear that the descendants of Khuda Bakhsh have divided the ancestral house between them in practically equal shares. There is no ground for holding that they took possession on behalf of the female descendants of Nur Muhammad. It is clear that they were holding on their own behalf and, therefore, the Punjab rulings are clearly in point.

As regards the suits brought by *Musammât Bakht Bhari*, *Musammât Khairan* and

Musammât Murad Khatun, Mr. Rashid had to admit that under Muhammadian Law they had no *locus standi* as Karim Bakhsh, through whom they claimed, died before his father Khuda Bakhsh.

We note that a preliminary objection was raised by respondents' Counsel to the effect that in the absence of a certificate by the District Judge the appeals were not competent. The judgment of the lower Appellate Court, however, shows that that Court did not definitely decide whether the parties were governed by Muhammadian Law or by custom though it inclined to the view that they were governed by custom. No certificate was, therefore, necessary.

The appeals accordingly fail and are dismissed with costs.

Z. K.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 135 OF 1922.

March 7, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

SAYAD MIRA SAHEB, SAYAD SAHAJI MIA RAFI AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

BAI CHHOTI BEGAM AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Construction of document—"Auladdar aulad," meaning of.

The expression *auladdar aulad* in a document includes descendants whether male or females except descendants through females.

Abdul Ganne Kasam v. Hussan Miya Rahimulla, 10 B. H. C. R. 7, followed.

Second appeal against the decision of the District Judge, Surat, in Appeal No. 84 of 1920.

Mr. G. N. Thakor (with him Mr. R. J. Thakor), for the Appellants.

Mr. M. B. Dave, for the Respondents.

JUDGMENT.—The plaintiffs sued to recover possession of the plaint property on the allegation that defendant No. 1 to whom it was given for residence, delivered

*Page of P. R. 1888—[Ed.]

†Page of P. R. 1916—[Ed.]

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it: to defendant No. 2, after executing a gift-deed. The plaintiff's suit was decreed in the Trial Court, but after a remand this decree was reversed by the District Judge. The house was admittedly *wakf* property. By the document, Exhibit 40, which has been relied upon by both sides, undoubtedly the descendants of the person who executed that document were entitled to reside in the suit house. It was argued the term "*auladdar aulad*" only meant male descendants, but there is no authority for that argument. On the contrary, the decision in *Abdul Ganne Kasam v. Hussien Miya Rahimtulla* (1) clearly shows that "*auladdar aulad*" include descendants whether male or female, except descendants through females. The plaintiffs had to admit that female descendants had a right of residence until their marriage, and also if a female of the family was forsaken by her husband or became a widow and has no house of her own, she could come and live in the house. But there can be no distinction between female descendants through males, for the right of residence belongs to them by reason of their descent, and not merely by reason of their being unmarried, or widows, or forsaken, as defendant No. 1 has a right of residence in the house, then it must follow the plaintiffs are not entitled to recover the property mentioned in the plaint. If they are dissatisfied with the arrangement which exists at present with regard to the residence of various members of the family, then they can take the necessary proceedings for claiming distribution of the premises. The appeal is dismissed with costs.

S. R. P.

Appeal dismissed.

(1) 10 B. H. C. R. 7.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 20 OF 1919.]

February 2, 1923.

Present:—Mr. Simpson, J. C., and
Mr. Dalal, A. J. C.J. C. GALSTAUN—DEFENDANT—
APPELLANT

versus

Mirza ABID HUSAIN—PLAINTIFF—
RESPONDENT.

Parties—Mortgage suit—Person claiming title paramount, whether proper party—Muhammadan Law—Legitimacy—Evidence Act (I of 1872), s. 18—Admission by predecessor-in-title, when admissible.

A plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee. [p. 432, col. 1.]

This rule is not one of convenience merely, and where the holder of a title paramount objects to being made a party to the mortgage-suit he must be discharged, even where it would be convenient to try his title in the mortgage-suit proceedings. At the same time, where no clear and distinct claim is made in the pleadings by such a party defendant and a prayer in express terms to be dismissed from the suit not being made the Court is permitted to proceed to a trial on the merits, without protest the party cannot during arguments in the first Court after a protracted trial demand that he should be dismissed from the suit. [p. 432, col. 1.]

The Muhammadan Law raises a strong presumption in favour of legitimacy where a child is born under a man's roof and continues to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring. [p. 433, col. 2.]

Statements made by persons from whom the parties to a suit have derived their interest in the subject-matter of the suit are admissible as admissions only when the admissions are of a date prior to the date of the transfer. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party claiming through them by title subsequent to the admission. [p. 434, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Lucknow, dated the 23rd December 1918.

Messrs. Zahur Ahmad and Bisheshwar Nath, for the Appellant.

Messrs. Wazir Hasan and P. L. Banerjee, for Respondent No. 1.

JUDGMENT.—This is an appeal from a decree of the Additional Subordinate Judge of Lucknow in a suit for sale on foot of a simple mortgage. Mirza Sayed Hasan

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Khan, the plaintiff, sued the mortgagor, Nawab Sultan Hasan and Mr. Hyam for recovery of Rs. 19,700 odd by sale of a one-fourth share in two properties:—

(1) A house in Calcutta at No. 13, Russell Street, and

(2) Revenue-paying property in a village in the Lucknow District.

The mortgage was executed on 15th September 1908 for Rs. 10,000 carrying interest at the rate of 1 per cent. per mensem re-payable in 8 months after the execution of the deed. In paragraph 5 of the plaint the reason given for joining Mr. Hyam as defendant was that he gave himself out as a vendee of the entire house in Russell Street from a co-sharer of the mortgagor. The mortgagor in his written statement admitted the claim and the contest lay between the plaintiff and Mr. Hyam. In the first part of his written statement Mr. Hyam denied the ownership of the Calcutta house by defendant No. 1 and the alleged mortgage. In paragraph 3 he alleged that the plaintiff had no cause of action, more particularly against him; and in paragraph 5 he claimed to be in possession of the house as purchaser under a deed of sale executed by Nawab Mehdi Ali Khan, his daughter Nawab Ummat-ul-Khatima Begam and her two sons, Mohammad Hashim Ali Khan and Muhammad Kasim Ali Khan in 1915, and in paragraph 6 he denied that the plaintiff was entitled to any relief against him. Paragraphs 7 to 12 of the written statement contained additional pleas:

(7) that the alleged title of the mortgagor rested on a claim to inherit a share in the house from his alleged father, Nawab Zaigham-ud-dowlah,

(8) that the mortgagor was never in possession of his alleged share of the house and that Mr. Hyam's vendors had all along been in adverse possession,

(9) that the right of the mortgagor, if any, to a share in the house became extinct on 21st August 1910 by expiry of 12 years from the death of Nawab Zaigham-ud-dowlah,

(10) that such a right, if any, lapsed on 19th March 1913, when the mortgagor withdrew his suit against Mr. Hyam's vendors and a decree was passed by this Court accordingly, and

(12) that the suit was barred by limitation as against Mr. Hyam.

The 11th plea was a repetition of the two previous ones. The suit was filed on 24th October 1916 and the written statement was filed on 5th February 1917. On the 28th March 1917 Mr. Hyam's learned Counsel made a statement that the allegation in the plaint, of the mortgagor being a son and heir of Nawab Zaigham-ud-dowlah was denied. On the same date the following issues were framed by the learned Judge of the lower Court:—

(1) Is the defendant No. 1 one of the sons and heirs of Nawab Zaigham-ud-dowlah?

(2) Is the defendant No. 2 estopped from denying the allegation embodied in the first issue?

(3) Did defendant No. 1 own the property in dispute in 1908? If so, did he mortgage it to the plaintiff by a deed dated 15th September 1908, (Exhibit I) for consideration?

(4) (a) Was the defendant No. 1 in possession of one-sixth share in Kothi No. 13 situated in Russell Street, Calcutta, at the time of the mortgage in question?

(b) If not, did he lose his right to the same subsequent to mortgage as alleged. If so, to what effect?

(5) Was defendant No. 1's right to one-fourth share in Kothi No. 13 in Russell Street, Calcutta, extinguished by a decree of the Court, or by the defendant No. 2's vendor's remaining in possession of the property for above 12 years as alleged?

(6) Cannot.....bring the property to sale as alleged?

(7) To what relief, if any, is the plaintiff entitled and against which of the defendants?

On the 3rd December 1918 after arguments commenced the learned Judge added two more issues Nos. 7 and 8 bringing the 7th issue previously framed as 9?

(7) Has the plaintiff any cause of action against defendant No. 2?

(8) Is the suit as against defendant No. 2 barred by limitation?

The suit was decreed against both the defendants whereupon Mr. Hyam appealed to this Court. The grounds of appeal excepting No. 13 relating to costs attack the findings of the lower Court on all the issue?

Nawab Zaigham-ud-dowlah died on 1st August 1898. On 5th February 1895

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he had executed a deed of trust purporting to transfer to two trustees, his wife, Nawab Ummat-ul-Fatima, and her father, Nawab Mehdi Ali Khan, properties situated in Oudh and the house in suit in Calcutta upon trust for the benefit of his wife during her life, with remainder to his two sons by her, Hashim Ali Khan, Kasim Ali Khan. After the death of Nawab Zaigham-ud-dowlah, his widow and her father declaring themselves to be trustees and in possession of the house in Russell Street which is in dispute in this case, executed a power of attorney in favour of Madho Lal Doongar on 29th August 1902, a usufructuary mortgage deed on 13th September 1902, and two deeds of further charge in 1904. On 7th September 1907 another usufructuary mortgage was executed in favour of the same persons. Out of the consideration only a portion was devoted to the payment of the prior mortgages. The lady and her father in the same capacity conveyed the house to Mr. Hyam under a sale-deed dated 28th January 1915, and a portion of the sale consideration was left with him to redeem the mortgage of Madho Lal Doongar. This is how Mr. Hyam contested the suit as owner of the house in Russell Street. The present appellant, Mr. Galstaun, is a purchaser of the rights and interests of Mr. Hyam in the house in suit.

There were certain transfers of the estate of Nawab Zaigham-ud-dowlah in Lucknow which led to litigation which requires mention in this case. On 26th June 1900 the Nawab's widow executed a simple mortgage of some of the Lucknow property in favour of the plaintiff-respondent for herself and on behalf of her two sons, then minors. On 3rd November of the same year Sultan Hasan Mirza mortgaged his share of certain properties to the plaintiff. In 1908 there were two suits by the plaintiff against the lady and her two sons to enforce the mortgage of June 1900, and another by the lady's two sons, Hashim Ali Khan and Kasim Ali Khan, against Sultan Mirza and the plaintiff for a declaration that the former had no rights in the property which he could mortgage to the latter by the deed of November 1900. The plaintiff of the present suit was successful in the Trial Court. In both suits he lost in appeal here. Permission was granted by the Court to file an appeal to the Privy Council but subse-

quently Sultan Mirza withdrew from the appeal and the plaintiff prosecuted both the appeals alone in the Privy Council which set aside the decrees of this Court and restored those of the Trial Court *Sadik Husain Khan v. Hashim Ali Khan* (1). In 1910 Sultan Mirza sued the lady, her sons, Madho Lal Doongar and others for recovery of possession of his share of the Russell Street house, among other properties. This suit was withdrawn by him unconditionally and dismissed in 1913.

The first point argued on behalf of the appellant is covered by the first three grounds of appeal. The contention was that the defendant-appellant was not a proper party to a suit for sale by the plaintiff on foot of his mortgage of 15th September 1908 and should have been discharged at the commencement of the proceedings in the lower Court. It will be noticed that it is in this Court for the first time that a specific plea has been put forward that the defendant-appellant was not a proper party to the plaintiff's suit. As already pointed out in the written statement, the plea was that the plaintiff had no cause of action against other defendants and, in any event against the defendant-appellant. It is obvious that the lower Court did not take this to be a plea under O. I, r. 13 as to mis-joinder of parties requiring an immediate decision under O. XIV, r. 2 of an issue of law raised in the pleadings. The general issue "To what relief, if any, is the plaintiff entitled and against which of the defendants?" did not include a question as to the form of the suit and the joinder of parties. The intention was to determine under that issue whether a decree could be passed after contest against the defendant-appellant or not. The defendant-appellant had an opportunity on 28th March 1917 of clearing the pleadings and raising objections to the issues framed by the Court. In fact an objection to the first paragraph of the fourth issue, was raised by the plaintiff's Counsel, and if the Counsel for the defendant-appellant had considered the issues to be defectiv-

(1) 36 Ind. Cas. 104; 19 O. C. 192 at p. 212; 31 M. L. J. 607; 14 A. L. J. 1248; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 377; 21 M. L. T. 401; 38 A. 627; 1 P. L. W. 1371; 4 O. L. J. 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140; 43 I. A. 212 (P. C.).

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or insufficient he would have pointed this matter out to the lower Court. From the nature of the pleadings it is clear that the intention of the defendant-appellant in the Trial Court was to enter into contest and it was not till 20 months later during arguments that a specific objection was raised to the form of the plaintiff's suit. The rule is well recognised as laid down in the case of *Jaggewar Dutt v. Bhuvan Mohan Mitra* (2), that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage and who has set up a title paramount to that of a mortgagor and mortgagee. This is the only case so far as we know where persons who were parties to the suit and had a paramount title to the property were dismissed from the suit by the Appellate Court. In the other reported cases where this rule was followed the stranger having paramount title desired to be made a party defendant to the suit and such a claim was refused: *Satagauda Appanna v. Satappa Daragauda* (3). *Joti Prasad v. Aziz Khan* (4) *Shamu Patter v. Abdul Kadir Rowthan* (5). It would, therefore, be necessary to examine with some care the principles of the decision of the Calcutta rulings. It is important to notice that the suit was first resisted by Dutt defendants on the ground that it was not properly framed inasmuch as adverse claimants in their position could not repeatedly be made parties to the mortgage suit for the purpose of litigating their titles. The Trial Court gave its decision on this contention first and overruled their objection that they ought to be dismissed from the suit. After this preliminary order, evidence was taken in the case which was heard on the merits. The plea in the opinion of the High Court was not one of jurisdiction but of the frame of the litigation and the scope of its enquiry. The same Judge who delivered the judg-

ment of the Bench pointed out in another case a few months later, *Bhaja Chowdhury v. Chuni Lal* (6), that the question whether the title which a third person alleges to have acquired after the plaintiff's mortgage is or is not a real title which is entitled to priority over the mortgage sought to be enforced is a question which may be tried and adjudicated in a mortgage suit. The learned Judge, therefore, observed: "The question is not one of jurisdiction, but rather of the form of the litigation, and the scope of its enquiry; in other words, the question was a question of multifariousness or of convenience affecting the discretion only and not the jurisdiction." He quoted with approval the following observations of a learned Judge in an American case:

"Having assumed the role of being a proper and necessary party defendant, having pleaded to the merits, a person cannot, after being cast in the suit, now change front and insist that error occurred in making him a party-defendant. Parties litigant are not allowed to assume inconsistent positions in Court; having elected to adopt a certain course of action, they will be confined to that course which they adopted."

In *Jaggewar Dutt v. Bhuvan Mohan Mitra* (2) the learned Judge did lay down that the rule is not merely one of convenience but he proceeded to investigate whether the rule had any, and if so, what exceptions. He pointed out that one of the exceptions was that when a person who has been made a defendant in a foreclosure suit has set up in answer a paramount title and when that matter without objection has been gone into he cannot, if defeated, rightly ask a reversal on the ground that the issue was not properly triable in the action. Though the learned Judge held the rule to be not one of convenience merely, he went on to consider the question of convenience with respect to the case before him and gave it as his opinion, that it would be more convenient to discharge the Dutt because in any case the paramount title had not been properly enquired into by the Trial Court and a remand would be necessary if they were kept as parties on the record. To deduce a principle it may be

(2) 33 C. 425; 3 C. L. J. 205.

(3) 57 Ind. Cas. 577; 44 B. 698; 22 Bom. L. R. 815.

(4) 1 Ind. Cas. 53; 31 A. 11; 6 A. L. J. 51; 5 M. L. T. 471; A. W. N. (1908) 263.

(5) 16 Ind. Cas. 250; 10 A. L. J. 259 at p. 261; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(6) 5 C. L. J. 95; 11 C. W. N. 284.

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said that the rule is not one of convenience merely and where the holder of a paramount title objects to being made a party to the mortgage suit he must be discharged even where it would be convenient to try his title in the mortgage suit proceedings. At the same time, where no clear and distinct claim is made in the pleadings by such a party defendant and a prayer in express terms to be dismissed from the suit not being made the Court is permitted to proceed to a trial on the merits, without protest, the party cannot during arguments in the First Court after a protracted trial demand that he should be dismissed from the suit. In the present case the suit was instituted on 24th October 1916, and decided on 23rd December 1918. The appeal filed on 3rd April 1919 has come to a hearing in 1923. We ought not to grant the appellant's prayer for discharge from the suit in 1923 when he failed to insist upon it as he ought at the end of 1916.

If we enquire into the reasons for the general rule it appears to be founded on three grounds of objection.

1. Multifariousness:—The joinder of causes of action against a mortgagee and a holder of a paramount title are prohibited under O. II, r. 4, except by leave of Court.

2. Confusion:—Their Lordships of the Privy Council pointed in *Radha Kunwar v. Reoti Singh* (7), that the joinder of the parties was irregular and tended to confusion where the persons entitled to the benefit of the mortgage sued, along with the mortgagors, certain people who had set up adverse claim to the mortgaged property.

3. The trial of the adverse title by a Court not competent to try a suit properly framed for the purpose:—A Munsit may have jurisdiction to try a suit of samil valuation to enforce a mortgage while the value of the property in respect of which an adverse title is set up may be large and within the jurisdiction of the Subordinate Judge.

In the present case the third objection does not exist; the lower Court tacitly permitted the causes of action to be joined

and if any slight confusion has arisen the Counsel of the parties have removed it by their able conduct of the suit and arguments by them in the lower Court and here.

We do not assent to the plea of the respondent's learned Counsel that the provisions of section 99 of the Code of Civil Procedure will prevent us from discharging the appellant from the suit. We have noted that the provisions of that section in their present altered form were first enacted subsequent to the ruling in *Jaggaswar Dutt v. Bhuban Mohan Mitra* (2) noticed above but they have no application here because the plea of the appellant is not that the suit should be dismissed for mis-joinder of parties but that he should be relieved of the burden of the lower Court's decree because he was not a proper party to the suit.

We hold that at the present stage of the proceedings the appellant is a proper party to the suit.

We shall next consider the question of legitimacy of Sultan Mirza. (Grounds of appeal Nos. 5 to 9). Objection was raised on behalf of the appellant to the admission by the lower Court of certain documents. We think that the mutation applications, Exhibits 8 to 16, by which Sultan Mirza and the lady *Musammam Ummat-ul-Fatima* applied for mutation with regard to the revenue-paying properties situated in Oudh on the death of Nawab Zaigham-ud-dowlah were rightly admitted both under section 13 and section 50 of the Evidence Act. Those were the occasions when Sultan Mirza asserted his right as a legitimate son of the Nawab and every one of them may also be taken as an expression of the lady's opinion at the time that Sultan Mirza was legitimate. Exhibit 24 is a copy of a plaint filed by the relations of Sultan Mirza in which he is described as the son of Nawab Zaigham-ud-dowlah and Exhibit 25 is a copy of another plaint in which Sultan Mirza and his relations appeared jointly as plaintiffs and in which he was described as the son of Nawab Zaigham-ud-dowlah. Both these documents are admissible under section 50 of the Evidence Act. The judgments, Exhibit 5 and Exhibit 6, of the Subordinate Judge and of the Privy Council are evidence of a transaction in which the plaintiff to the present suit asserted the right of

(7) 35 Ind. Cas. 939; 38 A. 488 at p. 491; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L. W. 456; 43 I. A. 264 (P. C.).

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Sultan Mirza as legitimate son of the Nawab and are, therefore, relevant under section 13 of the Evidence Act. We do not think that Exhibits X, Y and Z (an application for guardianship of her sons and an application for Succession Certificate, both presented to the District Court by the lady, and a mortgage-deed executed by her) were not rightly admitted by the lower Court during the lady's cross-examination. These copies ought to have been filed on behalf of the plaintiff at the first hearing as laid down in O. XIII, r. 1, and could be admitted subsequently under rule 2 if the Court was satisfied that there was good cause for the non-production thereof at the proper time. In the present case no cause was alleged for the delay and the reason given by the lower Court for the admission was in the interest of justice. In cross-examination their use ought to have been confined to the extent of contradicting the lady under section 145 of the Evidence Act. To permit a party to file new documents bodily at a late stage of the proceedings would be very unfair to the other party. The lady herself admitted the presentation of the two applications and the execution of the mortgage-deed so no occasion arose to contradict her. As regards the mortgage she stated: "I agreed to mention and did mention Sultan Hasan's name in the deed as one of the sons and heirs of my husband." Further on she said: "I mortgaged the trust property under this deed." It is not clear how the mortgage-deed, Exhibit, Z, was required at this stage to contradict the lady's statement. In this judgment we shall not make use of the Exhibits X, Y and Z beyond referring to the statement of the lady and her transactions in these matters.

In the present suit Sultan Mirza asserted on oath that he was a legitimate son of the Nawab and the lady did not positively deny the legitimacy. We notice with satisfaction that the Judge of the lower Court himself took the trouble of visiting the lady's house and recording her statement himself. The suggestion of the plaintiff was that Sultan Mirza was a legitimate son of the Nawab by a *mutu* wife. The lady's statement was, "I learned from *anna* (wet-nurse) that Sultan Mirza was son of Zohra who was not married either by *nikah*

or by *muta* to Nawab Saheb, but I do not know how far this is correct." The Muhammadan Law raises a strong presumption in favour of legitimacy where a child was born under a man's roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring. It is certain that Sultan Mirza was the Nawab's son by Zohra. The lady has admitted that the Nawab used to bear the expenses of Sultan Mirza's bringing up and that she appeared before Sultan Mirza. On the death of the Nawab, Sultan Mirza was given a share in *Zemindari* property in Oudh and has been treated throughout his life as the legitimate son of the Nawab, wherever any legal proceedings were taken with respect to the estates of the Nawab, after his death Sultan Mirza was mentioned as his son and one of the heirs of his property. There is no definite evidence or any possible inference from any conduct of the Nawab's relations to the contrary. In the previous litigation when the plaintiff to the present suit asserted the right of Sultan Mirza as the legitimate son of the Nawab that right was recognised by the Privy Council, (Exhibit 6). The evidence leads entirely one way and we hold that Sultan Mirza is the legitimate son of the Nawab.

We now come to the most important question of this appeal: Whether Sultan Mirza's title to the Calcutta house had been extinguished by adverse possession of the lady at the time of the execution of the mortgage in suit. A very feeble attempt was made in this Court to support the trust made by the Nawab during his lifetime. A copy of the trust-deed was not filed on behalf of the appellant. The trust deed may either operate for the consideration of the lady's dower or as a gift under the Muhammadan Law. The lady gave no release of a dower debt. In her statement she does not specifically say that she accepted the trust in lieu of her dower-debt and relinquished her claim for dower. If the trust amounted to a gift under the Muhammadan Law immediate possession by the trustees or at least possession during the lifetime of the donor ought to have been proved. There is no such proof on the record. We have already seen that mutation as regards

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the Oudh *zemindari* property included in the trust was made after the Nawab's death and not during his lifetime. The mortgage-deed of 8th September 1904 executed by the lady and her father in favour of Madho Lal Doongar contained a recital of a suit in the High Court of Bengal of 1895 during the Nawab's lifetime. Neither the file of that suit nor a copy of the decree is before the Court, and it is not possible to determine how far that suit would support the possession of the trustee during the life-time of the Nawab. The lady stated that after the execution of the trust-deed she recovered the rent of the house through her husband in whose favour she had executed a power of attorney. A copy of any such power of attorney is not on the record. She then went on to say that her father also collected rent on her behalf on the authority of a power of attorney from her. The gift was in favour of the lady and her father so her statement would indicate that the father never took possession. There is thus no evidence that a deed of trust operated either by way of consideration or as a gift and we hold that it was inoperative.

We have, first, to consider the nature of the lady's possession of the house in suit at its inception. She was entitled to possession as one of the heirs of her husband, so the inference must be that she took possession of the house on her husband's death in that capacity. On behalf of the appellant it was not pointed out when and how the possession became adverse and what notice Sultan Mirza had of any such adverse title. The argument here was that at its very inception the lady's possession was adverse but we cannot accept that contention because the lady had a legal title to possession. She herself admitted that Sultan Mirza never demanded any share of the rent of the house and that, therefore, there was no occasion for her to refuse payment. All the mortgage-deeds and the sale-deed in favour of Mr. Hyam were executed at Calcutta at a great distance from Lucknow, where Sultan Mirza lived. The evidence of the mortgagee, Madho Lal Doongar which was recorded in another suit was admitted in evidence by the lower Court as he had died since. The first mortgage-deed was executed in 1902 and it will appear from his evidence that most

of the money was spent in the repairs of the house. After that the rent of the house went towards payment of interest and principal amount. Some vague statements are made by witnesses of the house being rented to one Mrs. Emmett prior to 1902, but the evidence is not definite as to the lady realising any net income from the house between 1898 when the Nawab died and 1902 when the house was first mortgaged. Sultan Mirza has stated that he first came to realise the lady's dealings with the property adversely to him when Madho Lal Doongar was examined as a witness in the previous suit on 27th June 1908. Since then 12 years had not elapsed before the institution of the present suit on 24th October 1916.

The appellant's Counsel relied on one document and a reference to another document to establish the lady's adverse title. On 28th July 1910 Sultan Mirza sued for his share of the house in Russell Street, as already mentioned. In that plaint, Exhibit B-1, he based his cause of action on the lady's adverse possession from the date of the death of the Nawab. The statement, however, is not admissible as an admission against the plaintiff under section 18 of the Evidence Act. Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissible as admissions, only when the admissions are of a date prior to the date of the transfer. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party claiming through them by title subsequent to the admission. The mortgage in suit was executed prior to the date of the plaint and so the statement of Sultan Mirza cannot be admitted as an admission against the plaintiff. During the examination of Madho Lal Doongar on 27th June 1908 he was questioned whether he had received a letter from Sultan Mirza on 12th November 1904, and replied that he did not remember. Neither the letter nor a copy is before us: so it is not clear what conclusion the appellant desires the Court to draw from this reference. Sultan Mirza has denied sending any such letter. The reference is too slight to justify any Court in holding that Sultan Mirza was aware of

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the mortgage in 1904 and that the lady had been in adverse possession as against him since that date. Moreover, such an inference would not help the appellant, because the present suit was filed within 12 years of 12th November 1904.

It was argued on behalf of the appellant that when Sultan Mirza was given a specific share in the *zemindari* property of the Nawab in Oudh, there was sufficient notice to him that the lady was holding the Calcutta house adversely to him. The lady has deposed that, after the death of her husband, Sultan Mirza threatened to kill her sons if she did not give him a share in some of the Nawab's property, but we do not believe this statement. It seems to us the lady had regard for Sultan Mirza and, therefore, went to the length of a temporary disagreement with her father and allowed him his share in the property left by the Nawab. The relations between the two appear to have been amicable throughout. We have seen how Sultan Mirza withdrew his suit and the Privy Council Appeal against the lady's sons. The relations between the parties being of this nature there was no reason for Sultan Mirza to fear that the lady would act against his interests. As already pointed out, there is an entire absence of evidence to prove any income from the house in Russell Street. Her actions immediately after the death of her husband were entirely favourable to Sultan Mirza as is apparent from her making him a party to the various mutation applications. When such was the case the appellant ought to have pointed to some definite indication of her hostile attitude which would warn Sultan Mirza that her interests had become adverse to his. The appellant's learned Counsel pointed to the various mortgages as proof of the fact that she did not act on behalf of her husband's heirs but adversely to their interest. The circumstances, however, easily explain that she should have assumed the role of a trustee without any intention of injuring the rights of her co-heirs. There was the trust-deed in existence and reference has been made to a friendly suit in the High Court during the life-time of the Nawab. When money was urgently needed for repairs it was the most convenient course for the lady to borrow in the capacity of a trustee. On a consideration

of all facts of the case we hold that the lady entered into possession of the house after the death of her husband as one of his heirs; that her possession was not adverse to that of the other heirs, and that Sultan Mirza had no reason to believe that she was holding adversely to him until the statement of Madho Lal Doongar was recorded on 27th June 1908. Sultan Mirza had, therefore, a subsisting title in the house at the date of the mortgage in suit on 15th September 1908. It was admitted by the appellant's learned Counsel that the withdrawal of his suit of 1910 by Sultan Mirza did not extinguish the plaintiff's title under the mortgage.

We next come to the question of limitation viewed from a different stand point. The suit is one for sale on foot of a mortgage-bond and the lower Court held that Art. 132 applied. The argument on behalf of the appellant was that that Article covered the case only of the mortgagor while the claim against him was covered by Art. 120. He argued that the suit as against the appellant was really one for a declaration of title. Not to multiply rulings, we may mention that this point was decided by a Full Bench of the Allahabad High Court in *Raj Nath v. Narain Das* (8). It is applicable here, because Mr. Hyam's possession was subsequent to the date of the mortgage. In that case the plea was that Art. 144 applied. That Article will not avail the appellant here, because the suit was brought within 12 years of the lady's possession becoming adverse to that of Sultan Mirza to his knowledge. The arguments on behalf of the appellant have not disclosed any reason to induce us to differ from the opinion of the Allahabad High Court. We were asked to consider the appellant's contention favourably on the ground that, if he had not been improperly joined in the present suit, the plaintiff's claim against him would have been time-barred. We do not think such would have been the case if the plaintiff had been permitted to obtain a consent decree against Sultan Mirza in 1916 and a purchaser of the property had sued the appellant for possession within

(8) 24 Ind. Cas. 997; 36 A. 567; 12 A. L. J. 982 (F. B.).

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12 years of July 1908. The inordinate length of the present litigation, for which Mr. Hyam and the present appellant are principally responsible, has extinguished the title of any such purchaser, but that is no reason for showing any favour to the appellant's contention.

As regards the 3rd, 4th and 6th issues mentioned in the ground of appeal No. 12 we uphold the findings of the lower Court.

We dismiss the appeal with costs.

W, C. A.

Appeal dismissed.

PRIVY COUNCIL.**APPEAL FROM THE BOMBAY HIGH COURT.**

March 6, 1923.

Present.—Lord Dunedin, Lord Atkinson and Lord Wrenbury.

CHAMPSEY BHARA & Co.

—APPELLANTS

versus

THE JIVRAJ BALLOO SPINNING AND WEAVING CO., LTD.—RESPONDENTS.

THE JIVRAJ BALLOO SPINNING AND WEAVING CO.—APPELLANTS

versus

CHAMPSEY BHARA & Co.—

RESPONDENTS.

Arbitration—Arbitrators sole judges of law and fact—Exceptions to rule—Error of law on face of award, meaning of—Jurisdiction, question of.

Where a cause or matters in difference are referred to an arbitrator, he is constituted the sole and final judge of all questions both of law and fact. The only exceptions to this rule are, where the award is the result of corruption or fraud, or where a question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. This latter exception should not be given an extended meaning. [p. 438, col. 1.]

Hodgkinson v. Fernie, (1857) 3 C. B. (N. S.) 189; 27 L. J. C. P. 66; 3 Jur. (N. S.) 818; 6 W. R. 181; 140 B. R. 712; 111 R. R. 614, followed.

An error of law on the face of the award means that there is in the award, or a document actually incorporated thereto, some legal proposition which is the basis of the award and which is erroneous. [p. 439, col. 1.]

The question of whether an arbitrator acts within his jurisdiction is for the Court to decide, but whether the arbitrator acts within his jurisdiction or not, depends solely upon the clause of reference. [p. 439, col. 2.]

Messrs. *Upjohn, K. C.* and *Wallish*, for the Appellants.

Messrs. *Lowndes, K. C.*, *Raihes* and *Claughtan-Scott*, for the Respondents.

JUDGMENT.

Lord Dunedin.—In these consolidated appeals it will be convenient to consider the first case by itself. The appellants as sellers entered into two contracts with the respondents as buyers of certain bales of cotton. The contracts were made subject to the Rules and Regulations of the Bombay Cotton Trade Association, Limited. Rule 12 of the said Association provides:—

"All questions or disputes as to quality between buyer and seller shall be referred to the arbitration of two disinterested persons, one to be chosen by each disputant, such arbitrators having the power to call in a third arbitrator. The award made by such arbitrators or any two of them shall be final and binding subject only to the right of appeal to the Appeal Committee. All arbitrations held under this rule must be held in accordance with rule 5, and only shareholders and/or Directors shall be eligible to act on arbitrations held in the rooms of the Association. Associate members, however, shall be eligible to act as arbitrators when the arbitration is held in the seller's *jetha* and/or godown as provided under rule 5."

Rule 13 provides:—

"All questions in dispute (other than that of quality) arising out of, or in relation to, contracts made subject to the Rules and Regulations of The Bombay Cotton Trade Association, Limited, provided one of the parties to the contract is a member or associate member of the Association, shall be referred to the arbitration of two disinterested persons being shareholders or Directors of the Association, one to be chosen by each disputant; such arbitrators having the power to call in a third arbitrator who must also be a shareholder or Director of the Association.

"The award made by such arbitrators or any two of them shall be final and binding on both parties, subject only to the right of appeal to the Board within 15 days of the date of the arbitrators' award on payment of Rs. 100."

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The cotton was delivered but objected to by the respondents as being not up to contract. Upon this an arbitration was entered into between the parties, and the arbitrators under rule 12 made an award as to quality. Thereupon the respondents rejected the cotton. The appellants resorted to claiming damages. This dispute was referred to arbitrators under rule 13. They issued their award as follows:—

"To all to whom these presents shall come, we, Purshotamdas Thakoredas of Bombay Hindu Inhabitant, and Vincent Alpe Grantham, also of Bombay, European Inhabitant, send greeting! Whereas by a contract dated 17th day of August 1918, Messrs. Champsey Bhara and Company had agreed to sell to the Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of Mundra M. G. Fully Good Staple cotton on the terms and conditions mentioned in the contract. And whereas by another contract dated 4th day of September 1918, the said Messrs. Champsey Bhara and Company had also agreed to sell to the said Jivraj Balloo Spinning and Weaving Company, Limited, 100 bales of New M. G. Mundia Cotton Fully Good Staple on the terms and conditions therein contained. And whereas both the said contracts were made subject to the Rules and Regulations of the Bombay Cotton Trade Association, Limited. And whereas the goods tendered under the said contracts by the said Messrs. Champsey Bhara and Company were rejected by the Jivraj Balloo Spinning and Weaving Company, Limited, on the grounds contained in their letters dated 25th November 1918, and 11th November 1918, respectively. And whereas the said Messrs. Champsey Bhara and Company claimed from the said Jivraj Balloo Spinning and Weaving Company, Limited, the sum of Rs. 25,000 (rupees twenty-five thousand) in respect of the aforesaid contracts. And whereas the said Jivraj Balloo Spinning and Weaving Company, Limited, denied liability in respect of the said sum or any part thereof. And whereas the said disputes were referred to the arbitration of us, Purshotamdas Thakoredas and Vincent Alpe Grantham, who were appointed Arbitrators by the Deputy Chairman of the Bombay Cotton Trade Association, Limited. And whereas on

the 12th day of December the time for making our Award was extended by the Deputy Chairman to the 27th day of December 1918. Now know ye that we, the said Purshotamdas Thakoredas and Vincent Alpe Grantham, having taken upon ourself the burden of the said reference, and having done all acts necessary to enable us to make a valid Award, hereby make our Award as follows, that is to say:— We award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay to the said Messrs. Champsey Bhara and Company the sum of Rs. 25,000 (rupees twenty-five thousand) and we do further award and direct that the said Jivraj Balloo Spinning and Weaving Company, Limited, do pay the costs of this our Award, which we assess at the sum of Rs. 55 (rupees fifty-five).

"In witness whereof we have hereunto set our respective hands this 23rd day of December 1918.

Signed and Published	}	(Signed) Purshotamdas Thakoredas. V. A. Grantham.
this 23rd day of		
December, 1918, by us,		
Purshotamdas Thakoredas and Vincent Alpe Grantham in the presence of		

(Signed) J. A. Grant."

An appeal was made to the Appeal Committee, who confirmed the award. The respondents then presented a petition to the Court asking that the award should be set aside. They alleged two grounds (1) that there was no question referable to the arbitrators under rule 13; (2) that there was an error of law on the face of the award. The case depended before Pratt, J., who dismissed the petition. Appeal was taken to the Appellate Division of the High Court, and they reversed the judgment holding that there was an error in law on the face of the award. The way that the learned Judges arrived at that conclusion was this: They said that the recital that the respondents had rejected the cotton on the grounds mentioned in the letters of the 11th and 25th November, 1918, respectively, allowed them to look at the letters. The letter of the 11th November is as follows:—

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"To Messrs. Champsey Bhara and Company.

"Dear Sirs,

"Re: D Order No. 27 dated 6-11-18 for "100 bales

N. M. G. Mundia.

"Please note that at the survey held this day on the above lot tendered by you against contract No. 56, dated 4th April 1908, as the Arbitrators have in their award allowed Rs. 10½ off, we hereby reject the said lot and refuse to take delivery thereof.

"The Jivraj Balloo Spinning and Weaving Company, Limited."

The letter of the 25th November is in identical terms referring to the other contract. The learned Judges then held that if clause 52 of the Regulations is looked at—it being the clause which deals with what is to happen when arbitrators, as to quality make certain findings—it becomes apparent that the arbitrators here could only have arrived at their judgment if they entirely misinterpreted Art. 52. They based their opinion upon the case of *Landauer v. Asser* (1).

The law on the subject has never been more clearly stated than by Williams, J., in the case of *Hodgkinson v. Fernie* (2):—

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.... The only exceptions to that rule are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

This view has been adhered to in many subsequent cases, and in particular in

the House of Lords in *British Westinghouse Electric and Manufacturing Company v. Underground Electric Railways Company* (3).

The question to be decided is: Does the error in law appear on the face of the award? In the *British Westinghouse* case (3) it clearly did. The arbitrator had stated a special case and got an opinion of the Divisional Court; in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award. In *Landauer v. Asser* (1) the state of affairs was different. The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus:—

"I decide that as the parties to the contract dated the 3, November 1903, were by the terms thereof the principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent. and that the buyers are, therefore, entitled to, and only to, the said amount, the balance one way or the other being due from or to the sellers."

The Court of Appeal held that this entitled them to look at the contract and to come to the conclusion that the decision was erroneous in law. The case of *Landauer v. Asser* (1) is not binding on their Lordships and it was contended that it was wrongly decided, but in their Lordships' opinion it is not necessary to consider that point, for the present case differs from *Landauer's case* (1) in an essential particular. In that case the legal proposition was stated in terms on which the award proceeded. In the present case, no legal proposition at all is stated as a ground of the award. The reference to the letters is only in the narrative, and even when the letters are looked at they only contain the view of one party. To make this case equiparate with that of *Landauer's case* (1) the award would have to run somewhat thus:—"In respect of the ground of rejection contained in the letters of the 11th and 25th November, and in respect of clause 52 of the Article. I decide that, etc."

(1) (1905) 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T.L.R. 429.

(2) (1857) 3 C. B. (N. S.) 189; 27 L. J. C. P. 66; 3 Jur. (N. S.) 818; 6 W. R. 181; 140 E. R. 712; 111 R. R. 614.

(3) (1912) A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 S. J. 754.

CHAMPSEY BHARA & CO. v. JIVRAJ BALLOO SPINNING & WEAVING CO.

Now, the regret expressed by Williams, J., in *Hodgkinson v. Fernie* (2) has been repeated by more than one learned Judge and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: "Inasmuch as the arbitrators awarded £0 and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting clause 52." But they were entitled to give their own interpretation to clause 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J., was right and the conclusion of the learned Judges of the Court of Appeal erroneous.

The Counsel for the respondents then argued the other point, which the learned Judges of the Court of Appeal found it unnecessary to decide, and which the Trial Judge decided against them. He said that upon a proper construction of the contract the moment his client rejected the cotton in virtue of the decision by the arbitrators as to quality, he was entitled to do so, and the contract was repudiated or came to an end; that then the arbitration clause could no longer be appealed to, and he said that inasmuch as this was a plea to jurisdiction the Court ought to decide it.

Their Lordships think that this argument is based upon a confusion of thought. The question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in this case whether the dispute which has arisen is a dispute covered by clause 13 of the articles. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the Rules and Regulations of the Cotton Trade Association. Now, that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality. It is, therefore, for the arbitrator and not for the Court to decide what is the effect of a rejection based on an award as to quality. In truth, this point is decided in terms by the recent case of *Sanderson & Son v. Armour & Co.* (4). It was a Scotch case, but in no way depended upon any peculiarity of the Law of Scotland.

The decision of the first appeal in this sense disposes of the second appeal without further argument, as it is obvious that in that case even the reference in the narrative to the grounds of defence in the letters is absent, and there is nothing but the bare statement that a certain sum was awarded. It follows that in the first appeal the appeal must be allowed and the judgment of the Trial Judge restored; the appellants must have their costs here and in the Courts below. The second appeal must be dismissed and the respondents will have their costs.

Their Lordships will humbly advise His Majesty accordingly.

W. C. A.

Appeal allowed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondents:—Messrs. Hughes & Sons.

(4) (1922) S. C. (H. L.) 117; 91 L. J. P. C. 127 L. T. 597.

DUKHI RAM V. B. N. W. RAILWAY.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 100 OF 1922.

November 23, 1922.

Present:—Mr. Justice Ryves.

DUKHI RAM BARAI—APPLICANT

versus

B. N.-W. RAILWAY—OPPOSITE PARTY.

Evidence, admissibility of—Goods consigned to Railway—Damages, suit for—Valuation of goods—Invoice, admissibility of.

In a suit for damages, against a Railway Company, on account of the deterioration of goods while in transit, an invoice, sent to the claimant by the consignor, showing the value of the goods, is a *prima facie* evidence of what the claimant was charged for them and what presumably he would have to pay for them, and in the absence of cross-examination, it is admissible in evidence and it is not necessary to put the consignor into the witness-box to prove what was the actual value of the goods sent.

Civil revision from an order of the Judge, Small Cause Court, Azamgarh, dated the 21st April 1922.

Mr. Mukhtar Ahmad, for the Applicant.

Messrs. A. Sanyal and Benoy Kumar Mukerji, for the Opposite Party.

JUDGMENT.—This is an application in civil revision filed by the plaintiff to set aside the decree of the Judge of the Small Cause Court at Azamgarh. Two consignments of betel leaves were delivered to the Bengal Nagpur Railway at their station of Danton in the Midnapur District to be conveyed to the plaintiffs who are *pan*-sellers at Mau in the Azamgarh District. The consignments travelled from Danton to Howrah over the B. N. Railway, a distance of 104 miles. From Howrah they were sent to Moghal Sarai on the E. I. Railway 418 miles. From Moghal Sarai to Benares they were carried for a distance of 10 miles over the O. and R. Railway and from Benares to Mau they were carried by the B. and N.-W. Railway, a distance of 58 miles. There was considerable delay in transit and when the goods arrived at Mau they were found to be in a rotten condition and the plaintiff refused to take delivery. He then entered into correspondence with the authorities of the B. N. Railway, the E. I. Railway Company and the B. and N.-W. Railway, but failing to get redress he brought this suit in the Court of Small Causes at Azamgarh against the B. N. Railway, E. I. Railway Company and B. and N.-W. Railway claiming Rs. 204 damages. All three defendant

Companies contested the suit. The learned Judge has held that the goods were delivered to the B. N. Railway at Danton as alleged and that when they arrived at Mau they were rotten. He has also held that it is not proved that the damage was caused to the goods while they were being carried either by the E. I. Railway or the B. and N. W. Railway. He, however, has dismissed the suit on technical grounds which seems to me to be wrong. He has held, in the first place, that no notice such as is required by section 77 of the Indian Railways Act was served on the defendants. There was evidence of the plaintiff's son that notices were sent by registered post to the Agents of all three Railways. There is on the record the registered receipt of the Agent of the B. N. Railway. The Judge holds that it is not proved that registered receipt was for the notice sent by the plaintiff. If it was not for that notice, it is hard to conceive for what it was. The plaintiffs swear that it was and it seems to me almost farcical to hold that any further proof was required as there was no cross examination, besides which there are letters on the record from the B. and N.-W. Railway actually making an admission that they were prepared to pay a small sum in full satisfaction of the plaintiff's claim. In the face of letters on the record it seems to me impossible to hold that notice was not sent within the meaning of section 77 of the Act. Another ground on which the learned Judge has dismissed the suit is that the amount of the damages is not proved. The plaintiff sought to prove it by producing the invoices sent to him by the consignors showing that the value of the goods amounted to Rs. 204. The Judge holds that this is not legally admissible evidence of the value. It is *prima facie* evidence of what the plaintiff was charged for the goods and what presumably he would have to pay for them and in the absence of cross-examination, in my opinion, it is perfectly admissible evidence and it would not be necessary to call the consignors and put them into the box to prove what was the actual value of the goods sent. It has been found that the goods were irretrievably damaged and, therefore, I think the plaintiff is entitled to a decree. I hold that the amount of the damage was, as sworn by the plaintiff, and corroborated

GHANSHAM O. RAMJI LAL.

by the invoices, Rs. 204. On the finding that it has not been proved that the damage was caused during transit over the lines of the first and second defendant I think that under section 80 the B. N. Railway are liable. I, therefore, allow this application. I dismiss the suit as against the B. and N. W. Railway and the E. I. Railway but I decree it against the B. N. Railway with costs in both Courts.

N. K.

*Application allowed.***LAHORE HIGH COURT.**

FIRST CIVIL APPEAL No. 241 OF 1918.

May 2, 1923.

Present—Mr. Justice Martineau and
Mr. Justice Moti Sagar.

GHANSHAM—PLAINTIFF—APPELLANT
versus

RAMJI LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Custom—Partition—Widow, whether can claim partition—Burden of proof.

The widow of a deceased co-sharer has a statutory right to demand partition, and the onus is upon the party who disputes the widow's right to obtain a partition to prove that such right does not exist.

Bhag Bhari v. Wazir Khan, 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912. *Sant Singh v. Basant Singh*, 71 Ind. Cas. 28; (1923) A. I. R. (L) 81, followed.

Abdul Qadir v. Rabia, 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev, dissented from.

First appeal from the decree of the Assistant Collector, First Grade, with powers of a Munsif, First Class, Gurgaon, dated the 29th October 1917.

Mr. Shamair Chand, for the Appellant.
Dr. G. C. Narang, for the Respondents.

JUDGMENT.—On the death of Tula Ram in 1891 his land was mutated in equal shares in favour of the plaintiff and defendants Nos. 3 and 4, who were the sons of Tula Ram, by his wife, *Musammam* Raji, and Khem Ram, defendant No. 1, and Yad Ram, who were, stated to be his sons by another wife, *Musammam* Lali. In 1917 Khem Ram and Yad Ram's widow, *Musammam* Bholi, applied for partition

of their shares, and this has given rise to the present suit, in which the plaintiff contends that Khem Ram was not the son of Tula Ram and is, therefore, not entitled to a share, and disputes the right of *Musammam* Bholi, to have her share partitioned. The suit has been dismissed and the plaintiff appeals.

The plaintiff has produced three witnesses of an ordinary type who say that Khem Ram is the son of one Sita. On the other hand, Khem Ram himself has deposed that he is the son of Tula Ram, to whom, he says, his mother *Musammam* Lali was married and he is corroborated by other witnesses. Although the plaintiff was not present at the time of the mutation in 1891 his brothers, Mangal Singh and Net Ram, defendants Nos. 3 and 4, were present and admitted Khem Ram to be Tula Ram's son, and from that time no objection was ever taken by the plaintiff to Khem Ram's succeeding to a share in Tula Ram's property until Khem Ram and *Musammam* Bholi applied for partition in 1917. Had Khem Ram not been a son of Tula Ram the plaintiff would not have kept silent and allowed Khem Ram to remain in possession for so many years. The plaintiff says he partitioned the property with defendants Nos. 3 and 4, and *Musammam* Bholi about five years before suit, and has been in possession of one-fourth of the land ever since, but we agree with the lower Court that he has failed to prove this allegation. The lower Court is right in finding that Khem Ram is the legitimate son of Tula Ram.

The second question relates to *Musammam* Bholi's right to a partition. The issue framed was, whether she was not entitled to apply for partition, although the real question is as to her right to obtain a partition. The lower Court has held following *Abdul Qadir v. Rabia* (1), that she has no right to obtain a partition except under a decree of a Civil Court, but we do not agree with this view. It has been held in *Bhag Bhari v. Wazir Khan* (2) that a widow of a deceased co-sharer has a statutory right to

(1) 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev..

(2) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

GHULAM MOHIUDIN v. DAYABHAI CHIMAN LAL;

SALIG RAM v. BARKAT ALI.

demand partition, and in *Sant Singh v. Basant Singh* (3) that ruling was followed, and it was held that the *onus* was upon the party who disputed the widow's right to obtain a partition to prove that such right did not exist. That *onus* in the present case has not been discharged.

Moreover, *Musammal Bholi's* right to a partition is clear from the *Rivaji-i-am* in which it is stated (page 51 of the paper-book) that any one of the persons upon whom the estate devolves, irrespective of the sex of such person or of the relationship in which such person stood to the deceased, can claim a partition as a matter of right.

The suit has been rightly dismissed and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*
(3) 71 Ind. Cas. 28; (1923) A. I. R. (L) 81.

Mr. G. N. Thakor, with Mr. R. J. Thakor, for the Appellants.

Mr. J. G. Rele, for the Respondent.

JUDGMENT.—The first defendant held over after notice was given to vacate the suit property which was let out to him by the plaintiff. He sub-let the premises and in addition to the rent received a premium of Rs. 1,250. Under section 2 (12) of the Code "mesne profits" of property means those profits which the person in wrongful possession of such property actually has received or might with ordinary diligence have received therefrom, and clearly Rs. 1,351 was profit received by the first defendant, so the plaintiff was entitled to a decree for that amount together with rent at the annual rate of Rs. 271 for the period for which he sued, less the amount which had been paid by defendant No. 1, namely, Rs. 542.

The plaintiff claims that Pleader's fees are payable on Rs. 5,000 the value of the subject-matter of the suit. We think that contention is sound under the law regulating the charge for Pleader's fees when the suit was filed. The appeal, therefore, succeeds and there must be a decree in terms of the judgment with costs throughout.

W. C. A.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 301 OF 1922.
February 16, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
GHULAM MOHIUDDIN NARMAVALA
—PLAINTIFF—APPELLANT

versus

DAYABHAI CHIMANLAL—DEFENDANT
—RESPONDENT.

Landlord and Tenant—Notice to quit—Tenant holding over—Sub-letting by tenant at profit—Landlord, right of, to recover such profit—Civil Procedure Code (Act V of 1908), s. 2 (12).

Where after receiving notice to quit a tenant holds over and sub-lets the premises leased to him and in addition to the rent receives a premium from the sub-tenant, such premium amounts to profits received by him while in wrongful possession within the meaning of section 2 (12) of the Civil Procedure Code, and he is liable to pay the sum so received, together with the rent, to the landlord.

Second appeal from the decision of the Judge of the Court of Small Causes with A. P., at Ahmedabad, in Appeal No. 73 of 1920, confirming the decree passed by the First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 817 of 1918.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 80 OF 1920.
February 3, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Fforde.

SALIG RAM AND OTHERS—
DEFENDANTS—APPELLANTS
versus

BARKAT ALI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 3 (5)
(a)—Guardians and Wards Act (VIII of 1890),
s. 29—Sale by guardian of minor with sanction of
Court, whether liable to pre-emption.*

HARI SHRIDHAR PRABHU DESAI v. SAKHARAM PADMANNA MAGDUM.

Section 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. The Court, under this section, makes no order for sale, but merely authorises a transaction which would otherwise not be binding upon the minor. The sale is in fact a transaction *inter partes* approved of by the Court, and the Court, having approved of the contemplated sale, has no further say in the matter.

Such a sale cannot be described as one made in execution of an order of a Civil Court within the meaning of section 3 (5) (a) of the Punjab Pre-emption Act, and is not, therefore, exempted from liability to the exercise of the right of pre-emption.

Second appeal from the decree of the District Judge, Gujranwala, dated the 7th October 1919, affirming that of the Munsif, First Class, Gujrat, dated the 31st May 1919.

Dr. Khalifa Shuja-ud-din, for the Appellants.

JUDGMENT.—The only question we have to determine in this appeal is, whether the sale in respect of which the right to pre-emption is sought to be exercised, comes within the exceptions in sections 3 (5) (a) of the Punjab Pre-emption Act of 1913. It is there provided that 'sale' shall not include, *inter alia*, a sale in execution of an order of a Civil Court. The sale in the present case was of certain property owned by a minor and, therefore, required the sanction of the Court.

The guardian of the minor accordingly applied to the Court under section 29 of the Guardians and Wards Act for leave to execute a sale-deed which had already been drawn up and approved of by the parties. Leave was granted and the conveyance was duly executed and registered.

The appellant contends that this transaction comes within the definition of a sale in execution, of an order of a Civil Court. We cannot accept this contention.

The sale in the present case was an ordinary private transaction and only required the sanction of the Court because one of the parties to it was under disability. Section 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. The Court under this section makes no order for sale, but merely authorises a transaction which would otherwise not be

binding upon the minor. The sale is in fact a transaction *inter partes* approved of by the Court. The Court having approved of the contemplated sale has no further say in the matter.

We are accordingly of opinion that, section 3 (5) (a) of the Pre-emption Act has no application to the case before us and we dismiss the appeal.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL, NO. 259 OF 1922.

February 20, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

HARI SHRIDHAR PRABHU DESAI—
PLAINTIFF—APPELLANT

versus

SAKHARAM PADMANNA MAGDUM—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Waste committed after decree—Execution of decree—Court, duty of—Judgment-debtor, liability of.

The question with regard to waste committed by a judgment-debtor after a decree for possession of property has been obtained against him, is a question arising between the parties, relating to the execution, discharge or satisfaction of the decree within section 47 of the Civil Procedure Code, and ought to be determined by the Court executing the decree, and not by a separate suit.

If property in respect of which a decree is made has depreciated in value, or been damaged since the decree, owing to the wilful action of the judgment-debtor the question whether he is liable to make good the loss is a question in execution.

Appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 235 of 1921, confirming the decree passed by the Subordinate Judge at Rajapur, in *Darkhast* No. 368 of 1920.

Mr. G. B. Chitale, for the Appellant.

Mr. D. R. Manerikar, for Mr. G. S. Mulgaonkar, for Respondent No. 1.

JUDGMENT.—The appellant in this case obtained a decree for possession of the suit property. An appeal was filed, and

HADAYAT ULLAH v. GHULAM MUHAMMAD BEG.

pending the hearing of the appeal the defendants remained in possession. The appeal was dismissed and then the appellant discovered that the present respondents, while in possession of the property pending the appeal, appeared to have committed waste by cutting down trees. Consequently, the appellant took out a *Darkhast* to ascertain the damages alleged to have been committed by the respondents.

It was contended that this was not a question in execution, and that the appellant would have to file a separate suit. Both the lower Courts have dismissed the *Darkhast* on this ground. But we think that the question with regard to the waste committed by the judgment-debtor after decree was a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree, and not by a separate suit. The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss. Therefore, we remand the *Darkhast* to be decided on its merits. The appellant is entitled to his costs in this Court and in the Court below. Costs in the Trial Court to be costs in the cause.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1776 OF 1922.

February 10, 1923.

Present:—Mr. Justice Campbell.

HADAYAT ULLAH—PLAINTIFF—

APPELLANT

versus

GHULAM MUHAMMAD BEG AND
ANOTHER—DEFENDANTS—RESPONDENTS.

Interpretation of Statutes—Court, duty of—Pre-emption—Pre-emptor, title of, whether relates back to date of sale—Civil Procedure Code (Act V of

1908), O. XX, r. 14—*Punjab Pre-emption Act (I of 1913), s. 16—“Owner,” meaning of.*

Courts cannot read into Statutes provisions which are not there, even if they think that anomalies are not to be avoided otherwise. [p. 446, col. 1.]

In the Punjab the Legislature has taken the responsibility of embodying the customary rules of pre-emption in a Statute and the Courts must presume that Statute to be exhaustive and must follow it. [p. 446, col. 1.]

There is nothing in the Punjab Pre-emption Act, which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction contained in O. XX, r. 14 of the Civil Procedure Code that Courts shall declare the title of the pre-emptor to be deemed to accrue from the date of payment into Court of the purchase-money after decree. [p. 446, col. 1.]

A successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale but from the date on which he enforces his rights, that is, from the date on which he satisfies the conditions of the decree and brings it into operation. [p. 445, col. 2.]

Kehr Singh v. Mahman Singh, 25 P. R. 1908; 128 P. L. R. 1908; 51 P. W. R. 1908, dissented from.

Dhanna Singh v. Gurbakhsh Singh, 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. R. 1909, referred to.

L. Beli Ram v. Hari Chand, 59 Ind. Cas. 744; 128 P. W. R. 1921; 3 L. L. J. 205, *Deonandan Prasad Singh v. Ramdhari Chowdhuri*, 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J. 375; 21 C. W. N. 786; 25 C. L. J. 573; 19 Bom. L. R. 437; 6 L. W. 65; (1917) M. W. N. 470 and 811; 22 M. L. T. 196; 44 L. A. 80 (P. C.), followed.

The word “owner” as used in section 16 of the Punjab Pre-emption Act does not mean a person who is not in danger of losing his ownership right at the instance of a pre-emptor. [p. 446, col. 1.]

Second appeal from the decree of the Senior Subordinate Judge, Hoshiarpur, dated the 15th February 1922, affirming that of the Munsif, First Class, Hoshiarpur, dated the 2nd August 1921.

Lala Faqir Chand, for the Appellant.

Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—This judgment will dispose of three Second Appeals Nos. 1776, 1777 and 1778.

A certain house in Hariana was sold by Maule Bakhsh on the 19th May 1917, two-thirds to Ghulam Muhammad Beg by two deeds and one-third to Murad Ali Beg. On the 20th May 1917, Murad Ali Beg transferred his bargain to Ghulam Muhammad Beg.

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On 20th May 1918, Hadayat Ullah, the owner of the contiguous house on the east, brought three pre-emption suits, one for each sale-deed on the two grounds of dominance and contiguity. Ghulam Muhammad Beg resisted the suits on the plea that he had an equal right of pre-emption by reason of his ownership of contiguous property on the north, and his plea was upheld by both the Courts below who found that the property in suit was not servient to that of Hadayat Ullah.

Hadayat Ullah has come up to this Court on second appeal, and the sole question for determination is whether his right is superior to that of Ghulam Muhammad Beg as an owner of contiguous property. The question of dominance of tenement is also raised in the memorandum of appeal but this claim was abandoned in the lower Appellate Court and has not been mentioned in arguments before me.

The property which was the basis of Ghulam Muhammad Beg's assertion of equal pre-emption rights with Hadayat Ullah was acquired by him by purchase on 21st and 23rd January 1917. There were five sale-deeds and on 18th January 1918 Hadayat Ullah instituted five suits for pre-emption. All eight suits were decided by the Munsiff in one judgment dated 2nd August 1921. The three suits now under consideration were dismissed, as already stated, but the five suits for possession by pre-emption of the rights of ownership acquired by Ghulam Muhammad Beg in the land of the north were decreed in favour of Hadayat Ullah.

Ghulam Muhammad Beg thus was owner in the contiguous land on the north at the time of the sale and at the time when the suit was instituted. If the title to this land of the successful pre-emptor, Hadayat Ullah be regarded in terms of O. XX, r. 14 (1) (b), Civil Procedure Code, as having occurred from the date of payment of the pre-emption price, he was also owner when Hadayat Ullah's present suits for pre-emption of the house were dismissed.

It is argued, however, for Hadayat Ullah, the plaintiff-appellant, that Ghulam Muhammad Beg's right of pre-emption at the date of the sales to him was a defeasible right and, therefore, no right at all in the light

of the fact that it has been defeated and of what was laid down in *Kehr Singh v. Mahman Singh* (1), a Single Bench judgment.

In *Kehr Singh v. Mahman Singh* (1) it was held that a vendor, who by reason of a prior purchase had become a landholder in the village, and, as such, was competent to resist the claim of a pre-emptor with respect to a subsequent purchase, cannot, if in a pre-emption he loses the first bargain, retain the subject-matter of the second bargain. A dictum by Mr. Justice Rivaz in a former case was cited with approval that the effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of the sale, which is a transaction voidable at the option of the pre-emptor.

The lower Appellate Court considered this judgment but thought, not without reason, that subsequent remarks recorded by the learned Judge who delivered it. Shah Din, J., in *Dhanna Singh v. Gurbakhsh Singh* (2) indicated a change of opinion. The pronouncement of Rivaz, J., was doubted in *Dhani Nath v. Budhu* (3) and is directly contrary to what has been ruled by a Division Bench of this Court in a very recent decision, *Muhammad Akram Khan v. Muhammad Azim Khan* (4), that a successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale but from the date on which he enforces his rights i.e., from the date on which he satisfies the conditions of the decree and brings it into operation. The same view was taken by Martineau, J., in *Beli Ram v. Hari Chand* (5) and he dissented expressly from *Kehr Singh v. Mahman Singh* (1) mainly on the authority of the Privy Council judgment *Deonandan Prasad Singh v. Ramdhari Chowdhri* (6).

(1) 25 P. R. 1908; 128 P. L. R. 1908; 51 P. W. R. 1908.

(2) 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909.

(3) 136 P. R. 1894.

(4) 73 Ind. Cas. 318; 4 L. 137.

(5) 59 Ind. Cas. 744; 28 P. W. R. 1921; 3 L. J. 205.

(6) 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J. 375; 21 C. W. N. 786; 25 C. L. J. 573; 19 Bom. L. R. 437; 6 L. W. 65; (1917) M. W. N. 470 and 811; 22 M. L. T. 195; 44 I. A. 80 (P. C.).

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There are certain rulings of the Allahabad High Court which support the contention of the appellant but in this Province the Legislature has taken the responsibility of embodying the customary rules of pre-emption in a Statute and the Courts must presume that Statute to be exhaustive and must follow it. There is nothing in the Punjab Pre-emption Act which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction of O. XX, r. 14, Code of Civil Procedure, that Courts shall declare the title of the pre-emptor to be deemed to accrue from the date of payment into Court of the purchase-money after decree nor has the Act qualified the term "owner" so as to mean a person who is not in danger of losing his ownership right at the suit of a pre-emptor. Courts cannot read into Statutes provisions which are not there, even if they think that anomalies are not to be avoided otherwise.

According to the plain terms of section 16 of the Punjab Pre-emption Act, Ghulam Muhammad Beg owned immoveable property contiguous to the property in suit at the date of the sale. His right of pre-emption was, therefore, at that time equal with that of Hadayat Ullah which was brought into existence only by the sale and for the enforcement of which he was entitled to sue only when the sale had been completed.

The appeals must fail and are dismissed with costs.

Z. K.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1547 OF 1921.

March 27, 1923.

Present:—Mr. Justice Rafique.

BISHUN SARUP—DEFENDANT—

APPELLANT

versus

BINDRABAN—PLAINTIFF—RESPONDENT.

Malicious prosecution—Charge absolutely false—Probable and reasonable cause—Further evidence, whether necessary.

Where in a suit for damages for malicious prosecution it is found that the charge made by the defendant was absolutely without foundation, further evidence directly going to show that there was no reasonable and probable cause for making the charge is not necessary, as, in such a case, it is legitimate to infer that the defendant had no probable or reasonable cause.

Second appeal against the decree of the Subordinate Judge, Jhansi, dated the 29th of August 1921.

Mr. Baleshwari Prasad, for the Appellant.

Mr. Sailanath Mukerji, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by one Bindraban for the recovery of damages for malicious prosecution. It appears that Bindraban had a decree against the defendant-appellant which he proceeded to execute. The *amin* of the Court went to the house of the judgment-debtor and attached some articles. The defendant-appellant was away from home at the time and on his return he filed a criminal complaint of theft against Bindraban charging the latter with having stolen a ring set with precious stones and a pair of silver anklets. Bindraban was tried for theft and acquitted. Thereupon he filed the suit out of which this appeal has arisen for damages. The claim was resisted on various pleas. The Court of first instance dismissed the claim. On appeal the decree of the first Court was set aside and the appeal of Bindraban was allowed.

In second appeal the defendant-appellant contends that the burden of proof was cast wrongly on him and that there should have been positive evidence to the effect that he had no reasonable and probable cause for the charge of theft brought by him against Bindraban. From the evidence on the record which has been believed by the lower Appellate Court it is quite clear that the charge of theft brought against Bindraban was absolutely without foundation. In view of that finding it is not open to the defendant-appellant to contend that there should have been further evidence directly going to show that there was no probable and reasonable cause for him to charge Bindraban with theft. If the charge was absolutely baseless, it is legitimate to infer that the defendant-appellant had no reasonable and probable

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cause for making the charge. The appeal fails and is dismissed with costs including fees in this Court on the higher scale if any.

There are cross-objections by the plaintiff-respondent with regard to the amount of damages. I have examined the reasoning of the Court below with regard to the amount of damages carefully, and I am not prepared to differ from it. The cross-objections are also dismissed with costs.

W. C. A.

*Appeal dismissed.***LAHORE HIGH COURT.**

CIVIL REVISION PETITION NO. 162 OF 1923.

May 23, 1923.

Present:—Mr. Justice Moti Sagar.RAM SARUP—PLAINTIFF—PETITIONER
versus

ZORAWAR MAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copies, what is—Appeal, second—Finding of fact—Revision.

Under section 12 of the Limitation Act only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded.

A finding as to the time requisite for obtaining copies under section 12 of the Limitation Act is one of fact and cannot be attacked in second appeal, much less in revision.

Sher Singh v. Pem Raj, 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918, *Bawa Singh v. Thakur Singh*, 67 Ind. Cas. 478; 4 U. P. L. R. (L) 80; (1922) A. I. R. (L) 423, followed.

Petition, under section 44, Act VI of 1918, for revision of the order of the District Judge, Ferozepore, dated the 29th November 1922, affirming that of the Senior Subordinate Judge, Ferozepore, dated the 12th June 1922.

Lala Gobind Ram Khanna, for the Petitioner.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This is an application for revision of an order passed by the District Judge of Ferozepore holding that a certain appeal was barred by limitation. It is argued on behalf of the petitioner, that the appeal to

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the District Court was within time, inasmuch as in computing the period of limitation for his appeal the period from the date of his applying for copies of the judgment and decree up to the date on which the copies were delivered to him should have been excluded. I am unable to agree with this contention. It has been held in a recent judgment of this Court reported as *Bawa Singh v. Thakur Singh* (1) that, under section 2 of the Limitation Act, only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded. I see no reason to dissent from this view on the facts of this particular case, and hold that the learned District Judge was right in holding that the appeal was barred. Moreover, there is ample authority for holding that the finding as to the time requisite for obtaining copies is one of fact and cannot be attacked in second appeal, much less in revision [*Sher Singh v. Pem Raj* (2), *Bawa Singh v. Thakur Singh* (1).]

I do not see any force in this petition, and dismiss it with costs.

Z. K.

Petition dismissed.

(1) 67 Ind. Cas. 478; 4 U. P. L. R. (L) 80; (1922)

A. I. R. (L) 423.

(2) 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 629 OF 1922.

January 29, 1923.

Present:—Mr. Justice Zafar Ali.THE EAST INDIAN RAILWAY COMPANY, LTD., CALCUTTA—DEFENDANT—
PETITIONER*versus*THE FIRM MOHAN LAL-PANNA LAL—
PLAINTIFFS—RESPONDENTS.

Carriage of goods—Damages for non-delivery—Railway Company—Risk Notes, Forms A and B—Loss, proof of.

A Railway Company seeking shelter behind a Risk Note in Form A or B for the non-delivery of the whole or a part of a consignment must show, in the first instance, that the goods have been

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lost, before the person claiming compensation for their loss can be called upon to prove that the loss was due to the neglect of the Company or to theft or to wilful neglect of its servants, etc. [p. 450, col. 1.]

Ghelabhai Punsi v. East Indian Railway Company, 63 Ind. Cas. 241; 23 Bom. L. R. 525; 45 B. 1201, relied on.

Agent, G. I. P. Railway v. Karaylal, 48 Ind. Cas. 294; 14 N. L. R. 122, *East Indian Railway Company v. Kanak Behary Halder*, 44 Ind. Cas. 691 22 C.W.N. 622, dissented from.

Petition, under section 44, Act IX of 1919, for revision of the order of the District Judge, Delhi, dated the 1st April 1922, reversing that of the Additional Munsif, First Class, Delhi, dated the 30th August 1921.

Kanwar Dalip Singh, for the Petitioner.

Lala Nanua Mal, for the Respondents.

JUDGMENT.—The only question of law that arises in this application in revision is whether in case of short delivery of a consignment booked under Risk Notes in Forms A and B the initial *onus* of establishing "loss, destruction or deterioration of, or damage to the said consignment," lies on the Railway Administration concerned, or whether the loss should be presumed, and the *onus* of proving that it was due to the neglect of the Railway Administration or to theft by, or to the wilful neglect of, its servants, etc., should be thrown on the person claiming compensation for it.

The facts are few and simple. The plaintiffs delivered to the defendant—Railway Company—at Calcutta on three different dates three consignments of sugar, two of 125 bags each, and one of 126 bags, to be conveyed to Delhi, and gave in respect of each consignment Risk Notes in Forms A and B. The first consignment was delivered short by one bag only. Out of the second consignment one bag was not delivered and there was a shortage of 9 maunds and 15 seers of sugar, and out of the third there was a short delivery of 3 maunds and 2 seers. The plaintiffs sued to recover compensation for the quantity of sugar not delivered. They denied to have executed the Risk Notes and asserted that "loss did occur owing to gross neglect of the Railway Company." The defendants pleaded protection under the Risk Notes and denied all liability for the loss but made

no statement as to how it took place, with the exception of the loss of one bag from the first consignment which they stated was stolen in the course of transit.

The Trial Court (Munsif, Delhi) framed only two issues, one as to the execution of the Risk Notes by the plaintiffs-consignors, and the other as to the amount of compensation due, decided the first against the plaintiffs and dismissed their suit on the ground that in the face of the terms of the Risk Notes they were not entitled to any compensation without proving neglect, etc., on the part of the Railway Company. The plaintiffs appealed to the District Judge who upheld the Munsif's finding as to the execution of the Risk Notes, disallowed the plaintiffs' claim with regard to the bags stolen in transit, but accepted their plea that it lay on the defendant—Railway Company—to prove, in the first place, that the goods were lost, and remanded the case to be decided afresh after an enquiry into the following issue:—

Was the short delivery in each case with the exception of the bag proved to have been stolen due to loss or to leakage or wastage?"

The defendant—Railway Company—has come up to this Court on the revision side to urge that the lower Appellate Court was wrong in throwing upon it the initial *onus* of substantiating their plea that the goods not delivered had actually been lost. There can be no doubt that the authorities on the point are conflicting, but the learned District Judge followed the ruling of a Division Bench of the Bombay High Court in *Ghelabhai Punsi v. East Indian Railway Company* (1), and further referred to *Jamnadhar Baldev Dass v. Burma Railways Company, Ltd.* (2) to show that the same view of the law was taken by the Burma Chief Court. The only ruling cited by the learned District Judge to the contrary was that of the Judicial Commissioner, Nagpur, printed in *Agent, G. I. P. Railway v. Karaylal* (3). Mr. Kanwar Dalip Singh, who appeared for the Railway Company,

(1) 63 Ind. Cas. 241; 23 Bom. L. R. 525; 45 B. 1201.

(2) 64 Ind. Cas. 395; 10 L. B. R. 354; 13 Bur. L. T. 190.

(3) 48 Ind. Cas. 294; 14 N. L. R. 122.

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argued that the Bombay High Court based its decision on an Irish case governed by the Carriers Act whose provisions on the point in question were different from those of the Indian Railways Act, and cited two more judgments; one of a Division Bench of the Calcutta High Court and the other of a Single Judge of this Court, to the same effect as the Nagpur case. The Calcutta judgment is reported as *East Indian Railway Company v. Kanak Behary Halder* (4). The judgment of the Punjab Chief Court is dated the 30th June 1922 in Civil Revision No. 19 of 1922.

A reference to the judgment of the Bombay High Court does not bear out the argument that the Irish case relied on therein was not governed by a Risk Note similar to the Risk Note Form B under the Indian Railways Act. The learned Judges of the Bombay High Court dealt with the question thus:—

"* * * the question was argued whether it was sufficient for the defendants merely to admit that the goods were lost without leading evidence to show that they were lost. None of the Indian cases cited really deal with this particular question, which certainly did arise in the Irish case of *Curran v. Midland Great Western Company of Ireland* (5). In that case two pigs consigned by the plaintiff were short delivered and the Railway Company sought to escape liability under the Risk Note drawn up in very similar form to the present Risk Note Form B. The suit was decreed clearly on the ground that, although the Company admitted the loss, they did not lead any evidence as to how the pigs came to be lost. * * * If the present contention of the defendants were right, the consignor whose goods were short delivered would have no remedy even although, as a matter of fact, if evidence were taken, he might show that his case came within one of the exceptions in the Risk Note. If the plea of the Company that the goods are lost were sufficient, then, all that evidence is excluded."

The learned Judges cited with approval the following from the judgment of Mr. Justice West in *Mohansingh Chawan v. Henry Conder* (6):—

(4) 44 Ind. Cas. 691; 22 C. W. N. 622.

(5) (1896) 2 Ir. R. 183; 2 Ir. L. R. 739.

(6) 7 B. 478 at p. 480; 8 Ind. Jur. 98; 4 Ind. Dec. (N. S.) 322.

"The Railway Company in this case were bound to deliver the particular bags which they received from the plaintiffs' firm for carriage. They did not deliver them, nor did they, so far as the evidence goes, announce their inability to deliver them on account of having lost them either in transit or by misdelivery to some one not entitled. The natural presumption under such circumstances is that all the goods arrived, and that the Railway Company was in a position to deliver them. We are asked to infer from the mere non-delivery that they could not be delivered, because they were lost; but that is an affirmative fact of which the Company ought to have given evidence. *Prima facie*, the responsibility rested on the Company, and the non-delivery of the goods might arise from other causes than loss. Had the Company announced to the plaintiff that his goods were lost, that might have helped the defendants' case; but no such announcement was made, and the plaintiff could only tell that goods received and carried for him were not delivered."

The Punjab case cited by *Kanwar Dalip Singh* affords no assistance, because in that case the goods were lost in transit and the plaintiff failed to establish wilful neglect on the part of the Railway Company which he imputed to it. It has been held by the same Division Bench of the Bombay High Court that in case of loss from a running train the Railway Administration is fully absolved from liability if the consignment was booked under the Risk Note Form B.

The Calcutta case is certainly in favour of the defendant—Railway Company—but the question of initial *onus* was not discussed therein, and the defence in that case also was that the missing bags were stolen from the running train between Bhatinda and Allahabad. The learned Judges of the Calcutta High Court laid down a very wide proposition without a reference in their judgment to the plea of the defendant—Railway Company—but there can be no doubt that they had it in view in deciding the question of *onus*. After reproducing the relevant portion of the Risk Note B and without stating the facts they proceeded to record their conclusion as below:—

"As these words (in the Risk Note) stand, they have the effect of throwing the burden

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of proving in what manner a particular consignment or part of a consignment is lost on the consignor or the person claiming damages from the Railway Company."

Having regard to the facts of the present case I am of opinion, that the view of the law taken, and the interpretation of the language of the Risk Note given by the Bombay High Court is correct, and was rightly followed by the learned Judge of the Court below. A Railway Company seeking shelter under a Risk Note for the non-delivery of the whole or a part of a consignment must show that it was lost. Therefore, I dismiss this petition for revision. The defendant—Railway Company—would pay the plaintiffs' costs in this Court.

Z. K.

*Petition dismissed.***LAHORE HIGH COURT.**

CIVIL REVISION No. 577 OF 1922.

February 3, 1923.

Present:—Mr. Justice Campbell.

Pandit RIKHI KESH—DEFENDANT—

PETITIONER

versus.

MEHA RAM—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel—“At the beginning of the tenancy,” meaning of:

The words “at the beginning of the tenancy” in section 116 of the Evidence Act apply only to cases in which a tenant is put into possession of the tenancy by the person to whom he has attorned and do not apply to cases in which the tenant has previously been in possession. [p. 450, col. 2.]

Lal Mahomed v. Kallamus, 11 C. 519; 5 Ind. Dec. (N.S.) 1104, *Sibu Sant v. Netai Charan Das*, 9 Ind. Cas. 806; 15 C. L. J. 114, *Yerraguntla Seshacharlu v. Mukkumalla Chinniah*, 25 Ind. Cas. 721, relied on.

Ketu Das v. Surendra Nath Sinha, 7 C. W. N. 596 and *Mahra Prasad v. Gokal Chand*, 51 Ind. Cas. 548; 17 A. L. J. 835; 1 U. P. L. R. (A.) 100; 41 A. 654, distinguished.

In answer to a suit for rent on the basis of a written lease the defendant stated that the house to which the lease referred was really the joint property of himself and the plaintiff, who was his brother and who had agreed to a scheme of partition by which the house in dispute was to go to him and another house to the defendant, and that as a guarantee for carrying out the terms of this arrangement the defendant had been persuaded to execute the lease, but that the partitions had fallen through and the document remain-

ed a mere formality, no rent having ever been paid;

Held, that in the absence of proof of any rent ever having been paid or that the defendant was inducted as a tenant by the plaintiff, the former was not estopped from denying that he was the plaintiff's tenant. [p. 451, col. 1.]

Revision petition against the order of the Small Cause Judge, Amritsar, dated the 10th June 1922.

Mr. Gobind Ram, for Mr. B. D. Qureshi, for the Petitioner.

Mr. Des Raj Sawhney, for the Respondent.

JUDGMENT.—This was a suit in the Court of Small Causes, Amritsar, by Meha Ram, against his brother, Rikhi Kesh, for arrears of rent. The suit was brought on a written lease regarding which the only evidence taken was that of the defendant. The defendant stated that the house to which the lease referred was really the joint property of himself and his brother who had agreed to a scheme of partition by which this house was to go to the plaintiff and another house to the defendant. As a guarantee for carrying out the terms of this arrangement he, the defendant, was persuaded to execute the lease. Later on, the partition fell through. In point of fact, no rent had ever been paid and the document was a mere formality.

The learned Judge of the Small Cause Court held that the defendant was estopped, under section 116, Indian Evidence Act, from denying the plaintiff's title as landlord and decreed the latter's claim for Rs. 90 rent.

The defendant has applied to this Court for revision and on his behalf is cited a ruling of the Calcutta High Court, *Lal Mahomed v. Kallamus* (1), wherein it was held that the words in section 116 “at the beginning of the tenancy” only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. This rule was afterwards followed by the Madras High Court in a case reported as *Yerraguntla Seshacharlu v. Mukkumalla Chinniah* (2) and also in another case *Sibu Sant v. Netai Charan Das* (3).

(1) 11 C. 519; 5 Ind. Dec. (N. S.) 1104.

(2) 25 Ind. Cas. 721.

(3) 9 Ind. Cas. 806; 15 C. L. J. 114.

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The learned Counsel for the plaintiff-respondent challenges the correctness of *Lal Mahomed v. Kallanus* (1) and quotes two cases in which the opinion was indicated that the above rule was expressed in too broad terms. These, however, do not apply to the facts of the present case. In the first, *Ketu Das v. Surendra Nath Sinha* (4), rent had actually been paid by the defendant, and in the other, *Mathra Prasad v. Gokal Chand* (5), the defendant was proved to have been put in possession as a tenant by the predecessor-in-interest of the person who claimed rent from him.

In the case before me there is no proof of any rent ever having been paid; or that the defendant was inducted as a tenant by the plaintiff. The parties are brothers and, admittedly, the house was once joint property. In these circumstances, on the authorities quoted, I hold that the defendant was not estopped from denying that he was the plaintiff's tenant and that there is no evidence to prove that he was, or to rebut his explanation of how he came to sign the lease.

I accept the revision, set aside the decree of the Judge Small Cause Court and order that the suit be dismissed with costs.

L. K.

Application accepted.

(4) 7 C. W. N. 596.

(5) 51 Ind. Cas. 548; 17 A. L. J. 835; 1 U. P. L. R. (A) 100; 41 A. 654.

PATNA HIGH COURT.

CIVIL REVISION NO. 41C OF 1922.

March 5, 1923.

Present.—Mr. Justice Ross,

DHOBI ROY—PETITIONER

versus

MAHADEO SINGH AND OTHERS—

OPPOSIE PARTY.

Execution of decree—Sale of tenure—Crops, whether belong to raiyat or purchaser.

The sale of a tenure in execution of a decree would pass all that is growing upon the land, unless the growing crops are excepted by the notification of sale, or else a custom is proved that the out-

going *raiayat* should have the crops, subject to a payment for use and occupation of the land while they remain on the ground.

Afatoonla Siddar v. Dwarka Nath Moitry, 4 C. 814; 4 C. L. R. 95; 2 Ind. Dec. (N. S.) 516, relied on.

Application against an order of the District Judge, Monghyr, dated the 28th July 1922, upholding that of the Munsif, Jamui, dated the 10th July 1922.

FACTS.—That the petitioner obtained a mortgage-decree, dated 24th February 1913, against the opposite party and in execution of the said decree 15 *bighas* 7 *cottas* of land belonging to the judgment-debtors were sold and the decree-holder purchased the same at the execution-sale on 10th March 1921.

2. That the judgment-debtors filed a petition under O. XXI, r. 90, Civil Procedure Code, for setting aside the sale which was dismissed for default.

3. That on appeal against the said order dismissing the petition the Appellate Court remanded the case to the Munsif.

4. That after remand the learned Munsif of Jamui heard the parties and dismissed the petition on 10th July 1922, holding that there was no justification for setting aside the sale.

5. That against the said order of the Munsif dismissing the petition the judgment-debtors have appealed to the District Judge of Monghyr.

6. That on 20th July 1922 the judgment-debtors filed a petition before the District Judge praying that execution may be stayed which was rejected by the District Judge on 28th July 1922.

7. That on 3rd August 1922 the judgment-debtors again filed a petition to the District Judge for re-consideration of his order dated 20th July 1922 which was also dismissed on 18th September 1922 as the delivery of possession had already taken place in July 1922.

8. That on 30th October 1922 the judgment-debtors again filed a petition before the District Judge praying that a Commissioner be appointed to appraise the crops standing on the land and the Court granted this petition.

9. That on 9th November 1922 the judgment-debtors filed a petition before the Munsif of Jamui praying that the crops may be delivered to them on their deposit-

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ing security as the crop had been raised them and the Court ordered Rs. 600 to be deposited as security.

10. That the decree-holder objected to the petition on the ground that the crop had been raised by the decree-holder and, secondly, that the security of Rs. 600 was insufficient for 400 maunds of paddy.

11. That on 14th November 1922 the learned Munsif was pleased to overrule the objection of the decree-holder and allowed the security to be deposited.

12. That on 16th November 1922 the decree-holder moved the District Judge against the said order of the Munsif dated 14th November 1922 and the learned District Judge was pleased to uphold the order of the Munsif by his order dated 22nd November 1922.

Mr. *Hareshwar Prasad*, for the Petitioner.

JUDGMENT.—This is an application against an order of the learned District Judge of Monghyr upholding an order of the Munsif of Jamui permitting the opposite party to take away the paddy crop on land which formerly belonged to them but which had been sold in execution of a decree on the 16th of March 1921 and of which delivery of possession had been given on the 31st of July 1922. In *Afatoonla Sirdar v. Dwarka Nath Moitry* (1), it was held that, "the sale of the tenure would apparently pass all that was growing upon the land, unless the growing crops were excepted by the notification of sale, or else a custom was proved that the out-going *raiyyat* should have the crops, subject to a payment for use and occupation of the land while they remained on the ground." In the present case, apparently, the opposite party were tenants continuing on the land and any crop that they raised must be taken to have been raised for the benefit of the owner of the land.

The application is allowed and the order of the District Judge is set aside and the crops will be delivered to the petitioner. As the opposite party did not appear there will be no order as to costs.

Z. K.

Application allowed.

(1) 4 C. 814; 4 C. L. R. 95; 2 Ind Dec. (N. S.) 516.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2273 OF 1918.
February 21, 1923.

Present.—Mr. Justice Broadway and
Mr. Justice Moti Sagar.

SAMAIL AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

AHMADA, MINOR, THROUGH *Musammât*
SABO, HIS MOTHER, AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Custom—Gift in favour of collateral—Gilotar Jats of Jhang District.

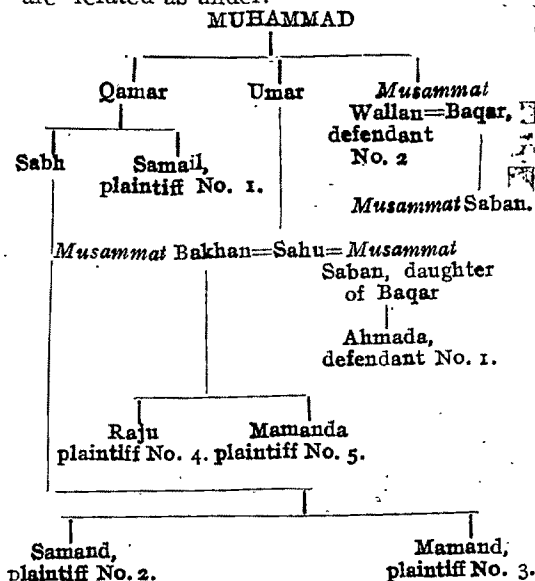
Among *Gilotar Jats* of the Jhang District a male proprietor is empowered by custom to make a gift of ancestral property in favour of a collateral to the exclusion of other collaterals. [p. 453, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, First Class, Jhang, dated the 28th March 1918.

Mr. C. L. Gulati, for the Appellants.

Mr. Nanak Chand, for the Respondents.

JUDGMENT.—The parties to this suit are related as under:—



Baqar made a gift of his land in favour of Ahmada, who is his daughter's son as well as the son of his nephew. His right to do so has been impeached by Samail and others, the plaintiffs in this case, who are also the collaterals of Baqar. Baqar is dead, but the plaintiffs sought a declaration of by their rights, inasmuch as his widow,

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Musammal Wallan, is still alive. The parties are Gilotar Jats of the Jhang District and the defence set up on behalf of Ahmada was that, by the custom of their tribe, Baqar had the power, to make a gift in his (Ahmada's) favour. The Trial Court has, after a careful inquiry, come to the conclusion that Baqar was competent to make the gift, and the plaintiffs have, therefore, come up to this Court in appeal through Mr. C. L. Gulati whom we have heard. As stated above the parties are Gilotar Jats of the District of Jhang, and according to the *riwaj-i-am*, this tribe recognises the right of a male proprietor to gift lands in favour of collaterals. The *riwaj-i-am* has been held by their Lordships of the Privy Council in *Beg v. Allah Ditta* (1) to be a strong piece of evidence in support of the custom therein declared. In the present case there is practically no rebuttal of the entry in the *riwaj-i-am*, whereas the defendants have succeeded in proving several instances of gifts made by male proprietors in favour of collaterals to the exclusion of other collaterals. The evidence on the record, both documentary and oral, supports the entry in the *riwaj-i-am*, and we are, therefore, satisfied that the view taken by the Court below is correct and that among the Gilotar Jats of the Jhang District, the custom, set up by the defendants by which a male proprietor is empowered to make a gift in favour of a collateral, has been established.

We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 4 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 2 OF 1922.

October 23, 1922.

Present.—Mr. Justice Piggott and Mr. Justice Walsh.

BHARAT INDU AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus

ASGHAR ALI KHAN—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), O. IX, applicability of, to execution proceedings—Application for execution dismissed in default—Remedy, proper—Order refusing to restore application for execution dismissed in default, whether appealable.

The provisions of O. IX of the Civil Procedure Code have no application to execution proceedings. Where, therefore, an application for execution of a decree is dismissed in default, the proper remedy of the decree-holder is to make a fresh application for execution of his decree. [p. 453, col. 2.]

An order refusing to restore an application for execution of a decree dismissed in default of prosecution is not open to appeal. [p. 454, col. 1.]

First appeal from an order of the Subordinate Judge, Bareilly.

Mr. Surendro Nath Sen, for the Appellants.

Mr. Agha Haider, for the Respondent.

JUDGMENT.—This is an appeal by the decree-holder in an execution matter. In the form in which it comes before us in consequence of the decision of the Court below, it raises a simple question of law. On the 28th of May 1921 an application for execution of a certain decree, which had been made on the 7th of April 1920, was dismissed by the Execution Court on the ground that the decree-holder had failed to prosecute it with due diligence. On the 1st of June 1921 the decree-holder presented to the Court below an application not described as falling under the provisions of any specified section or rule of the Code of Civil Procedure, but offering an explanation of the alleged default of prosecution and asking the Court to restore the application of April the 7th 1920, to its file and to proceed with its disposal according to law. The Court below has rejected this application on the ground that the provisions of O. IX of the Code of Civil Procedure have no application to execution proceedings and that the decree-holder's remedy, if any, was to make a fresh application for execution of his decree. The authority quoted for this view of the law is the decision of the

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Privy Council in the case of *Thakur Prasad v. Fakir Ullah* (1). On the face of it, this case is decisive against the decree-holder. He had no right in law to apply for the restoration of his application of the 7th of April 1920 and, what is more, nothing in O. XLIII, r. 1, clause (c) of the Code of Civil Procedure would give him any right of appeal against the decision of the Court below rejecting his application. It has been contended before us that the decision of the Privy Council above referred to ceases to govern the case, by reason of the provisions of section 141 of the present Code of Civil Procedure (Act No. V of 1908) in which an explanation which had been added by the Amending Act No. VI of 1892, to section 407 of the former Code of Civil Procedure, was omitted. The history of this matter is somewhat curious, but we think there can be no doubt that the correct view is that taken by the Chief Justice of the Calcutta High Court in the case of *Hari Charan Ghosh v. Manmatha Nath Sen* (2). This ruling has since been followed by the Patna High Court in the case of *Ritu Kuer v. Alakhdeo Naram Singh* (3).

We think the decision of the Court below was correct and, moreover, that no appeal lies against it. We dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

(1) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

(2) 19 Ind. Cas. 683; 4 I. C. 1 at p. 4; 18 C. W. N. 343.

(3) 47 Ind. Cas. 154; 4 P. L. J. 3303 (1918) Pat. 265; 5 P. L. W. 208.

r. 89—Sale-proceeds, payment of, into Court—Money received by decree-holder.

The payment of sale-proceeds into Court is not sufficient to constitute them money received by the decree-holder within the meaning of r. 89, O. XXI, of the Civil Procedure Code.

Appeal from an order passed by the First Class Subordinate Judge, at Jalgaon. In Miscellaneous Application No. 28 of 1922.

Mr. D. C. Virkar, for the Appellant.

Mr. K. H. Kelkar, for Respondent No. 1.

JUDGMENT.—The question in this appeal is clearly covered by the decision in *Trimbak Narayan v. Ramchandra Narsingrao* (1) where it was held that payment of sale proceeds into Court is not sufficient to constitute them money received by the decree-holder. That decision was under section 310A of the Code of Civil Procedure of 1882. The same words are used in O. XXI, r. 89, of the present Code. As long as the Legislature has decided that only money received by the decree-holder can be taken into account, then it is not for the Court to say that money paid into Court, and not put into the pocket of the decree-holder, is money received by him. The appeal, therefore, must be dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 23 B. 723; 1 Bom. L. R. 215; 12 Ind. Dec. (N. S.) 483.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2691 OF 1921.

November 9, 1922.

Present.—Mr. Justice Scott-Smith.

SANT SINGH—DEFENDANT—APPELLANT
versus

GOBIND RAM—PLAINTIFF—ATMARAM
—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (I of 1913)—Building mainly used as residence and part as workshop—"Shop," meaning of.

The mere fact that a part of a building, which is mainly used as a residence, is used as a tail r's workshop, would not convert the whole of it into a shop. [P. 455, col. 2.]

The word "shop" denotes a building primarily used for the retail sale of goods. [P. 455, col. 1.]

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 48 OF 1922.
February 15, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

TOTARAM CHUNILAL SHET—

PLAINTIFF—APPELLANT

versus

CHHOTURAM MOTIRAM SHET—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI,

DAGDU RAJARAM V. LAXMAN PANDUSHET.

Second appeal from an order of the District Judge, Jullundur, dated the 24th October 1921.

Mr. Kanwar Dalip Singh, for the Appellants.

Mr. Jagan Nath, for the Respondents.

JUDGMENT.—The plaintiff having been given a decree for pre-emption of a certain building situate in Mohalla Jilan in the Jullundur City, the defendant-vendee has come up in the second appeal to this Court on the ground that the building is a shop and not a house and that, therefore, it cannot be pre-empted. The lower Courts have concurrently held that the building is a house and upon the facts found by them there is no difficulty in holding that their decision is correct.

The building according to the sale-deed consists of a *kotha*, which is used as a residence, a roofed *sehn*, a stair-case and a shop. Atma Ram, the vendor, admittedly lived in the back part of the premises with his family and used the front room, which opens on to the lane, as tailor's shop. According to the finding of the learned District Judge, Atma Ram merely worked as a tailor and did not sell any goods in the so-called shop. In other words, he used it as his workshop. In the learned District Judge's opinion the term "shop" does not include a workshop. In *Bhamba Ram v. Allah Bakhsh* (1) it was held that the *ratio decidendi* in cases in which the property is used for more than one purpose is to find out the primary or main purpose for which it has been used. In *Nawal Kishore v. Amir Khan* (2) it was held that the use of a residential property as business premises for transacting the business of commission agency does not alter the nature of such property and it would not in consequence of such usage be considered to be shop property. I have no doubt that the word "shop" denotes a building primarily used for a retail sale of goods. I asked Mr. Dalip Singh, who appeared for the appellant, whether there was any evidence on the record to show that Atma Ram used any por-

tion of the building as a retail shop. He referred to defence witnesses Nos. 6, 7 and 8. Defence witness No. 6 said that Atma Ram used to sell clothes, whilst defence witnesses Nos. 7 and 8 said he used to sew clothes. In other words, he did the ordinary work of a tailor who makes clothes for people. It is clear that the learned District Judge considered this evidence and in his opinion Atma Ram merely used the front portion of the building as a workshop and not as a retail shop. On the facts found by him I have no difficulty in holding that the building was mainly used as a residence and that the mere fact that Atma Ram used a part of it as a tailor's workshop did not convert the whole of it into a shop.

No other point was argued before me. The appeal fails and is dismissed with costs.

With regard to the cross-objections, Counsel did not urge the first ground which relates to a finding of fact and said he would leave the question of costs to the Court. I am not prepared to interfere with the order as to costs which, under the circumstances, was a proper one.

W. C. A.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 231

OF 1922.

March 22, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Cramp.

DAGDU RAJARAM MARWADI—

DECREE-HOLDER—APPLICANT

versus

LAXMAN PANDUSHET THAKUR—

OPPONENT.

Vakalatnama—Execution proceeding—Claim petition—Separate Vakalatnama, whether necessary.

Where a Pleader files a *vakalatnama* in a proceeding in execution of decree, he ought not to be required to file a separate *vakalatnama* when a claim petition is made against the execution.

Application against an order passed by the Joint Subordinate Judge at Thana,

(1) 31 Ind. Cas. 191; 69 P. R. 1915; 156 P. W. R. 1915.

(2) 122 P. R. 1906; 80 P. L. R. 1907; 161 P. W. R. 1906.

KALYANASUNADARAM AIYAR v. NARASIMHA AIYANGAR.

Mr. D. C. Virkar, for the Applicant.

JUDGMENT.—We think that the Rule must be made absolute. The decree-holder's Pleader put in his *vakalatnama* in the proceeding for execution. It cannot be contended that because a claim petition was put in against the execution, it was necessary for the decree-holder to file another *vakalatnama*.

W. C. A.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 80 OF 1921.
December 21, 1922.

Presents—Mr. Justice Spencer and
Mr. Justice Venkatasubba Rao.

C. L. KALYANASUNADARAM AIYAR
—PETITIONER—APPELLANT

versus

S. NARASIMHA AIYANGAR AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64—Attachment of decree obtained by Receiver—Leave of Court not obtained, effect of—Bona fide purchaser for value, rights of, whether affected.

An attachment of a decree obtained by a Receiver in a suit is invalid without the leave of the Court that appointed the Receiver.

An act done without the Court's sanction to proceed against a Receiver can, however, be validated by subsequent sanction.

Karooth Parakote Ammukutty v. Manavikraman, 59 Ind. Cas. 568; 43 M. 793; 12 L. W. 331, *Jangana Sanyasiah v. Mycherla Peda Atachanna*, 70 Ind. Cas. 759; 15 L. W. 289; 42 M. L. J. 339; *Banku Behary Dey v. Harendra Nath Mukherjee*, 8 Ind. Cas. 11, 15 C. W. N. 54, *Sarat Chandra Banerjee v. Apurba Krishna Roy*, 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J. 55, relied on.

But where no steps have been taken to validate an irregular attachment of a decree obtained by a Receiver by the time the Receiver assigns his interest as decree-holder to an innocent purchaser, the rights of the attaching creditor cannot be allowed to prevail over those of a *bona fide* transferee for consideration of the decree-holder's interest.

Appeal against an order of the Court of the Subordinate Judge, Coimbatore, in I. A. No. 536 of 1920 in O. S. No. 113 of 1919.

Mr. A. Ramachandra Iyer, for the Appellant.

Messrs. C. A. Sashagiri Sastrier and N. R. Sasha Iyer, for the Respondents.

JUDGMENT.—The Subordinate Judge was rightly of opinion that the appellant's attachment of the decree obtained by the Receiver in Original Suit No. 113 of 1919 was invalid for want of the leave of the Court that appointed the Receiver. We accept the principle that an act done without the Court's sanction to proceed against a Receiver could subsequently be validated, as has been held by this Court in *Karooth Parakote Ammukutty v. Manavikraman* (1) and *Jangana Sanyasiah v. Mycherla Peda Atachanna* (2), and by the Calcutta High Court in *Banku Behary Dey v. Harendra Nath Mukherjee* (3) and *Sarat Chandra Banerjee v. Apurba Krishna Roy* (4) respectively.

But in this case no step had been taken to validate the irregular attachment by the time that the Receiver assigned his interest as decree-holder to the innocent purchaser, who is 1st respondent in this appeal, and, therefore, the appellant's right as an attaching creditor cannot be allowed to prevail over the rights of a *bona fide* transferee for consideration of the decree-holder's interest. An attempt has been made to show that the Receiver had no power to assign the decree under the powers vested in him, but this contention cannot be maintained in view of the wide authority given by the vesting order of 18th April 1908, which expressly refers to the "full powers" of O. XL, r. 1.

The appeal fails and is dismissed with costs.

Appeal dismissed.

V. N. V.

- (1) 59 Ind. Cas. 568; 43 M. 793; 12 L. W. 331.
- (2) 70 Ind. Cas. 759; 15 L. W. 289; 42 M. L. J. 339.
- (3) 8 Ind. Cas. 11; 15 C. W. N. 54.
- (4) 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J. 55.

THAKUR DAS v. BRIJ LAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1304 OF 1922.

January 3, 1923.

Present:—Mr. Justice Campbell.

THAKUR DAS—DEFENDANT—

APPELLANT

versus

BRIJ LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11 Expl. IV—Res judicata—Plea not taken in previous suit—Subject-matter, difference of, effect of.

Defendant obtained a decree against one M. in execution of which he brought to sale and purchased a certain undivided share in a house which was alleged to have belonged to M. Subsequently, defendant brought a suit against B., the nephew of M., for rent of the purchased share. B. denied the purchase by defendant but did not put forward the plea that the share purchased had never belonged to M. The suit was eventually decreed. B. then brought the present suit for possession of the share purchased by the defendant on the ground that M. was not the owner of the share:

Held, (1) that the question of M's ownership of the share purchased by the defendant was *res judicata* between the parties by virtue of Explanation IV to section 11 of the Civil Procedure Code;

(2) that the fact that the subject-matter of the earlier suit was not the same as the subject-matter of the later suit did not make any difference.

Gobind Lal v. Rao Baldeo Singh, 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914, followed.

Second appeal from a decree of District Judge, Sialkot, dated the 31st January 1922, affirming that of the Munsif, First Class, Sialkot, dated the 10th November 1921.

Diwan Mehr Chand, for the Appellant.
Lala Daulat Ram, for the Respondent.

JUDGMENT.—In 1910 Thakur Das obtained a decree against the estate of one Mul Raj in a suit which was defended by the latter's widow, Musammat Sukh Devi. In execution of his decree he attached an undivided share in house property which was alleged to have belonged to Mul Raj and in subsequent auction-sale purchased it. In 1919 Thakur Das brought a suit against Brij Lal, nephew of Mul Raj, and Musammat Thakur Devi, widow of a brother of Mul Raj, for rent of the purchased share. Other persons actually in possession as tenants were also joined. In his plaint Thakur Das asserted that he was owner by purchase in execution-sale, and attached to the plaint copies of certain documents

which showed that he claimed to have purchased Mul Raj's share. Brij Lal as defendant denied that there had been any auction-sale, denied that Thakur Das had purchased any share in the house property or had got possession, and denied that he (Brij Lal) was a tenant of the plaintiff. On the pleadings an issue was struck whether the plaintiff, Thakur Das, had purchased a share in the house property in suit and had obtained possession. Both the Trial Court and the Appellate Court found this issue in favour of Thakur Das and he was granted a decree in the Appellate Court for Rs. 59-10. The present suit was lodged on the 1st of July 1921 by Brij Lal for possession of the share sold to Thakur Das on the ground that Mul Raj was not the proprietor of that share. The suit had been decreed by the Trial Court and the decree has been upheld in appeal by the learned District Judge.

A second appeal has been preferred and it is urged that, under section 11, Explanation IV of the Code of Civil Procedure, the question of Mul Raj's ownership rights in the share in suit is *res judicata*. This contention must, I consider, be sustained. The learned District Judge has disposed of the point in language which is by no means clear. He says that it would not appear that Brij Lal has much chance of effectively raising the question in the previous suit whether Musammat Sukh Devi had actually any saleable interest in the property sold. I cannot see how this was so. The plea was an obvious one for Brij Lal to raise, especially since the ultimate result proved that the plea which he did raise, namely, that there had been no auction-sale at all, was frivolous.

It is argued on behalf of Brij Lal before me that the plea that Mul Raj had no rights in the property was raised in the former suit, but that it was not put in issue and, therefore, was not heard and finally decided. I am referred in substantiation to a statement in the written pleas of Brij Lal and Musammat Thakur Devi that they are owners and not tenants and that the houses are their ancestral property. Now Mul Raj was the uncle of Brij Lal and the brother of Musammat Thakur Devi's husband and a bare assertion by these two persons that their ownership rights were

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ancestral could hardly be taken to contain an implication that Mul Raj had no rights; any implication would be to the contrary. The further argument that a decision in a former suit is not *res judicata* in a subsequent suit when the subject-matter is not the same has no force and has been disposed of in *Gobind Lal v. Rao Baldeo Singh* (1), a ruling which is distinctly in point here.

I accept the appeal with costs, set aside the decree of the Courts below and order that the plaintiff's suit be dismissed with costs throughout.

Z. K.

Appeal accepted.

(1) 24 Ind. Cas. 931; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914.

ALLAHABAD HIGH COURT.

SECOND CIVIL, APPEAL NO. 308 OF 1922.

April 4, 1923.

Present.—Mr. Justice Lingsay and Mr. Justice Sulaiman.

Babu BINDESHRI PRASAD—DEFENDANT—APPELLANT

Kuar SARJU SINGH—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 25—*Unlawful consideration*—*Debt incurred when borrower under Court of Wards*—*Inadequacy of consideration*.

A debt unenforceable at law because of its having been incurred by a ward of the Court of Wards is not an unlawful consideration, within the meaning of section 23 of the Contract Act, for a bond executed after the estate is released by the Court of Wards.

A consideration for a bond is not inadequate within the meaning of Explanation 2 of section 25 of the Indian Contract Act, if a portion of it consists of a debt which was unenforceable because of its having been incurred at a time when the debtor was a ward of the Court of Wards.

Second appeal from a decree of the District Judge, Cawnpore, dated the 9th of January 1922.

Messrs. R. Malcomson, M. L. Sandal, K. N. Kaiju and Shafi-ullah, for the Appellant.

Mr. P. L. Banerjee, for the Respondent.

JUDGMENT.—We are of opinion that the decree of the lower Court must be affirmed. The facts are that, on the 20th August 1912, the father of the present defendant, Bindeshri Prasad, executed a promissory-note in favour of the plaintiff for a certain sum.

At the time this promissory-note was executed the defendant's father was a ward of the Court of Wards and, consequently, it follows that the contract evidenced by this promissory-note was a void contract and that no debt resulted.

After the release of the estate from the Court of Wards and the death of the defendant's father, the present defendant on the 19th August 1915 executed a bond for Rs. 3,000 in favour of the plaintiff.

It is found that this sum of Rs. 3,000 was made up of Rs. 1,800 advanced at the time and that the balance, Rs. 1,200, represented the sum which had been secured by the promissory-note executed by the defendant's father.

The present suit was on this bond and the Courts below have decreed the claim. The argument in the Court below, as here, is that in no case can the plaintiff recover this sum of Rs. 1,200 on the ground that there was an unlawful consideration.

We think this plea cannot be maintained. We agree with the learned Judge of the Court below that the consideration so far as it concerns this sum of Rs. 1,200 was not an unlawful consideration within the meaning of section 23 of the Contract Act.

Further, it cannot, we think, be argued that there was no consideration for the bond so as to bring the case within the purview of section 25. It may be that there was no existing debt in respect of this sum of Rs. 1,200, but the fact remains that under this bond an advance of Rs. 1,800 was made to the defendant and that there was, therefore, real consideration for the bond. The Court below finds that the plaintiff would not have advanced Rs. 1,800 without the undertaking of the defendant to pay the money which had been advanced to his father.

We are not concerned with the adequacy of the consideration. That is not a matter which has to be taken into account in considering a question of this kind (see Explanation 2 to section 25 of the Indian

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Contract Act). The decree of the Court below is correct. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

M. D. Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 210 OF 1920.

February 10, 1923.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Ffiorde.

FIRM GHAMANDI LAL-NARAIN
DAS—DEFENDANT—APPELLANT

versus

FIRM CHURANJI LAL-POKHAN MALL,
—PLAINTIFF—RESPONDENT.

Construction of contract—Contract for sale of goods—Arbitration clause—Claim for damages for non-delivery, whether claim arising out of contract.

A contract for the sale of goods contained a clause providing that any claim or dispute of any sort whatever arising in connection with the contract, unless amicably settled, must be referred to arbitration. Plaintiff sued to recover damages for non-delivery of a portion of the goods contracted for:

Held: that the plaintiff's claim being for damages arising out of the failure of the defendant to fulfil his contract to supply the goods, was covered by the arbitration clause and his suit was not, therefore, maintainable. [p. 460, col. 1.]

Ganesh Das-Ishar Das v. Durga Dai-Jagan Nath, 60 Ind. Cas. 776; 2 L. 19; 3 L. L. J. 61; (1922) A. I. R. (L.) 97, follow.d.

Charles Louis Dreyfus v. Jai Chand, 18 Ind. Cas. 316; 54 P. W. R. 1913; 124 P. L. R. 1913, *Chajju Mal & Co. v. Gurmukh Singh-Bhagwan Das*, 42 Ind. Cas. 95; 72 P. R. 1917; 139 P. W. R. 1917, referred to.

Second appeal from a decree of the District Judge, Delhi, dated the 18th of September 1919, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 18th October 1918.

Mr. M. L. Puri, for the Appellant.

Sheikh Niáz Muhammad, for the Respondent.

JUDGMENT.—The action out of which this appeal has arisen was brought to recover damages for breach of a contract to deliver certain goods. The contract

in question was in writing and contained a clause providing that any claim or dispute of any sort whatever in connection therewith, unless an amicable settlement could be arrived at, must be referred to arbitration.

Upon a claim being made for non-delivery of a portion of the goods contracted for, the defendants referred the matter to arbitration under the provisions of this clause. The plaintiffs, however, refused to attend the arbitration, and alleged as their reason for such refusal that arbitrators are invariably a prejudiced tribunal, and that such proceedings are always subject to such delay.

The arbitration, thereupon, proceeded in the absence of the plaintiffs and ultimately an award was made dismissing the claim.

The plaintiffs then brought their suit before the Sub-Judge at Delhi upon the same cause of action as had already been disposed of by the award. The defendants set up the award in defence, but the learned Subordinate Judge held that the award was no bar to the action as the arbitration clause did not apply to a case of non-delivery and gave judgment for the plaintiff. Upon appeal to the District Judge the decree was affirmed.

The plaintiffs have, at no time, attacked the award upon any of the grounds upon which such a document may be impeached, but have, throughout, rested their case against its validity, solely upon the contention that the arbitration clause does not apply in the case of non-delivery.

In support of this contention, Counsel for the plaintiffs has referred to the decision of Kensington, J., in *Charles Louis Dreyfus v. Jai Chand* (1) which was approved of by Broadway, J., in *Chajju Mal & Co. v. Gurmukh Singh-Bhagwan Das* (2). Both these cases, however, were discussed in *Ganesh Das-Ishar Das v. Durga Dai-Jagan Nath* (3) where the applicability of this identical arbitration clause in the case of a short delivery of goods was the subject of decision. The Court in this last mentioned case refused to follow these decisions, and held:

(1) 18 Ind. Cas. 316; 54 P. W. R. 1913; 124 P. L. R. 1913.

(2) 42 Ind. Cas. 95; 72 P. R. 1917; 139 P. W. R. 1917.

(3) 60 Ind. Cas. 776; 2 L. 19; 3 L. L. J. 61; (1922) A. I. R. (L.) 97.

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that the reason given in the Court below for refusing to delay the suit, namely, that such an arbitration clause did not apply to short delivery of goods, was incorrect. We can see no difference in principle between the case of short delivery and non-delivery. The plaintiff's claim in the present suit was for damages arising out of the failure of the defendants to fulfil their contract to supply the goods in question. We fail to see how it can be seriously contended that such a clause does not come within the meaning of the words "any claim or dispute arising in connection with this contract."

We are satisfied that, in the events which have happened, the arbitration clause in question is clearly applicable.

The parties have, by agreement, elected their own tribunal, and must be bound by its decision unless it can be impeached upon any of the well-known grounds upon which such a decision can be challenged.

The plaintiff having failed to establish any plea against the award set up in bar of the suit, the suit accordingly fails and the appeal must be allowed with costs throughout.

Z. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1569 of 1921.

April 5, 1923.

Present:—Mr. Justice Daniels.

AMIN-UD-DIN AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

ABDUL SHAKOOR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Agra Tenancy Act (II of 1901), s. 199 (1) (b)—Question of title decided by Assistant Collector, Second Class—Subsequent suit for ejectment before Assistant Collector, First Class—Res judicata.

Under ordinary circumstances the decision of an Assistant Collector, Second Class, would not be *res judicata* for a suit only triable by an Assistant Collector of the First Class. [p. 460, col. 2.]

Ram Gobind v. Sri Thakurji Mahasaj, 19 Ind. Cas. 126; 11 A. L. J. 231, relied on.

But if an Assistant Collector of the Second Class decides a question of proprietary title under the provisions of section 199, sub-section (1) (b) of the Agra Tenancy Act his decision is one of a Civil Court and would act as *res judicata* in a subsequent suit brought in the Court of the Assistant Collector of the First Class in which such a question is involved. [p. 461 col. 1.]

Shahzade Singh v. Mohammad Mehdi Ali Khan, 3 Ind. Cas 954; 6 A. L. J. 917; 32 A. 8 followed.

Second appeal against a decree of the District Judge, Allahabad, dated the 16th July 1921.

Mr. Iqbal Ahmad, for the Appellants.

Dr. K. N. Katju, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiffs in a suit for ejectment which was filed in the Court of an Assistant Collector of the First Class. The defendant set up proprietary right in the land. Section 199 of the Tenancy Act requires the Court in such cases either to refer the defendants to the Civil Court or to decide the question of title itself, unless the question has already been determined by a Court of competent jurisdiction. The issue between the parties is whether the question of title had previously been determined by a Court of competent jurisdiction whose decision is conclusive in the present suit. The lower Appellate Court has answered this question in the affirmative. It appears that in the year 1919 the plaintiff filed a suit for arrears of rent against the defendants in the Court of an Assistant Collector of the Second Class. The defendants alleged that they were not tenants but had a proprietary right. The Assistant Collector framed the following issue, "whether the relationship of landlord and tenant exists between the parties?" This was the sole issue in the case. In the course of his judgment the Assistant Collector held that the defendants were in possession of the land in suit not as tenants but as owners. His finding on the issue framed by him is embodied in the following sentence: "I, therefore, hold that the defendants are not tenants of the plaintiffs."

Under ordinary circumstances, the decision of an Assistant Collector of the Second Class would not be *res judicata* for a suit only triable by an Assistant Collector of the First Class. This is clear from the language of section 11, Civil Procedure Code, which requires that the Court which decides the

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former suit shall be a Court competent to try the subsequent suit and it has also been directly held in *Ram Gobind v. Sri Thakurji Maharaj* (1). In this case, however, if a question of title was decided by the Assistant Collector under section 199 of the Tenancy Act his decision under the provisions of that section is treated as equivalent to the decision of a Civil Court. The Civil Court which would have been competent to decide the question of title if the Assistant Collector had referred it under clause (a) of the section instead of deciding it himself under clause (b) would have been the Court of the Munsif. The Court to which a reference would have had to be made in the present case was also the Court of the Munsif. In deciding the question of title the Assistant Collector was not acting as a Revenue Court but as a Civil Court of the lowest grade, and his proceedings were in all respects governed by the Civil Procedure Code. It is difficult, therefore, to see how the Courts below could avoid the conclusion, when the question of title was raised before them in a second suit, that it had already been decided by a Court of competent jurisdiction in the former litigation, and the case in *Shazade Singh v. Mohammad Mehdi Ali Khan* (2) relied on by the District Judge is direct authority for this view.

In view of the form of the issue raised by the Assistant Collector in the former suit I had at first some doubt as to whether the Assistant Collector really did decide a question of title. It is true that this point had not been raised by the appellant in this Court and was not suggested in the Court below. In form, the Assistant Collector restricted the issue to the question whether the relationship of landlord and tenant existed. It is clear, however, that in the particular circumstances of this case the decision of that issue necessarily involved the question of title. The only ground on which the defendants denied the relationship was that they themselves were the owners, and it was on a definite finding of their proprietary right that the Assistant Collector decided the suit. It has been pointed out on behalf of the appellants

that in that litigation the plaintiffs claimed in the alternative either under a direct agreement of tenancy or, in case the defendants were occupying the land without right under section 34 of the Tenancy Act. The suit, therefore, could not have been dismissed except on a finding that the plaintiffs had not the proprietary right which they claimed.

For these reasons I affirm the decision of the Court below and dismiss the appeal with costs.

W. C. A. & N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL,
No. 8 OF 1919.

November 22, 1922.

Present:—Mr. Justice Abdul Raoof and
Mr. Justice Moti Sagar.

JHAMMAN LAL—DECREE-HOLDER—
APPELLANT
versus

DAULAT RAM AND OTHERS—JUDGMENT-
DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), *Sch. I, Art. 182* (4)
—*Execution of decree—Amendment of decree after
execution has become barred, effect of.*

A decree which is capable of execution and is not executed within the period of limitation becomes dead and cannot be revived by a subsequent application for amendment. [p. 462, col. 2.]

Rabiuddin v. Ram Kanai Sen, 59 Ind. Cas. 186, followed.

Where a decree is quite capable of execution as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under clause (4) of Art. 182 of Schedule I to the Limitation Act. [p. 462, col. 2.]

Anandram v. Nityananda Barham, 32 Ind. Cas. 744, relied upon.

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 6th May 1918, affirming that of the Subordinate Judge, Second Class, Lahore, dated the 20th October 1917.

Lala Sardha Ram, for the Appellants.

Lala Madan Gopal, for Lala Tirath Ram,
for the Respondents.

JUDGMENT.—This is a second appeal arising out of proceedings in execution of a decree. The following facts will disclose

(1) 19 Ind. Cas. 126; 11 A. L. J. 231.

(2) 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. G.

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the nature of the question which we have to decide in this appeal.

On the 22nd January 1909, the Arbitrators made an award granting a decree in favour of the appellant in this case for Rs. 4,000. Two conditions were mentioned in the award, namely, (a) that the judgment-debtor might pay the amount in three years by equal instalments, the first instalment falling due on the 1st of January 1910; and (b) that if the judgment-debtor paid Rs. 3,500 within seven months of the date of the award he would be allowed a remission of the remaining Rs. 500.

On the award being filed in Court, certain objections were raised which delayed the passing of a decree on the award. A decree was eventually passed on the 23rd May 1910 for Rs. 4,000 without incorporating the clauses above-mentioned. A default in payment of the first instalment had already taken place and the judgment-debtor had also failed to pay Rs. 3,500 within seven months. Consequently, according to the terms of the award, the plaintiff had become entitled to realise the entire amount of Rs. 4,000 from the judgment-debtor and an unconditional decree for the amount was passed in his favour. An application for the execution of the decree was made on the 23rd June 1913. In this application the decree-holder rightly stated that, owing to the failure on part of the judgment-debtor to fulfil the condition mentioned in the award, he had become entitled to recover the whole amount of Rs. 4,000 in a lump sum. An objection was taken to the execution of the decree on the score of limitation and the application for execution being clearly beyond three years from the date of the decree was held to be barred by time and was dismissed.

The decree-holder then applied on the 30th June 1915 for the amendment of the decree, stating that all the terms of the award had not been incorporated in it. The decree was amended on the 25th of October 1915 and the decree-holder put in a fresh application on the 18th June 1917 for the execution of the amended decree within three years from the date of the amendment and relied upon clause (4) of Art. 182 of the Indian Limitation Act (IX of 1908).

Both the Courts below have dismissed the application, holding it to be barred by time on the ground that the decree had already become dead when its amendment was applied for and it could not be revived by being subsequently amended. They have correctly stated the law that where a decree is quite capable of execution, as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under Art. 182, clause (4). In support of its decision the Appellate Court has relied upon the case of *Anandram v. Nityananda Barham* (1). In our opinion, the decision of the learned Judge of the Court below is fully supported by the ruling quoted by him. This ruling was followed in another case, namely, *Rabiuddin v. Ram Kanai Sen* (2), where it has been laid down that "a decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment." We are entirely in accord with the view expressed in these two rulings. We are, therefore, constrained to hold that the application for execution is clearly barred by time and has rightly been dismissed.

We accordingly dismiss the appeal, but having regard to the circumstances of the case we do so without costs.

Z. K. *Appeal dismissed.*

(1) 32 Ind. Cas. 744.

(2) 59 Ind. Cas. 186.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1477 OF 1922.

April 4, 1923.

Present:—Mr. Justice Daniels.

RAM KISHEN RAI—DEFENDANT—
APPELLANT

versus

SHEO SAGAR PANDEY AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Petition to Revenue Court in mutation proceedings—Admission of title—Registration, whether

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necessary—*Agra Tenancy Act* (I I of 1921), s. 32—*Suit for possession of portion of holding, maintainability of.*

An application in the mutation proceedings in the Revenue Court, by the defendant admitting plaintiffs' claim to a portion of a holding is not a document of title and does not require registration.

Jagrani Misrain v. Bisheshar Dube, 35 Ind. Cas. 701; 38 A. 336; 14 A. L. J. 449 (F. B.), distinguished.

Section 32 of the *Agra Tenancy Act* does not bar a suit for the recovery of a fractional share in a holding against a person in lawful possession.

Kedar v. Deo Narain, 39 Ind. Cas. 80; 37 A. 656; 13 A. L. J. 919, followed.

Second appeal against the decree of the District Judge, Ghazipore, dated the 23rd of May 1921.

Mr. Haribans Sahai, for the Appellant.

Dr. M. L. Agarwala, for the Respondents.

JUDGMENT.—This appeal by the defendant, Ram Kishen Rai, arises out of a suit for possession of a 1-4th share in plot No. 590-1 in the village of Kosara in the Ballia District in which the parties are permanent tenure-holders. The plaintiffs' title to a 1/8th share in this plot based by purchase is admitted. The dispute is as to the remaining 1/8th. In the plaint the plaintiffs simply set up their ownership of the plot and their unlawful dispossession by the defendant in June 1918. The case which they set up at the trial and which has been accepted by both the Courts below is that they came into possession of the remaining 1/8th share under a private partition which took place 8 or 10, according to one witness, and 15 or 16, years ago, according to another. A private partition can be effected without any written document. In this Court the defendant's appeal is urged on two grounds neither of which was put forward in either of the Courts below and which this Court might, therefore, well refuse to entertain on this ground alone.

In support of the plaintiffs' case reliance was placed by the Courts below on an application for correction of papers filed in the Revenue Courts in 1916 in which the defendant admitted that the plaintiffs were in possession of the area in suit by mutual arrangement and asked that the papers should be corrected accordingly to prevent future disputes. The proceedings

for correction of papers were ultimately struck off for default but this fact is immaterial. It is the admission that is relied on. The plea put forward here is that this application is being relied on as a document of title and that as such it was inadmissible in evidence without registration. In fact, the document is not and does not purport to be a document of title, it is merely an admission of possession based on a previous arrangement between the parties and a request to the Court to give effect to that possession. In my opinion the ruling in *Jagrani Misrain v. Bisheshar Dube* (1) on which the appellant relies does not apply. It is said that, apart from this document, there was no evidence of title but the judgment of the Trial Court which the learned District Judge has confirmed shows that this was not the case. The document was not relied on as a foundation of title but as an admission of it. The second plea is that the suit was barred by section 32 of the *Tenancy Act*. Section 32 contains two sub-sections. The first declares that no division of a holding should be binding on the landholder unless he consents. In this case the landholder is not a party to the proceedings and no question of his consent was ever raised. The second sub-section forbids the Courts to entertain a suit for the division of a holding. It has, however, been held in *Kedar v. Deo Narain* (2) that this section does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. For these reasons the appeal, in my opinion, fails and I accordingly dismiss it with costs.

M. A. A. & N. B. *Appeal dismissed.*

(1) 35 Ind. Cas. 701; 38 A. 336; 14 A. L. J. 449 (F. B.).

(2) 30 Ind. Cas. 89; 37 A. 656; 13 A. L. J. 919

CHIMANBHAI KALYANBHAI V. KESHAVLAL BULKHIDAS.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

NO. 210 OF 1921.

February 21, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

CHIMANBHAI KALYANBHAI—

PLAINTIFFS—APPLICANTS

versus

KESHAVLAL BULKHIDAS

AND OTHERS—DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 115
—Order refusing to pass decree in terms of
award.—Interlocutory order.—Revision.

An order refusing to pass a decree in terms of an award made in the course of the suit, and directing the hearing of the suit to proceed is an interlocutory order, and is not open to revision by the High Court under section 115, Civil Procedure Code.

Application against an order passed by the Additional First Class Subordinate Judge, Surat, in Suit No. 236 of 1917.

Messrs. H. C. Coyajee and M. B. Dave,
for the Applicants.

Messrs. G. N. Thakor and N. K. Mehta,
for Opponents Nos. 1, 2, 7, 10, and 11.

Messrs. G. N. Thakor and R. J. Thakor,
for Opponents Nos. 3, 4, to 9 and 12
to 15.

JUDGMENT.—In this case there was a reference to arbitration in which an award was made. When an application was made to the Court to pass a decree in terms of the award, objections were taken to it on various grounds. The Judge framed three issues for preliminary trial:—

(1) Was the permission of the Court taken to refer this dispute to the arbitrator in this case so as to make the reference binding on the minor defendants on the record?

(2) If not, is the award, Exhibit 191, binding on the said minor defendants? Is the reference itself not bad if the first issue is held in the negative?

(3) Is defendant, Dhansukhlal, not a major now? Did he attain his majority pending the suit; if so, on what date?

It was found that defendant, Dhansukhlal, became a major on July 19, 1920, pending the suit. The first two issues were found against the plaintiffs seeking for a decree on the award. The consequence was that

the Court refused to pass a decree in terms of the award. The arbitration proceedings became a nullity and the suit had to proceed in the ordinary course.

From that order of the Judge an application has been made to us under section 115 of the Code. A preliminary objection has been raised by the opponents that it is not competent to this Court in such a case to consider an application in revision. In *Damodar Trimbak Dharap v. Raghunath Hari* (1) it was held that an order under section 521 of the Code of 1882, setting aside an award made under Chapter XXXVII of the Code on a reference to arbitration in the course of a suit, on the ground of the arbitrator's misconduct, was not subject to revision under section 622. The order complained of was interlocutory and, if erroneous, might form a ground of appeal against any decree that might be passed in the suit.

Under section 115 of the present Code, the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. It cannot be said in this case that there has been a decision of the suit by the Subordinate Judge. He decided not to pass a decree in terms of the award but to continue the hearing of the suit by the Court. There is no appeal from that decision and as it is clearly an interlocutory order, an application to revise it is not competent. It is unnecessary, therefore, to discuss the grounds on which the Judge decided that he should not pass a decree in terms of the award. When the suit is finally decided it may be open to the parties supporting the award to appeal on the ground that a decree ought to have been passed in terms of the award. But we may refer, perhaps, at the present moment to the decision in *Atmaram Yekoba Vani v. Bhila Ganpat Vani* (2), in which this Court decided that an agreement to refer in a suit was an agreement coming within the provisions of O. XXXII, r. 7. Therefore, the sanction of the Court was necessary in the case of a minor party. The Rule is discharged with costs. It is

(1) 26 B. 551; 4 Bom. L. R. 267.

(2) 19 Ind. Cas. 424; 15 Bom. L. R. 223.

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desirable that the hearing of this suit should be expedited as much as possible.

W. C. A.

Rule discharged.

OUDE JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 66 OF 1922.

December 16, 1922.

Present.—Mr. Daniels, A. J. C.

Thakurain ABHAIKAR KUAR—

PLAINTIFF—APPLICANT

versus

DATA DIN—DEFENDANT—OPPOSITE PARTY.

Stamp Act (I I of 1899), s. 2 (22), Sch. I, Art. 5—Promissory-note—Instrument undertaking to deliver grain on demand, nature of—Stamp-duty leviable.

An instrument which contains an undertaking to deliver a certain quantity of grain on demand is not a promissory-note as defined in section 2 (22) of the Stamp Act. It is an agreement requiring a stamp of eight annas under Art. 5 of the Stamp Act.

Revision against the order of the Munsif, Kunda, District Partabgarh, dated 7th July 1922.

Mr. H. C. Sen, for the Applicant.

Mr. Radha Krishna, for the Opposite Party.

JUDGMENT.—This is an application for revision of a decree of a Small Cause Court. The suit was on the basis of a document described as a pro-note by which the defendant bound himself to deliver 10½ maunds of grain on demand. The document was treated as a promissory-note, liable to a stamp-duty of one anna and as the one-anna stamp which it bore was not cancelled it was technically unstamped and could not be received in evidence even on payment of duty and penal y. It is now admitted that the instrument was not a promissory-note as defined in section 2, clause (22) of the Stamp Act, inasmuch as a promissory-note must be an undertaking to pay a definite sum of money and, unlike a bond, does not include an undertaking to deliver grain. Under the erroneous impression that

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the instrument could not be admitted even on payment of penalty, the learned Munsif allowed the plaintiff an opportunity to prove the debt apart from the instrument and as he failed to do so dismissed the suit. The instrument, for the reasons given, is not a promissory-note. It is also not a bond under clause (c) of the definition because it is not attested by a witness. It appears to be an agreement requiring a stamp of eight annas under Art. 5, and this is the view taken in Donough's Commentary on the Stamp Act, 6th Edition, page 49. As the learned Munsif's decision proceeds on an erroneous view of the instrument, I set aside the decree of the Court below and send the case back to it for decision *de novo*. Costs here and heretofore will abide the result.

W. C. A.

Decree set aside.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 224 OF 1921.

February 14, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.
HIRACHAND AMICHAND GUJAR—
PLAINTIFF—APPELLANT

versus

NEMCHAND FULCHAND MARWADI—
DEFENDANTS—RESPONDENTS.

Transfer of Property Act (I V of 1882), s. 6 (e)—Damages, right to claim, whether transferable.

A right to claim damages for an alleged breach of contract is not transferable under section 6 (e) of the Transfer of Property Act.

First appeal from the decision of the First Class Subordinate Judge at Sholapur, in Suit No. 361 of 1920.

Messrs. H. C. Coyajee and N. V. Gokhale, for the Appellant.

Messrs. G. N. Thakor and R. A. Jahagirdar, for the Respondents.

JUDGMENT.—The firm of Jivraj-Amichand entered into contracts for the purchase of specified goods at various rates, as evidenced by the sale-notes from the Laxmi Mills. Then the same firm contracted to

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sell the goods bought under the aforesaid agreements to the defendant firm, Nemchand-Gulabchand, at a profit. Jivraj-Amichand complained that the defendant would not take delivery and purported to sell the goods against the defendant. The result was that, owing to the refusal of the defendant to take delivery, there appeared to be a loss of Rs. 13,000 odd to Jivraj-Amichand. It was open then to Jivraj-Amichand to file a suit against the defendant for damages for breach of the contract. Instead of so doing, Hemchand, one of the partners of the said firm, purported to transfer to the plaintiff the right to recover damages.

The suit was dismissed in the Trial Court on the ground that the defendant did not break the contract. When it came before us in appeal it seemed to us obvious that the right to claim damages against the defendant-firm could not be transferred under section 6 (e) of the Transfer of Property Act. It was merely a right to sue, and it was not a transfer of an 'actionable claim' as defined in section 3 of the Act, being neither a debt nor a beneficial interest in moveable property.

The same point had to be decided by the High Court of Calcutta in *Abu Mahomed v. S. C. Chunder* (1). Maclean, C. J., said (page 351*):

"I do not think that we can properly bring a mere claim for damages for breach of contract within those words (actionable claim). Now, if it does not fall within the definition of 'actionable claim' what is it except a mere right to sue, a mere right to sue for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that; and, if so, that cannot be transferred."

With due respect, that reasoning seems obviously right. Therefore, this appeal must be dismissed. The appellant's Counsel urges upon us that he ought not to be made to pay respondents' costs, as this point was not taken in the Court below. But it was open to the respondent's Counsel to dispute the plaintiff's case in this Court on any point which was open to him, and as the plaintiff was not satisfied with the decision of the Trial Court, but wished to take his

(1) 1 Ind. Cas. 827; 36 C. 345; 13 C. W.N. 384.

*Page of 36 C.—[Ed.]

chance of obtaining a decision in his favour, in this Court, he must pay the costs of the appeal.

W. C. A.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 315 OF 1921.

December 20, 1922.

Present:—Mr. Dalal, A. J. C., and
Mr. Daniels, A. J. C.

RAM SARUP SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

JAGESHAR SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Invalid mortgage by deceased father—Pious obligation of sons.

A mortgage by a Hindu father, not incurred for legal necessity or for the payment of an antecedent debt, is not binding on his sons even after his death, on the ground of any pious obligation on them to pay their deceased father's debts.

(Case-law reviewed.)

Appeal against the judgment and decree of the Officiating Subordinate Judge, Unao, dated the 28th July 1921, modifying the judgment and decree of the Munsif, Purwa, Unao, dated the 23rd December 1920.

Mr. Bisheshar Nath Srivastava, for the Appellants.

Mr. A. P. Sen, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption. The original mortgage was executed on 12th June 1896 by Ram Sewak Singh who is now dead. The plaintiffs who seek redemption are pious mortgagees under a mortgage executed by Ram Sewak Singh's sons Bishunath Singh and Raghubar Singh, defendants Nos. 5 and 6. On the same date as the original mortgage, which was usufructuary, Ram Sewak Singh executed a deed of further charge for a sum of Rs. 300 on which over Rs. 2,000 is now claimed as interest. It was found by the Trial Court that this mortgage was not executed for legal necessity or antecedent debt. The question in

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dispute is, whether this mortgage is binding on the family estate in the hands of the descendants of the original mortgagor after his death subject to the plea noted at the conclusion of this judgment; it is common ground that, if Ram Sewak Singh had been still alive, the mortgage would not, in view of the decision of their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1), be binding on the estate. The proposition contended for by the defendants was that, though the mortgage was originally invalid, it became binding on the death of the father in virtue of the pious obligation of Hindu sons to pay their father's debts. As this is a point on which there has been some conflict of authority in this Court it has been referred to a Bench in order that the point may be finally settled.

The First Court dismissed the suit in so far as the deed of further charge was concerned. The lower Appellate Court allowed the defendants' appeal and required the plaintiffs to deposit also the amount due on the deed of further charge on pain of having the property sold. The respondents relied on observations contained in two decisions of this Court—*Ram Saran v. Mangal Singh* (2) and *Muhammad Baqar Ali Khan v. Hazari Lal* (3). These observations certainly support the view which the learned Subordinate Judge has taken, but in neither case were they strictly necessary for the decision of the appeal. In the former case legal necessity for a large number of items was discussed. In regard to one item it was said that, where the ancestor is dead the pious obligation to pay his debts is not concerned with the question whether the debts are secured or unsecured. It was, however, also found that in this particular case the purpose for which the debt was incurred amounted to legal necessity. In the latter case, the learned Judges gave what purports to be a summary of the principle deducible from the decision in

Sahu Ram Chandra's case (1). In the course of this summary they say, that a transfer which was originally invalid may be given effect to against the sons on the death of the father owing to the pious obligation to discharge their father's debt. This summary was entirely unnecessary for the decision of the case before them and it has been dissented from in two subsequent decisions of this Court. In *Ram Chhattar v. Ram Lal* (4) the learned Judicial Commissioner pointed out that there was nothing in the judgment of their Lordships which either directly or indirectly supports the proposition laid down. In the case before their Lordships the question of pious obligation was ruled out altogether as the father was alive at the time of the suit, but in dealing with the case their Lordships say that responsibility for paying the father's debts is an entirely distinct question from that of the validity of a mortgage of the joint estate. So far, therefore, as any inference on this question could be drawn from their Lordships' judgment it is rather against, than in favour of, the respondents. It was also pointed out by the learned Judicial Commissioner that in the Full Bench Allahabad case of *Chandra-deo Singh v. Mata Prasad* (5), which was expressly approved by the Privy Council in *Sahu Ram Chandra's case* (1) the father was dead at the time of suit, and yet a mortgage incurred by him not for legal necessity or antecedent debt was not held to be binding on the family estate. The same view was taken by one of us in *Gajadhar Bakhsh Singh v. Batinath* (6) the head-note of which runs:—

"The mere circumstance of pious obligation to pay does not validate a mortgage which is invalid for want of legal necessity or of the necessity for the payment of antecedent debt."

This view of the law is strongly supported by another Privy Council judgment delivered shortly after the decision in *Sahu Ram Chandra's case* (1)—*Jogi Das v. Ganga Ram* (7). This was a suit to enforce a mortgage. Two of the four original

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 668; 1 P. L. W. 537; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 141 (1917) M. W. N. 439; 22 M. L. T. 221; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 60 Ind. Cas. 1219; 23 O. C. 327; 21 U. P. L. R. (O.) 191; 8 O. L. J. 87.

(3) 52 Ind. Cas. 108; 6 O. L. J. 297 at p. 306.

(4) 65 Ind. Cas. 950; 24 O. C. 395.

(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(6) 65 Ind. Cas. 967; 8 O. L. J. 605.

(7) 42 Ind. Cas. 791; 21 C. W. N. 957 (1917) M. W. N. 739 (P. C.).

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mortgagors were alive and two were dead. The suit was brought against the surviving mortgagors and the sons and grandsons of the deceased mortgagors. There was no proof of legal necessity or antecedent debt. The High Court dismissed the suit as against the family property, and the Privy Council upheld the decisions remarking, in language borrowed from the decision in *Sahu Ram Chandra's case* (1), that the mere circumstance of a pious obligation does not validate the mortgage. This is direct and very strong authority in favour of the view taken in *Ram Chaitar v. Ram Lal* (4) and *Gajadhar Bakhsh Singh v. Bai Nath* (6).

The learned Counsel for respondents has sought to avoid the effect of these decisions by suggesting that there is no limitation against a defence, and he has also urged cases in which a plaintiff seeking to set aside an alienation has been put to terms and required to re-pay the consideration he has received. Neither of these pleas is valid. The plaintiffs are seeking to redeem and have been given a decree for redemption of a mortgage binding on the estate. The mortgagees are seeking to enforce against the family property an invalid encumbrance. There is no ground of equity on which they can be compelled to do so. The question of personal obligation for the debt does not arise, as any claim for a simple money-decree in respect of the original debt was long since barred at the time of suit.

As regards the plea of putting the defendants on terms, the cases referred to are cases in which, as a condition of setting aside an alienation, the plaintiffs have been required to repay the amount which was validly borrowed for legal necessity or antecedent debt. Neither of which applies in this case.

At the conclusion of his argument the learned Counsel for the respondents suggested that as Rs. 108 of the consideration in the deed of further charge was borrowed to re-pay a previous mortgage this might amount to antecedent debt and the deed of further charge being held good. The previous mortgage was one executed on 8th October 1895 and is on the record. An examination of it shows that a usufructuary mortgage had been executed in 1894.

The deed of 1895 borrowed a further sum on the same property on condition that the amount of this further loan was to be repaid along with the amount borrowed under the usufructuary mortgage and that all the terms of the usufructuary mortgage were to be applicable to this deed also. There was no provision permitting the mortgagee to sell the property in case of non-payment and the learned Judge of the Trial Court was right in saying that no personal covenant can be found in the terms of the deed. This mortgage was, therefore, not an obligation incurred wholly apart from the security afforded by the joint property within the meaning of the Privy Council decision.

The result is that we allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with costs both in the lower Appellate Court and in this Court.

N. H.

*Appeal allowed.
Decree set aside.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 875
OF 1923.

April 5, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

THE SECRETARY OF STATE FOR INDIA

—PLAINTIFF

versus

GREAT INDIAN PENINSULA RAILWAY

—DEFENDANT.

Sea Customs Act (VIII of 1878)—Customs duty—G. I. P. Railway Company—Stores imported into British India—Line owned by Government but worked by Company—Liability of Company to pay customs duty.

As the G. I. P. Railway is owned by the Government and has been made over to the Company simply for management under contract, the stores purchased and imported by the G. I. P. Railway Company into India for the use of the undertaking are, at the time of importation, goods belonging to the Government for the purpose of the payment of customs duty. [p. 476, col. 1.]

Mr. Kanga, (Advocate-General), for the Plaintiff.

Sir Thomas Strangman and Mr. Campbell, for the Defendant Company.

SECRETARY OF STATE FOR INDIA *v.* G. I. P. RAILWAY.

JUDGMENT.

Macleod, C. J.—This is a case stated by the agreement of the parties for the opinion of the Court under O. XXXVI, r. 1. The question is, whether stores purchased and imported by the defendant Company into India for the use of the undertaking are at the time of importation goods belonging to Government. If the answer is in the affirmative, it has been agreed that the plaintiff shall refrain from levying or seeking customs duty upon such stores. The defendant Company was incorporated by Statute 11 & 12 Vic., c. 83, intituled an Act for incorporating the Great Indian Peninsula Railway Company and for other purposes contained therein.

Statute 63 & 64, Vic., c. 38, was passed to provide for the vesting of the Railways and other property of the Great Indian Peninsula Railway Company in the Secretary of State for India in Council and by section 4, it was provided that as and from June 30, 1900, the Railways, works and divers other property of the Company should be transferred to and vested in the Secretary of State.

Section 72 enabled the defendant Company to enter into and conclude with the Secretary of State any contract or contracts for the maintenance, management and working of the Great Indian Peninsula Railway Company. Accordingly, on December 21, 1900, the defendant Company entered into an agreement with the plaintiff a copy of which is annexed to the case stated. I will refer to the pertinent clauses, omitting any mention of the Indian Midland Railway system as unnecessary.

Under clause 5 the plaintiff was to hand over to the defendant Company for the purposes of the contract the Great Indian Peninsula Railway system together with the rolling stock, plant and machinery belonging thereto.

Under clause 6 the plaintiff was to deliver to the defendant Company for the purposes of the undertaking all stores belonging to the Great Indian Peninsula Railway system excepting such as on the representation of the Company the plaintiff might adjudge to be unserviceable and surplus stores.

Under clause 10 the Company was to keep the undertaking in good repair, in

good working condition and fully supplied with rolling stock, plant and machinery to the satisfaction of the plaintiff, and on their failure to comply with any requirements of the plaintiff, the plaintiff might enter on the undertaking to execute such requirements.

Under clause 22 all stores required by the undertaking were to be conveyed by the Company at rates to be approved by the plaintiff, not being less than the actual cost of conveyance.

Under clause 22A all capital monies required for the undertaking were at the option of the plaintiff to be provided by him or were to be raised by the Company by the issue of debentures or debenture stock in such manner and on such terms as to interest or otherwise as the plaintiff might determine.

Under clause 23 all monies received by the Company in India in respect of the undertaking were to be paid without deduction into the Treasury and all monies received elsewhere than in India were to be paid into the Bank of England to the plaintiff's account.

Under clause 24 all monies required by the Company for the undertaking were to be supplied by the plaintiff.

Under clause 25 all monies expended by the Company on account of the undertaking were from time to time to be stated and submitted to the plaintiff for his sanction.

Clause 33 provided for accounts to be delivered of all stores in hand or in the course of delivery on July 1, 1900, and for the valuation thereof. Thereafter, half-yearly accounts were to be furnished of all stores in hand and of all stores used since the last accounts were made, the value of stores used to be charged to the general working expenses or to the capital account as the case might require in accordance with the provisions of the agreement in that behalf.

Clause 34 provided for the re-valuation from time to time of stores in hand.

By clause 37 the Company was prohibited during the continuance of the contract from acquiring any property in India without the sanction of the plaintiff.

Clause 39 provided for the application of the nett receipts of the undertaking.

By clause 60 the Company was to give

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possession to the plaintiff on June 30, 1925, of the undertaking, together with the rolling stock, plant and machinery belonging thereto, and all stores in hand or in course of delivery on that day. The plaintiff was to pay to the Company the amounts paid up or credited as paid up on all shares or stocks or stock then in existence in the Company's new capital which the Company might have issued for the purposes of the contract with the sanction of the plaintiff.

It is sufficient for this case to say that the surplus arising from the excess of receipts over payments in any year commencing on July 1 and ending on June 30, were to belong as to 19-20ths to the plaintiff and as to 1-20th to the Company.

Now it will be seen that the whole of the undertaking became the property of the plaintiff on July 1, 1900, and was handed back to the defendant Company only for the management and working thereof according to the terms of the contract. On the termination of the contract everything had to be returned to the plaintiff. All receipts had to be paid into the Treasury in India, or into the plaintiff's account with the Bank of England. The Company, therefore, possessed no property of its own. All the monies required for the purpose of the undertaking had to be supplied by the plaintiff and no expenditure could be made without the plaintiff's sanction. It is difficult then to see how stores purchased in England or abroad became the property of the Company. There can be no distinction between stores, the cost of which could be debited to working expenses, and stores, the cost of which would be debited to capital account. If the plaintiff's contention were correct, new rolling stock imported is for the moment the property of the Company, but it belongs to the plaintiff as soon as it is taken into use, or even as soon as the customs duty has been paid. In other words, stores imported are to be considered as belonging to the Company for the purpose of paying customs duty and for that alone.

In my opinion, such a contention cannot be sustained.

I would answer the question propounded in the concise statement in the affirmative.

Crump, J.—I agree.

N. H.

Answered affirmatively.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 438 OF 1921.

October 11, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

CHINTALAPUDI SANYASI, MINOR, BY NEXT FRIEND VANAPALLI ACHAYYA—

DEFENDANT—APPELLANT

versus

CHINTALAPUDI VENKATA RAO,

MINOR, BY GUARDIAN *ad litem*

CHINTALAPUDI CHINNA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Arbitration—Arbitrator acting on private information—Misconduct—Award, whether valid—Guardian and minor—Minor, whether bound by guardian's admission—Reference by guardian waiving right to object to award, whether binding on minor.

An arbitrator is not entitled to examine witnesses in the absence of parties or institute private enquiries behind their back and an award based on such information or knowledge is invalid, unless a power is expressly vested in the arbitrator by agreement of parties where they are *sui juris*. [p. 471, col. 2; p. 473, col. 1.]

In re Gregson and Armstrong, (1894) 70 L. T. 106; 10 R. 408; *Harvey v. Shellon*, (1844) 7 Beav. 455; 49 E. R. 1141; 13 L. J. Ch. 466; 64 R. R. 116, *Dobson v. Groves*, (1844) 6 Q. B. 637; 115 E. R. 239; 14 L. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509, *Daya Kishen v. Dharam Das*, 4 A. L. J. 159; A. W. N. (1907) 75, *Lakshmi Narain v. Sheo Nath Pandey*, 54 Ind. Cas. 443; 42 A. 185; 18 A. L. J. 78; 1 U. P. L. R. (A.) 177; *Ganesh Narain Singh v. Malida Koeer*, 10 Ind. Cas. 450; 13 C. L. J. 399 and *Hari Singh v. Kankinarah Co., Limited*, 66 Ind. Cas. 389; 34 C. L. J. 39, relied on.

Where, on a reference to arbitration by a guardian on behalf of a minor agreeing to be bound by the decision of the arbitrator, either on his own information, or on examination of witnesses, and undertaking not to dispute the validity of the award on any ground, an award was passed based on private inquiries and information not accessible to the parties:

Held, that the guardian's conduct in waiving the minor's right to object to irregular procedure was grossly negligent and that the minor was not bound either by the reference or by the award. [p. 471, col. 2; p. 472, col. 1.]

Swamirao v. Collector of Dharwar, 17 B. 299; 9 Ind. Dec. (N. S.) 195, *Rhoders v. Swithenbank*, (1889) 22 Q. B. 577; 58 L. J. Q. B. 287; 60 L. T. 856; 37 W. R. 457, *Lakshminarayana Tantri v. Ramachandra Tantri*, 45 Ind. Cas. 763; 34 M. L. J. 71; 23 M. L. T. 89 and *Chunduru Punnaiah v. Rajam Viranna*, 70 Ind. Cas. 668; 42 M. L. J. 429; 15 L. W. 427; (1922) M. W. N. 213; 45 M. 425; (1922) A. I. R. (M.) 273, followed.

Venkatasubba Rao, J.—A statement in the nature of an admission by a guardian is not as such conclusive against a minor. [p. 473, col. 2.]

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If once it is found that evidence has been improperly admitted, the question whether such evidence had or had not an effect on the arbitrator's mind is immaterial and the award cannot be supported [p. 473, col. 2.].

Dobson v. Groves, (1844) 6 Q. B. 637; 115 E. R. 239, 14 L. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509; *Walker v. Forbisher*, (1801) 6 Ves. 70 31 E. R. 943; 5 R. R. 223, relied on.

Appeal against an order of the Court of the Subordinate Judge, Vizagapatam, dated the 30th September 1921, in Original Suit No. 62 of 1919.

Mr. A. Krishnaswami Iyer, for the Appellant.

Mr. B. Satyanarayana, for the Respondent.

JUDGMENT.

Spencer, J.—The plaintiff, a minor, represented by his natural father, sued to establish that he was the adopted son of Chintalapudi Sanyasayya. The defendant, who is the minor *aurasa* son of Sanyasayya, represented by his mother, opposed the suit. There was a reference to arbitration without the intervention of the Court. The defendant's mother agreed to the dispute being referred to be settled by a single arbitrator and in the *muchilika* that was drawn up, she consented to be bound by and act up according to the decision the arbitrator might give either on his own information or upon other information known in the village or by examining the witnesses of both parties should he think necessary. The agreement to refer goes on: "We shall not before you give a decision regarding the said disputes between us, cancel this *muchilika* executed by us, alleging among others that you are doing injustice, or that you are partial and that your arbitration is not necessary and that you should not give decision. We shall agree to Your decision itself as the final decision. We shall not contend for any reason and in any manner either in Courts or in any other place that your decision is not proper and that it cannot bind us." The arbitrator admits that he enquired of witnesses behind the back of the parties and that he acquired and collected information and obtained an admission from the defendant's mother without noting them down in writing. The question, is whether the minor defendant is bound by such a surrender by his guar-

dian of his legal rights that witnesses should be examined in the presence of the parties, and whether such procedure makes the award "otherwise invalid" within the meaning of section 15 of the Second Schedule, Civil Procedure Code.

The Subordinate Judge quotes *Lakshmi Narain v. Sheo Nath Pandey* (1) and observes: "If the parties agreed that there was no need for him to take any evidence, and that the arbitrator should decide the dispute between them on his own knowledge no misconduct could be implied if he decided accordingly."

That is a perfectly sound proposition provided that the parties are *sui juris*. But the question here is, whether it was a reasonable and prudent act on the part of the guardian of a minor thus to commit the interests of her ward into the absolute care of a single person whom she permits to follow a procedure opposed to natural justice. It is improper on the part of an arbitrator to get information from one side in the absence of the other or to utilise information not accessible to the other. *In re Gregson and Armstrong* (2), *Harvey v. Shelton* (2) and *Dobson v. Groves* (4). The arbitrator examined by the Court admits that he acted thus, and it also appears from the statement of plaintiff's guardian that the arbitrator acted on information obtained before the reference. I am of opinion that his procedure vitiated the award given in the present case and that the defendant's guardian could not waive her son's right to object to irregular procedure. *Vide Swamitrao v. Collector of Dharwar* (5), which follows *Rhodes v. Swithenbank* (6) I would go further and characterise her conduct as gross negligence on the part of a guardian; and it has been held by this Court in *Lakshminarayana Tanti v. Rama-*

(1) 54 Ind. Cas. 443; 42 A. 185; 18 A. L. J. 78; 1 U. P. L. R. (A.) 177.
(2) (1894) 70 L. T. 106; 10 R. 408.
(3) (1844) 7 Beav. 453; 49 E. R. 1141; 13 L. J. Ch. 466; 64 R. R. 116.
(4) (1844) 6 Q. B. 637; 115 E. R. 239; 14 L. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509.
(5) 17 B. 299; 7 Ind. Dec. (N. S.) 195.
(6) (1889) 22 Q. B. 577; 58 L. J. Q. B. 287; 60 L. T. 856; 37 W. R. 457.

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Chandra Tantri (7) and *Chunduru Punnaiah* v. *Rajam Viranna* (8) that gross negligence on the part of a next friend or guardian entitles a minor to impeach an award or a judgment passed against him. The appeal is allowed and the suit is dismissed. No costs.

Venkatasubba Rao, J.—The appellant, attacks the judgment pronounced by the Subordinate Judge giving effect to an award made in favour of the plaintiff. The facts of the case may be briefly stated. One Sanyasayya died leaving the defendant his natural son and his widow Ammanna, the mother of the defendant. The plaintiff claimed that he was adopted by Sanyasayya and stated that the defendant was born subsequent to the adoption and that Ammanna denied the adoption and refused to maintain the plaintiff. The disputes were then referred to the arbitration of a gentleman by name Boddu Appanna Dhoragan and the submission was executed by the natural father of the plaintiff acting on behalf of the latter and by Ammanna acting on behalf of the defendant. The arbitrator was to decide whether the plaintiff was the adopted son of Sanyasayya and to what rights he was entitled. The arbitrator made an enquiry and passed an award declaring the plaintiff was the adopted son of the deceased Sanyasayya and awarded to him a fifth share of the estate. The plaintiff then made an application under paragraph 20 of Schedule II of the Civil Procedure Code that the award be filed in Court and the application was numbered and registered as a suit and the Subordinate Judge ordered the award to be filed and pronounced judgment according to the award. The defendant contended that the award was not binding upon him for the reason *inter alia* that the arbitrator examined witnesses in the absence of parties and instituted private inquiries and passed his judgment upon information so obtained. The Sub-Judge refers to this contention in the following passage in his judgment: "The arbitrator does not pretend that he reduced the evidence of the witnesses he examined to writing nor did

he examine them in the presence of the parties."

This conduct on the part of the arbitrator is justified by a reference to the terms of the submission. The part of the submission material for this purpose is as follows: "Therefore we have executed this *Yoka Panchayat Muchilika* agreeing to be bound by and act according to the decision you might give either on your own information or upon their information known in the village or by examining witnesses of us both parties should you think it necessary. We shall not, before you give a decision regarding the said disputes between us, cancel this *muchilika* executed by us alleging that you are doing injustice or that you are partial and that your arbitration is not necessary. We shall agree to your decision itself as the final decision."

The first question that arises is, apart from any covenants in the submission, is an arbitrator under the general law entitled to act on information received in the absence of the parties or on his own knowledge of the facts in regard to matters in issue between the parties?

The law is perfectly clear on the point, that an award based on such information or knowledge is invalid. In *Harvey v. Shelton* (3) an award was set aside on the ground that the arbitrator interviewed one party, in the absence of the other. Lord Langdale, M. R., says: "In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side." The Master of the Rolls also observes: "There is no proof, nor in such a case do I apprehend there could be proof that the result to which Mr. Wakefield came was in any way prejudicial to Mr. Harvey." Still the award was set aside on the ground that: "it is an ordinary principle in the administration of justice that no party can be allowed to use any means whatsoever to influence the mind of the Judge which means are not known and capable of being resisted by the other party." This

(7) 45 Ind. Cas. 763; 34 M. L. J. 71; 23 M. L. T. 89.

(8) 70 Ind. Cas. 668; 42 M. L. J. 429; 15 L. W. 427; (1922) M. W. N. 213; 45 M. 425; (1922) A. I. R. (M.) 273.

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view was acted upon in numerous other cases in England and was accepted in several decisions of the Indian High Courts. See *Daya Kishen v. Dharam Das* (9), *Lachhmi Narain v. Sheo Nath Pandey* (1), *Ganesh Narain Singh v. Malida Koer* (10) and *Hari Sing v. Kankinarah Company Limited* (11).

It is also settled that if the parties agree that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence, no misconduct can be imputed. See *Lachhmi Narain v. Sheo Nath Pandey* (1). Lord Denman, C. J. observes in *Dobson v. Groves* (4) that no information ought to be received by the arbitrators in the absence of the parties unless the arbitrator has an express power reserved for that purpose or the parties agree that he shall exercise it. If the parties to this reference were *sui juris*, the arbitrator would have been justified in acting as he did and his award would not be liable to be set aside on the ground of misconduct. But on behalf of the defendant who is a minor his mother and natural guardian consented to the terms contained in the reference and it cannot be held that the act of the mother is beneficial to the defendant. Such covenants are sometimes found in submissions executed by parties who are *sui juris*. But when a guardian is acting on behalf of a minor I do not think it can be said that in any case it will be in the interests of the minor for the guardian to consent to the arbitrator possessing such wide powers. However, no special grounds have been shown to exist in this particular case which would justify the empowering of the arbitrator to depart from the usual rules of procedure indispensable to the impartial administration of justice.

There is one matter to which I must advert. It has been said that the arbitrator after making enquiries of other persons interviewed the defendant's mother herself and that she admitted the plaintiff's adoption. In regard to this, it is necessary to point out that the arbitrator in his award does not refer to this incident and does not profess

to base his judgment upon this admission. What the actual statement made by the mother, if any, was there is no means of knowing because it has not been recorded. In what circumstances the admission was made we are not in a position to say. Whether the admission was qualified or absolute does not appear. Whether she admitted the *factum* of adoption or the validity of the adoption we have no means to find out. It must be remembered that the so-called admission is not a statement by one of the parties to the suit but only a statement made by a guardian of one of the parties. Such a statement could not be conclusive against the defendant as an admission. In any event, it is settled law that if evidence is improperly admitted the Courts will not consider the question whether such evidence had or had not an effect upon the arbitrator's mind, and in this case the arbitrator having made private enquiries and obtained information, his award is thereby vitiated. In *Dobson v. Groves* (4) Lord Denman, C. J., observes: "When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biased, there is a sufficient objection." In *Walker v. Forbisher* (12) the arbitrator swore that though he heard certain persons in the absence of one of the parties the information had no effect upon his award. Lord Chancellor Eldon said: "I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice: but upon general principles it cannot be supported." I am constrained for these reasons to set aside the award and allow the appeal. From the judgment of the Subordinate Judge, it is clear that the arbitrator acted honestly and no prejudice or desire to do wrong can be imputed to him. But, nevertheless, the procedure adopted by him is illegal and his acts amount to

(9) 4 A. L. J. 159; A. W. N. (1907) 75.

(10) 10 Ind. Cas. 450; 13 C. L. J. 399.

(11) 66 Ind. Cas. 389; 34 C. L. J. 39.

(12) (1801) 6 Ves. 701, 31 E. R. 943; 5 R. R. 223.

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legal misconduct and his award is, therefore, bad. I agree with the order proposed by my learned brother.

V. N. V.

Appeal allowed.

Z. K.

BOMBAY HIGH COURT.

ORIGINAL, CIVIL JURISDICTION APPEAL,

NO. 22 OF 1921.

March 29, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

RATANCHAND DAYACHAND—

APPELLANTS

versus

DAMJI DHARSEY AND OTHERS—

RESPONDENTS.

*Letters Patent (Bom.), cl. 15—Appeal—
Security for costs—Principles applicable.*

In an appeal under clause 15 of the Bombay Letters Patent it is open to the High Court to demand such further security, beyond the Rs. 500 deposited by the appellant under High Court Rule 736, for the costs of the appeal as it may think fit.

In order to justify the exercise of the power to demand security for the costs of an appeal, there must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the appeal is vexatious.

Letters Patent Appeal against the judgment of Mr. Justice Kajiji.

Mr. Lalkaka, for Mr. Jinnah, for the Appellants.

Mr. Bahadurji, for the Respondents.

JUDGMENT.

Macleod, C. J.—This is an application by the respondents for an order directing the appellants to deposit such further security for the costs of the appeal as the Court may think fit, on the ground that the costs of the appeal will run into thousands of rupees beyond the 500 rupees deposited by the appellants under High Court Rule 736 when the appeal was filed.

A stay of execution of the decree of the lower Court was obtained on the appellants giving security to the extent of Rs. 35,000.

This is an appeal under clause 15 of the Letters Patent, and it has been contended that O. XLI, r. 10, does not apply to such appeals; and even if it did, that High Court Rule 736 is inconsistent with it and governs the case. The authority relied upon is *Behram Jung v. Haji Sultanali Shustry* (1). It does not seem to me to matter much whether we hold that O. XLI, r. 10, is not applicable, as the learned Chief Justice in the case just cited remarked that the Appellate Court had the power to demand security if it thought fit to do so in the interests of justice. I also think that High Court Rule 736 is not inconsistent with O. XLI, r. 10, as it merely prescribes the amount of security which an appellant shall deposit as a condition on which the appeal will be admitted. Although undoubtedly many of the rules in O. XLI cannot apply to appeals under the Letters Patent, I think it would be going too far to say that none of them are applicable. Certainly in *Kessowji Issur v. Great Indian Peninsula Railway Co.* (2) it appears to have been considered in what circumstances the Appeal Court in a Letters Patent Appeal may allow further evidence to be produced under section 568 of the Code of 1882 corresponding to O. XLI, r. 27.

But the powers to demand security for the costs of an appeal must in any event be exercised according to well-known principles. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the appeal is vexatious. This application, I think, should be dismissed with costs.

Crump, J.—I agree.

W. C. A. *Application dismissed.*

(1) 17 Ind. Cas. 739; 37 B. 572; 14 Bom. L. R. 1106.

(2) 34 I. A. 115; 9 Bom. L. R. 671; 11 C. W.N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 31 B. 381; 17 M. L. J. 347; 2 M. L. T. 435 (F. C.).

SHUJA-UD-DIN KHAN V. SHER MUHAMMAD KHAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1472 OF 1919.

January, 10, 1923.

Present:—Mr. Justice Broadway and
Mr. Justice Zafar Ali.SHUJA-UD-DIN KHAN AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

SHER MUHAMMAD KHAN AND OTHERS
—DEFENDANTS—RESPONDENTS.*Adverse possession—Mortgage—Sale of equity of redemption to mortgagee, after sale to stranger, Mortgagee, whether can set up adverse possession.*

The owner of the equity of redemption in certain property sold it to the plaintiffs. He subsequently purported to sell the same equity of redemption to the defendant who was an assignee of one-third of the mortgagee rights in the property. On the strength of this purchase of the equity of redemption the defendant redeemed the remaining two-thirds of the mortgage. In answer to a suit by the plaintiffs to redeem the property the defendant set up his adverse possession from the date of the sale of the equity of redemption in his favour:

Held, (1) that the sale of the equity of redemption in favour of the defendant which had already been sold to the plaintiffs was a mere nullity and did not operate to confer any title on the defendant; [p. 476, col. 1.]

(2) that the defendant's possession as co-mortgagee could not, as the result of the alleged sale of the equity of redemption in his favour, become adverse to the plaintiffs; [p. 476, col. 1.]

(3) that the redemption by the defendant of the shares of the other mortgagees was in his character of co-mortgagee and did not effect the character of his possession which was that of a mortgagee.

Mohan Lal v. Bhagu Shah, 14 Ind. Cas. 513; 252 P. W. R. 1912, *Jiva Khan v. Lakhmi Chand*, 11 Ind. Cas. 429; 146 P. W. R. 1911; 232 P. L. R. 1911 and *Ariyaputhira Padayachi v. Muthukumarasawmy Padayachi*, 15 Ind. Cas. 343; 37 M. 423; 12 M. L. T. 425; 23 M. L. J. 339; (1922) M. W. N. 854, relied on.

Lala Kanhoo Lal v. Musammal Manki Bibi, 9 C. W. N. 601; *Pulappa v. Tummaji*, 14 B. 176; 7 Ind. Dec. (N. S.) 576, *Hubdar Khan v. Gajadhar Chaudh*, 25 Ind. Cas. 600; 17 O. C. 294 and *Ram Narayan Rai v. Ram Dent Rai*, 63 Ind. Cas. 282; 6 P. L. J. 680, (1922) Pat. 129; (1923) A. I. R. (Pat.) 98, distinguished.

Second appeal from a decree of the District Judge, Jullundur, dated the 9th April 1919, reversing that of the Subordinate Judge, Second Class, Jullundur, dated the 15th March 1918.

Pandit Sheo Narain, R. B., for the Appellants.

Bakshi Tek Chand, for the Respondents.

JUDGMENT.—This second appeal arises out of a redemption suit which was decreed by the Trial Court but dis-

missed by the lower Appellate Court on the finding that as against the plaintiffs, who are the sons and heirs of the purchaser of the equity of redemption, the defendant Sher Muhammad, who was the assignee of the rights of the original mortgagees and had himself purchased the equity of redemption from the mortgagor subsequent to the sale in favour of the plaintiffs' father, had been in adverse possession for over 12 years, *i. e.*, from the date of the sale to him, and that, therefore, the suit was barred by time. The facts are briefly as below:—

Under the registered deed dated the 4th February 1887 Jia Khan and Fazal Muhammad were the mortgagees of the land with possession in the following shares.

Jia Khan..... $\frac{1}{3}$

Fazal Muhammad $\frac{1}{3}$

It is stated in the deed that the mortgage-money was received by the mortgagor through Sher Muhammad, defendant No. 3. Jia Khan died leaving two sons by one wife and two by another who naturally succeeded to his rights in equal shares. By the deed, dated the 28th July 1895, two of them, *i. e.*, Sheikh Umar and Muhammad Amin, assigned their rights for value to Sher Muhammad, defendant, who thus became mortgagee of $\frac{1}{3}$ rd share in the land. Before this assignment to him, *i. e.*, on the 7th April 1894, Ahmad Ali, the owner and mortgagor, had by a registered-deed sold the equity of redemption to Khalifa Fateh Din Khan, father of the plaintiffs, but no mutation of names followed on this sale. On the 10th July 1898 Ahmad Ali sold the equity of redemption afresh to Sher Muhammad and the latter obtained mutation of names. Subsequently to this, *i. e.*, on the 24th May 1903 and 29th July 1912, Sher Muhammad redeemed the shares of Fazal Muhammad and the remaining two sons of Jia Khan respectively. Upon these facts the lower Appellate Court built the theory that Sher Muhammad's possession became adverse to the original purchaser of the equity of redemption from the date of the sale in his favour and the mutation of names in accordance therewith. The learned Counsel for the plaintiff-appellants contends that this view of the learned District Judge was erroneous because the second sale of the

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equity of redemption to Sher Muhammad was a nullity and could confer no title and that his possession could not have become adverse as he was already in possession as a mortgagee. The learned Counsel for Sher Muhammad, respondent, realising the weight of the authority on which this general proposition is based does not contest it and admits that Sher Muhammad's possession could not be adverse in respect of the $\frac{1}{3}$ rd share that had been transferred to him before the first sale of the equity of redemption, but contends that his possession with regard to the remaining $\frac{2}{3}$ ds was adverse from the date of the sale because an adverse title was set up by Sher Muhammad and was given effect to in the Revenue Records. This contention is quite untenable as will be shown presently after noticing the authorities cited on either side.

Counsel for the appellants relies upon 1 *Mohan Lal v. Bhagu Shah* (1), 2 *Jiwa Khan v. Lakhmi Chand* (2) and 3 *Ariyapulhira Padayachi v. Mulhukumarasawmy Padayachi* (3) and has distinguished *Ram Narayn Rai v. Ram Devi Rai* (4).

No. 1 is a judgment of the Punjab Chief Court by Mr. Justice Rattigan who held that the sale of the equity of redemption which had been previously sold did not amount to adverse possession because the vendor had no rights left to him which he could sell subsequently and, therefore, the subsequent sale was a mere nullity in law.

No. 2 is a judgment of a Division Bench of the Punjab Chief Court in which it was held that, where a mortgagee has once got possession of the mortgaged property as mortgagee he cannot alter the nature of his possession by a mere assertion or by a wrongful decree or by getting himself recorded in the register of mutations, nor can the original character of the possession as mortgagee be changed by the assertion

of an absolute purchase of the property unless the alleged purchase is valid and binding.

In No. 3 it was held that a mortgagee in possession as such cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title under the Limitation Act.

According to these authorities, the plea of adverse possession advanced by Sher Muhammad was futile and in *Lalla Kanhoo Lal v. Musammatt Manki Bibi* (5) was distinguished in *Mohan Lal v. Bhagu Shah* (1) and 2 *Putappa v. Timmaji* (6) and 3 *Hutdar Khan v. Gajadhar Chaube* (7) cited by his Counsel are not to the point and can be of no avail to him.

As regards the specific plea that Sher Muhammad's possession was adverse with regard to the $\frac{1}{3}$ rd share of Fazal Muhammad and $\frac{1}{3}$ rd share of the two out of the four sons of Jia Khan, it is sufficient to state that the mortgage was an indivisible transaction according to its terms and, therefore, any one of the co-mortgagees could not obtain adverse possession of a particular share in it by lapse of time. The mortgagors could only redeem the whole of the mortgage by payment of the whole of the mortgage-money irrespective of the shares of the co-mortgagee *inter se*. The money contributed by each mortgagee was not stated in the mortgage-deed. Further, as Sher Muhammad took the place of each co-mortgagee whom he paid off, he did so as co-mortgagee and thus his possession in his place was that of a mortgagee only and not in any other capacity. Therefore, the plea fails and we hold that Sher Muhammad's possession was not adverse to the real purchaser of the equity of redemption.

Accordingly, we accept the appeal and set aside the order of the lower Appellate Court and remand the case for decision of the remaining points in dispute which were not disposed of by it. Stamps on the memorandum of appeal will be refunded and other costs in this Court of the plaintiffs-appellants will be paid by Sher Muhammad, respondent.

Z. K.

Appeal accepted.

(5) 6 C. W. N. 601.

(6) 14 B. 176; 7 Ind. Dec. (N. S.) 576.

(7) 25 Ind. Cas. 600; 17 O. C. 294.

(1) 14 Ind. Cas. 513; 252 P. W. R. 1912.

(2) 11 Ind. Cas. 429; 146 P. W. R. 1911; 232 P. L. R. 1911.

(3) 15 Ind. Cas. 343; 37 M. 423; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854.

(4) 63 Ind. Cas. 282; 6 P. L. J. 680; (1922) Pat. 429; (1923) A. L. R. (Pat.) 98.

BIDHI CHAND v. KACHHU MAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 261 OF 1922.

March 29, 1923.

Present:—Mr. Justice Lindsay and

Mr. Justice Daniels.

Choudhry BIDHI CHAND—

PLAINTIFF—APPELLANT

versus

KACHHU MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 30—Wagering contract—Collateral contract, whether enforceable.

Section 30 of the Contract Act does not prevent a person who is employed as agent in connection with wagering contracts from recovering sums due to him by his principal.

Shibho Mal v. Lachman Das, 23 A. 165; A. W. N. (1901) 33 and *Jagat Narain v. Sri Kishen Das*, 8 Ind. Cas. 783; 33 A. 219; 7 A. L. J. 1146, followed.

Second appeal against a decree of the District Judge, Aligarh, dated the 3rd December 1921.

Messrs. *Gulzari Lal* and *G. Agarwala*, for the Appellant.

Dr. S. N. Sen, for the Respondents.

JUDGMENT.—This appeal arises out of a claim brought by the plaintiff Bidhi Chand for certain sums paid by him for brokerage and commission in connection with certain forward contracts for the sale of cotton seeds, etc., which he entered into as commission agent on behalf of the defendants. His case was that the defendants were to deliver the goods to him for sale to third parties on forward dates; that the defendants failed to supply the goods, and that he had to compensate the buyers for the loss. The suit has been dismissed by both the Courts below on the ground that the contracts were wagering contracts which are illegal under section 30 of the Indian Contract Act. It is not disputed that the contracts were wagering contracts. The plaintiff appeals on the ground that section 30 does not prevent a person who is employed as agent in connection with wagering contract from recovering sums due to him by his principal. In support of this plea the rulings in *Shibho Mal v. Lachman Das* (1) and *Jagat Narain v. Sri Kishen Das* (2)

have been cited. It is not disputed on behalf of the respondents that these rulings support the plea of the appellant and that the law is as laid down in those rulings. The respondents contend, however, that there is a finding of fact of the lower Appellate Court in their favour that the plaintiff has failed to prove that he sold the goods on the defendants' account but that, in the opinion of the Court below, he sold them on his own account. We are of opinion that this cannot be treated as a finding of fact fatal to the appeal for the short and simple reason that no issue on this point was ever framed and no such case was set up by the defendants when the case went to trial. No doubt, the defendants in their original written statement denied that the plaintiff ever acted as commission agent for them and denied that any of the transactions relied on were entered into by the plaintiff on their behalf. This position was, however, materially modified by statements made by the Pleaders of the parties under O. X, r. r, of the Code of Civil Procedure, at the time of settlement of issues. In those statements it was admitted by both parties that there were two transactions, which are the transactions in suit, which were entered into by the plaintiff on account of the defendants. One of them was for 1300 bags and there was a dispute as to the amount of the other, the plaintiff alleging that it was for 1300 bags and the defendant that it was for 600 bags only. This is clearly set out in the judgment of the learned Subordinate Judge who says that it is admitted by both parties that there were only two contracts, one in *Katik Sambat* 1974 and the other in *Oghan Sambat* 1974 as to the amount of which there was a dispute. The issues framed by the learned Subordinate Judge were three in number. First, whether the contracts were of a wagering nature. Second, whether the first of the two contracts, was barred by time, and, third, whether the second contract was for 1300 bags or for 600 bags.

No issue was raised at all as to the position of the plaintiff as agent for the defendants. The learned District Judge states in his judgment that he had received very little assistance from the Bar in deciding the appeal and he evidently found some

(1) 23 A. 165; A. W. N. (1901) 33.

(2) 8 Ind. Cas. 783; 33 A. 219; 7 A. L. J. 1146.

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difficulty in appreciating the position of the parties. The sentence on which the respondents rely would seem to be based on a misunderstanding of a sentence of the Trial Court. The learned Subordinate Judge had said that, because it was a wagering transaction and no goods were to be delivered so the plaintiff did not enter into contracts in the defendants' name but on his own account, *i.e.*, in his own name. It is clear on the admission of the parties that the plaintiff was not the principal in the disputed transactions but was acting as the agent of the defendants. The result is that, under the rulings already referred to, the decree of the Court below must be and it hereby is set aside and the case remanded under O. XII, r. 23 to the lower Appellate Court for decision of the remaining issues. Costs here and heretofore will abide the result. Costs in this Court will include fees on the higher scale.

D. M.

*Appeal allowed.
Case remanded.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 62 1920.

April 21, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

A. NATARAJA MUDALIAR—

DEFENDANT No. 6—APPELLANT

versus

D. P. RAMASWAMI MUDALIAR AND

OTHERS PLAINTIFFS AND

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Auction-purchase by Hindu manager decree-holder with family funds—Properties benami in name of third person—Suit by other members if barred.

Section 66 of the Code of Civil Procedure does not bar a suit by a member of a joint family for recovering property bought in Court-auction out of joint family money in the name of some third person *benami* by the managing member who was himself the decree-holder. Such a purchase is not a purchase made "on behalf of" all the members of the family within the meaning of section 66.

Bajjnath Das v. Bishen Devi, 63 Ind. Cas. 676; 19 A. L. J. 787; 3 U. P. L. R. (A) 147; 43 A. 711 dissented from.

Suraj Narain v. Ratan Lal, 40 Ind. Cas. 988; 40 A. 159; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 685; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 44 I. A. 201 (P. C.), distinguished.

Bodh Singh Doodhooria v. Ganesh Chunder Sen, 12 B. L. R. 317 (P. C.); 19 W. R. 356; 3 Sar. P. C. J. 253, relied on.

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 16th March 1920, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 226 of 1918.

Mr. A. Viswanatha Aiyar, for the Appellant.

Messrs. S. Krishnamachariar, P. R. Ramakrishna Aiyar, V. Chellamiah and N. Viswanatha Aiyar, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The first plaintiff's father having a decree against the owners of some house property in Madras, brought that property to sale in execution. Without obtaining the leave of the Court to bid, he bought it himself using for that purpose the joint family money, and, in order to conceal this fraud on the Court, he bought it in the name of the 6th defendant. This is the case of the plaintiffs and of some of the defendants. That has been found by the learned Judge, who saw the witnesses and examined the facts obviously with the greatest care, to be the truth and I can find no ground for interfering with that finding of fact.

The first plaintiff with his sons, the second and the third plaintiffs, joining as defendants the other members of the joint family has brought this suit for partition, and he claims that part of the joint family property to be brought in and divided in the partition consists of this house property standing in the name of the 6th defendant, and he brings in the 6th defendant to, have that case decided. The 6th defendant resists that claim setting up, firstly, as a fact, that the plaintiff's case is not true at all, that he never was a *benamidar* or nominee of the first plaintiff's father which, as I have pointed out, has not been accepted as the fact, and, secondly, he says that in law, although he is not entitled to

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this property, it is not open to the plaintiffs in this case to recover it from him by reason of section 66 of the Code of Civil Procedure, 1908; and it is on the proper interpretation of that section, and that section only, that this case must turn.

Before the passing of that section, there was in existence section 317 of the Code of Civil Procedure of 1882. The terms of that section were:—

"No suit shall be maintained against the certified purchaser (which means the certified purchaser who has purchased the property at Court-auction) on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

There was very soon a conflict of authorities as to the meaning of that section and I think it may be stated that the Madras view, established first of all in *Natesa Ayyar v. Venkatramayyan* (1) and followed in *Krishna Aiyar v. Raghavaiyan* (2) and *Minakshi Ammal v. Kalianarama Rayer* (3), was that there was nothing in that section to prevent a member of a joint family from recovering the property which has been bought out of the joint family money in the name of some person *benami* at a Court-auction by the managing member of the family, he himself being the decree-holder. A different view was taken in Allahabad, and the matter came before the Privy Council in *Suraj Narain v. Ratan Lal* (4); and in that case there is no doubt that the Privy Council supported the view contrary to the view taken in Madras, though it is worth observing that there seems to have been very little discussion on the matter and the Madras cases do not seem to have been cited. If, however, the matter stood there, I should find great difficulty in distinguishing that case as was

done by the learned Judge below; but that case was tried when the Civil Procedure Code of 1882 was in operation and it is a decision under section 317 of that Code. After that case, or rather after the first hearing of that case, section 66 of the Civil Procedure Code of 1908 was introduced and that altered the law very materially, because now the only prohibition is contained in these words:—

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The obvious alteration is that now the penal provision is confined to purchases on behalf of a plaintiff or persons through whom he claims, whereas before it was wide enough, on one interpretation of it, to cover purchases on behalf of any other person. I should think that that alteration was made because, on what I may call the Allahabad interpretation, there might be an injustice. For it would follow that infants, whose father using the infants' property entered into such a transaction would be deprived, though perfectly innocent themselves, of their family property, and that it would remain in the hands of a *benami-dar*. It was, therefore, desirable that the inability to enforce rights should be restricted to the person who was guilty of the act which was looked upon as an illegal act. It is argued in this case that the purchase was made on behalf of the plaintiff and that the real meaning of that clause is that, if a managing member makes a purchase and for that purchase uses the money of the family, he is making that purchase on behalf of all the members of the family. Unless I were driven to an interpretation which would have the results which, as I have already stated, in my view it was the desire to prevent, I should be very loath to come to such a conclusion; but in my judgment it is quite unnecessary, because I do not think that a managing member buying property using family funds for that purpose can be properly said, within the meaning of that section, to buy on behalf of other members of the family. He is doing something wholly wrong. It cannot

(1) 6 M. 155; 2 Ind. Dec. (N. S.) 373.

(2) 9 M. L. J. 298.

(3) 20 M. 349; 7 M. L. J. 213; 7 Ind. Dec. (N. S.) 248.

(4) 40 Ind. Cas. 988; 40 A. 159; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 4771; 4 O. L. J. 742; 44 I. A. 201 (P. C.).

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be right for him to take the family money and put it into property in such circumstances that, if the man who lends his name chooses to behave in the way that this 6th defendant has behaved, the family would be deprived of the property. I can see no distinction between the case of a co-parcener and the case of a partner. Where partnership money is used for a *benami* transaction of that kind, it would follow, if the interpretation suggested of the section is right, that the innocent partner would lose his property. In my judgment, this is not the meaning of that section.

The learned Judge also relies on the proviso to that section and there is a great deal to be said in favour of his interpretation of the proviso, but in the view that I have expressed of the section itself, it is unnecessary to decide anything in respect of the proviso. I am aware that in coming to this conclusion I am taking a different view to that taken in *Bajinath Dās v. Bishen Devi* (5). It is enough to say that I do not agree with that decision or with the reasoning on which it is based. I think the Court in that case gave much too wide a meaning to the words in section 66 (1) "made on behalf of the plaintiff".

Therefore, in my judgment this appeal fails and must be dismissed with costs. This is a proper case for two sets of costs to be allowed, one for the plaintiffs and the other for the defendants Nos. 7 to 9. The reason being that the interests of some of the infant defendants might have been quite different to the interests of the plaintiffs and on one head of the argument which has been addressed to us was different.

Coutts Trotter, J.—I am of the same opinion. It was established by the case of *Bodh Singh Doodhooia v. Ganesh Chunder Sen* (6) that the sections of the Code which were designed to punish a person who puts his property in the name of the *benamidar* were not to be applied to the case where one member of a joint family gets property in his name and the rest of the family seek

to enforce their rights against that property standing in his name. The words of the Privy Council at page 330 were these:—

"Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds."

It is obvious that under Hindu Law it is natural and appropriate to regard members of a family as being in possession on behalf of the family, so that possession would enure to the family as a whole rather than to him in the character of *benamidar* or nominee which is quite alien to the conception of the relation of one member of a Hindu family to another. Further, their Lordships held in that case that the section of the old Code did not apply to a case where the alleged *benamidar* was himself a member of the undivided family.

The next case is where the person put in as *benamidar* was not a member of the undivided family but a nominee chosen by the head of the family, and the question arose whether the Code prohibited the members of the undivided family not concerned in the transaction from asserting their rights in the property or whether they were precluded from doing so by the section. In this Presidency, the cases, in my opinion, with one possible exception, have shown a consistent course of decision. It began with the case of *Natesa Ayyar v. Venkatramayyan* (1) and *Krishna Aiyar v. Ragha-vaiyan* (2). There is a *dictum*, for it has been analysed by other Courts and, in my opinion, rightly pronounced to be nothing more in, *Rama Kurup v. Sridevi* (7) which seems to go the other way. But, on the whole, the current of decisions in this Court has been uniform that the proposition which the case in *Bodh Singh Doodhooia v. Ganesh Chunder Sen* (6) laid down where the property stood in the name of a member of the family, was equally applicable when the nominee

(5) 63 Ind. Cas. 676; 19 A. L. J. 787; 3 U. P. L. R. (A) 147; 43 A. 711.

(6) 12 B. L. R. 317; 19 W. R. 356; 3 Sar. P. C. J. 253 (P. C.).

(7) 16 M. 290; 2 M. L. J. 173; 5 Ind. Dec. (N. S.) 909.

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was a stranger, provided that members of the family were merely seeking to enforce their claim to what they alleged to be the undivided family property or the proceedings of the money belonging to the undivided family. It cannot be denied that there is in the Allahabad Court a direct decision the other way, the case of *Bajinath Das v. Bishen Devi* (5) which has been referred to by my Lord. The reasoning is not difficult to follow. The property is put in the name of the *benamidar*, both in the Allahabad case and in the case before us, by the managing member of the family, and it is said that that is the act, under the Hindu Law, of the whole family and, therefore, the prohibition, which undoubtedly would extend to the managing member himself who carried out the transaction, must equally apply to the whole of the family on whose behalf he acts or purports to act. The answer appears to me to be that whatever the rule may have been under the section of the old Code, under the section of the present Code, section 66 (1), that result does not follow. In my opinion, the plaintiff in this suit and in similar suits is not seeking to enforce rights against the *benamidar* as his trustee, but he is following into the hands of the *benamidar* whose position as a trustee he *ipso facto* repudiates, a portion of the proceeds of what he alleges and has proved to be the ancestral estate in which he has a share and of which he is entitled to partition and severance of his own share. I am, therefore, of opinion that it cannot be said that the purchase at the sale of this property was a purchase made on behalf of the plaintiff. The managing member when he put in a *benamidar* knew that he was disobeying the Court, knew that he was putting a *benamidar* in a position to set up claims in derogation of the rights of his own family and of his co-parceners and, in such circumstances, it seems impossible to say that the purchase was made on behalf of this plaintiff within the meaning of section 66 (1) of the Code.

There only remains the difficulty created by a stray sentence in *Suraj Narain v. Ratan Lal* (4). It is suggested by my brother Kumaraswami Sastri, J., that it may be that the items of the property in question may have been in the same category as the

other properties, namely, gifts made to the son-in-law not as a benefaction to be held for the donor but as an advancement in life by way of gift. However, that does not appear from the report and I think the simplest method of dealing with that is to say, as my Lord has said, that the Allahabad case is dealing with a situation governed by the words of the old Code and that differentiation in wording effected by the new Code is sufficient to distinguish the observation of their Lordships in that case and not to make it not applicable to the present case.

With regard to the two other points that were argued as to the complicity of the first plaintiff to the transaction itself, the material put forward in support of that, to my mind, is quite unsubstantial. It amounts to no more than that he recorded the transaction in the family account books and it does not in the least follow that he appreciated exactly what was done, much less that he took an active and consenting part in it.

Finally, it was argued that not only was the first plaintiff completely aware of what was done but that in truth the 6th defendant was not a *benamidar* at all and he was never intended to be, but he was the real purchaser and had an independent right to the properties put up at Court auction. With regard to that, the learned Judge, who heard all the witnesses and discussed and weighed their evidence very carefully, has come to the conclusion with which I entirely agree, that there is no evidence worth the name to support the suggestion that the 6th defendant had an independent right over these properties.

I agree that the appeal fails and that it must be dismissed with costs.

V. N. V.

Appeal dismissed.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No.

2151 OF 1920.

November 14, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Rankin.

BEHARI LAL BISWAS—

PLAINTIFF—APPELLANT

versus

NASIMANNESSA BIBI—DEFENDANT—

RESPONDENT.

Landlord and tenant—Tender of rent—Amount not including interest on arrears—Tender, refusal of—Tender and appropriation—Bengal Tenancy Act (VIII of 1885), s. 55, effect of—Putni Regulation (VIII of 1819), s. 8 (2)—Proceedings for realization of arrears of rent, nature of—Service of notice on defaulter.

A landlord is not bound to accept the principal amount of rent when the interest due thereon is not tendered in full. As the principal and interest constitute one indivisible and entire claim, the landlord is entitled to refuse a tender by which what is due as rent is transmitted but what is remitted as the entire amount due on account of interest on rent, cesses and interest on cesses is less than what is legally due. [p. 487, cols. 1 & 2.]

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of a part of an entire and indivisible debt. But, though a tender of a smaller amount than that of which an indivisible and entire claim consists will be invalid as a tender there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, always provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole. [p. 486, col. 2.]

The cause of action where principal and interest thereon are both due, is only one, so that if the creditor sued to recover only the interest he could not sue to recover the principal and subsequent interest in a second suit. [p. 487, col. 2.]

A tender must be unconditional, or, at all events, free from any condition to which the creditor may rightfully object. [p. 487, col. 2.]

Section 55 of the Bengal Tenancy Act was not intended to abrogate the ordinary rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. Section 55 refers not to the right of a debtor to make a part-payment, but to the appropriation of a payment when accepted by the landlord; in other words, section 55 treats, not of tender but of appropriation. [p. 488, col. 1.]

Proceedings under the Putni Regulation, taken for the realisation of arrears of *putni* rent, are not taken against persons at all, but against the tenure; and the Zemindar is quite right in setting out in his petition and notices the name of the *putni* and the name of the *putnidar* as record-

ed in his books. The Regulation does not contemplate service of notice upon the defaulters personally. The proceeding is thus throughout against the tenure, and the mere fact that in the application to the Collector, the Zemindar mentions the names of one or two of the parties in possession, though not registered in his books, and omits to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid. [p. 489, col. 1.]

It is incumbent on persons who acquire an interest in a *putni* tenure by succession to get themselves registered in the books of the landlord. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Putni Regulation on the ground that their names were not mentioned in the application to the Collector. [p. 489, col. 2.]

Appeal against a decree of the District Judge, Nadia, dated the 20th July 1920, affirming that of the Munsif, First Court, at Krishnagar, dated the 13th June 1919.

Babu Tarakeswar Pal Choudhury (with him Babus Atul Chandra Gupta and Nirmal Chandra Chatterjee), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit to set aside a *putni* sale on the ground that the arrears were not due. The plaintiff was the owner of a subordinate tenure under the *putnidar*, named Majidunnessa. In 1909 the *putni* was sold to the present defendant. It appears that the *dar-putnidar* is trying his best to pay the rents. In 1321 again the *putni* was put up for sale. The plaintiff paid the rent by depositing it under section 62 of the Putni Regulation. The *putni* was ultimately sold in 1916. The present suit was brought on the 27th of May 1916. Both the Courts below have dismissed the suit on the ground that the amount of tender and deposit was insufficient. There were the *putni* rent, interest and cesses. We sent them by separate money orders through the Post Office. The Courts below held that the interests were insufficient. The interest was at the rate of 12 per cent. The Court held that under section 67, Bengal Tenancy Act, I ought to have paid interest at the rate of 12½ per cent. In the *kabuliyat* the provision was that the interest was to be paid in accordance with law at the end of each month. I submit if I am to pay interest according to law then I am entitled to pay interest at the end of each quar-

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ter. I submit the sale was illegal. The tender of rent and interest thereon was quite sufficient. The insufficiency of the cesses does not affect the sale. My next point is that the Court-fee paid on the plaint was Rs. 10. The suit was for a declaration that the sale was illegal. The Court below held that it ought to be treated as a suit for setting aside sale. We are ready to pay *ad valorem* Court-fees. As regards the insufficiency of the cess see section 47 of the Cess Act; *Gujraj Sahai v. Secretary of State for India in Council* (1). In that case it has been held that a *putni* cannot be sold for arrears of cesses. Nothing is rent which does not satisfy the definition of rent. See section 3 (5), Bengal Tenancy Act; *Jotindra Mohun Tagore v. Jarao Kumari* (2). I sent two postal money orders on the 1st Kartic 1322 (1) for Rs. 600 as rent of the *putni* from *Baisakh* to *Aswin* and (2) for Rs. 47-0-9. See *Dixon v. Clark* (3); *James v. Vane* (4). For on *Landlord and Tenant* (5th Edition) 547. The first deposit was made on 4th *Agrahayan* 1322 and the second in *Baisakh*. These deposits were made in respect of the money orders which were refused. See *Jotindra Mohun Tagore v. Jarao Kumari* (2), *Bhagabati Debya v. Basanta Kumari Debi* (5), section 14, Regulation VIII of 1819. The Regulation does not mention interest. See *Gulam Sattar v. Prodyat Kumar Tagore* (6), *Narendra Kumar Ghose v. Gora Chand Poddar* (7), *Manahar Mukherjee v. Khetra Nath Sabui* (8).

Babu Ramchandra Majumdar (with him Babu Bijan Kumar Mukerjee), for the Respondent—So far as the second money order goes the landlord is not bound to accept it. The amount of cess paid was less than

what was due. The tender must be of such a character as to enable the person to whom it is made, to appropriate it for the purpose. As regards interest, admittedly it was due on that date according to the terms of the *kabuliyat*. The question is whether it was proper tender. I submit it was not. See *Durga Prasad Singh v. Rajendra Narain Bagchi* (9). At the close of the year they sent another money order. Refers to section 8, Regulation VIII of 1819. I submit, therefore, no question of law would arise. Refers to *Assanulla Khan v. Tirthabashini* (10). As to the next point as to the validity of tender I submit there was no valid tender at all.

[Mookerjee, J.—How does section 55 of the Bengal Tenancy Act modify the ordinary law?]

Of course the landlord is not bound to accept the rent in acquittance of the entire rent. He is bound to accept part payment. In the present case there was no part payment at all.

[Mookerjee, J.—Is the landlord bound to accept rent only excluding interest thereon to be taken thereafter?]

I submit no. Rent includes interest. The landlord is bound to accept payment in part. Section 55 applies only where he accepts payment.

[Mookerjee, J.—But is he bound to accept?]

No. Section 55 does not entitle the tenant to make a part payment. Leaving aside the question of cesses, I submit there being no valid tender, the sale cannot be set aside. As regards rate of interest section 67 of the Bengal Tenancy Act does not apply inasmuch as there are monthly *kists* in the present case. Here the contract was before the passing of the Bengal Tenancy Act. See *Hemanta Kumari Debi v. Jagadindra Nath Roy* (11).

[Mookerjee, J.—If you exclude section 67 how can you claim interest?]

The lease provides for payment of interest according to law. The Legislature intended that in such cases the interest should be

(1) 17 C. 414; 8 Ind. Dec. (N. S.) 815.
 (2) 33 C. 140; 3 C. L. J. 7; 10 C. W. N. 201; 1 M. L. T. 8; 33 I. A. 30 (P. C.).
 (3) (1847) 5 C. B. 365; 75 R. R. 747; 5 D. & L. 155; 16 L. J. C. P. 237; 136 E. R. 919.
 (4) (1860) 2 El. & El. 883; 119 R. R. 988; 29 L. J. Q. B. 169; 6 Jur. (N. S.) 731; 2 L. T. (N. S.) 281; 8 W. R. 446; 121 E. R. 330.
 (5) 11 C. W. N. 110; 5 C. L. J. 69.
 (6) 51 Ind. Cas. 933; 29 C. L. J. 481.
 (7) 33 C. 683; 3 C. L. J. 391.
 (8) 19 Ind. Cas. 625; 17 C. W. N. 820; 18 C. L. J.
 175.

(9) 21 Ind. Cas. 750; 41 C. 493 at p. 513; 40 I. A. 223; 19 C. L. J. 95; 18 C. W. N. 66; (1914) M. W. N. 1; 15 M. L. T. 68; 26 M. L. J. 25; 16 Blm. L. R. 42 (P. C.).

(10) 22 C. 680; 11 Ind. Dec. (N. S.) 453.
 (11) 22 C. 214 at p. 221; 21 I. A. 131; 6 Sar. P. C. J. 473; 11 Ind. Dec. (N. S.) 144 (P. C.).

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paid at 12½ per cent. My next point is that there is no prayer to set aside the sale in the plaint. The suit is not maintainable under section 42 of the Specific Relief Act. The learned Judge also comes to a clear finding on the point.

Babu Tarakeshwar Pal Choudhury in reply.—It is not a plain suit for a declaratory decree. The plaint is headed as a suit for setting aside a sale under section 14 of Regulation VIII of 1819. The plaint, no doubt, was inartistically drawn up. In substance the suit was really one for setting aside a sale. The Court-fee was, no doubt, insufficient. As regards payment under section 55 I submit the landlord is bound to receive it. Refers to section 56, Bengal Tenancy Act. As regards payment of interest according to law there was no law for the time being in force. See *Ahsanulla Khan Bahadur v. Haricharan Mozumdar* (12).

JUDGMENT.—The subject-matter of this litigation is a *putni taluk* created on the 31st December 1844 by Maharaja Srish Chandra Deb of Nadia in favour of Kaligatee Mookerjee. The interest of the Zemindar is now held by Nasimannessa Bibi, the defendant in this suit, while the interest of the *putnidar* has, by devolution, vested in Majidannessa Bibi. The plaintiff Behari Lal Biswas is a *dar-putnidar* who obtained possession of the *putni* in 1909, under the provisions of section 13 of the *Putni Regulation*, on payment of the dues of the then Zemindar, and he has since then been in occupation in order to recover the amount advanced by him. On the 15th May 1916 the *putni taluk* was brought to sale by the Zemindar for realisation of arrears due and was purchased by the Zemindar herself. On the 27th May 1916, the plaintiff instituted the present suit for declaration that the sale was null and void, inasmuch as no arrears were due at that time. The Court of first instance dismissed the suit on the ground that rent was in arrears, and that decision has been affirmed by the District Judge on appeal. On the present appeal, the plaintiff has urged that there

had been a valid tender of the sums due, which had been improperly refused by the landlord. The facts material for the determination of the question of law thus raised are really not in controversy and may be briefly recited at this stage.

On the 18th October 1915, the plaintiff sent to the defendant a sum of Rs. 647-0-9 through the Post Office, by what is known as rent-money order. As under the rules of the Postal Department the maximum amount which can be remitted by a single money order is Rs. 600, the amount mentioned was included in two money orders one for Rs. 600, the other for Rs. 47-0-9. The money order for Rs. 600 stated that the amount was remitted as rent due on the *putni* for the six months from *Baisakh* to *Aswin* 1322. The money order for Rs. 47-0-9 stated that Rs. 10-8-0 was interest on rent in arrears, Rs. 35-13-9 was road and public works cesses, and annas 11 was interest due on cesses. The money orders were tendered to the defendant by the Postal peon and were refused. On the 22nd November 1915, the plaintiff deposited the amount in Court under section 61 of the Bengal Tenancy Act. On the 6th April 1916, the plaintiff sent to the defendant Rs. 654-2-0 by rent-money order. There were two money orders as on the previous occasion, namely, one for Rs. 600 and the other for Rs. 54-2-0. The money order for Rs. 600 stated that the amount remitted was rent due for the six months from *Kartik* to *Chait* 1322. The money order for Rs. 54-2-0 stated that Rs. 17-4-3 was interest in rent in arrears, Rs. 35-13-9 was road and public works cesses, and annas 6 was interest on cesses. The money orders were taken to the defendant by the Postal peon but were refused. On the 18th April 1916, the plaintiff deposited the sum in Court under section 61 of the Bengal Tenancy Act. The question in controversy is, whether there was a valid tender on either or both of the occasions mentioned. The defendant urges that what was tendered on each occasion was really less than the amount actually due and did not constitute a valid tender.

The *putni* lease fixed the annual rent at Rs. 1,200, payable in twelve monthly instalments, namely, Rs. 50 in *Baisakh*, Rs. 50 in *Jaistha*, Rs. 50 in *Assar*, Rs. 100 in *Saravan*

(12) 20 C. 86; 19 I. A. 191; 6 Sar. P. C. J. 252; 10 Ind. Dec. (N. S.) 58 (P. C.).

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Rs. 250 in *Bhadra*, Rs. 100 in *Aswin*, Rs. 100 in *Kartik*, Rs. 100 in *Aghrayan*, Rs. 200 in *Pous*, Rs. 100 in *Magh*, Rs. 60 in *Falgun* and Rs. 40 in *Chaitra*. The lease contained a covenant that on default of payment of the instalments, the lessee would pay interest according to law. It was further provided that on default, the rights and interests of the lessee would be sold under Regulation VIII of 1819 in order that the arrears of rent with interest might be realised. It is plain from the terms of the lease that Rs. 600 was the aggregate amount of rent in arrears for the first half of the year ending in *Aswin* and another sum of Rs. 600 the aggregate amount of rent in arrears for the second half of the year ending in *Chait*. Consequently, when on the 18th October 1915, the plaintiff sent to the defendant the sum of Rs. 647-0-9 by rent-money order the rent in arrears was Rs. 600 as correctly stated in the first money order, the question in controversy is, whether Rs. 10-8-0 was the amount of interest due on rent in arrears; Rs. 35-13-9 the amount due on account of cesses, and annas eleven the amount due as interest on cesses in arrears. The Courts below have answered this question against the plaintiff. The three items require separate examination.

The *putni* lease, as already stated, provided that in the event of default in the payment of rent according to the prescribed instalments, the lessee would pay interest according to law. This clearly refers to the law that might prevail at the time when the default should be made and the liability to pay interest might accrue. Regulation XV of 1793, which was repealed by Act VIII of 1868, fixed the maximum rate of interest on money due at twelve per cent. per annum subject to the reservation that interest would be decreed at a lower rate if so stipulated between the parties. The Regulation further provided that the amount decreed as interest would not exceed the principal sum, and that compound interest would not be allowed on intermediate adjustments of accounts. These provisions were reproduced in Regulation XXXIV of 1803 which was repealed by Act XV of 1874. Regulation VIII of 1805, which was repealed by Act XIX of 1873, and Regulation XIV of 1805 which was repealed by Act XII of 1876, contained similar provisions, and their

application was extended by Regulation XVII of 1806 which was repealed by Act IV of 1882. These were followed by Act XXXII of 1839 which authorised the Courts to allow interest, in certain specified cases, at a rate not exceeding the current rate of interest. Next came Act XXVIII of 1855 which repealed the Usury Laws. Under section 21 of Act X of 1859 (*Bengal Rent Act*), interest was made payable on arrears of rent at 12 per cent. per annum from the date of each instalment, to a similar effect was the provision in section 21 of Act VIII of 1869 B. C. and this was reproduced in section 67 of the *Bengal Tenancy Act, 1885*. The law was altered, however, by Act I of 1907 (B. C.) and Act I of 1908 (B. B. & A. C.) and interest was made payable on arrears of rent at twelve-and-a-half per centum per annum. Section 67 thus modified stands as follows:

"An arrear of rent shall bear simple interest at the rate of twelve-and-a-half per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due, to the date of payment or of the institution of the suit, whichever date is earlier." This has to be read with section 53 which provides that "subject to agreement or established usage, a money rent payable by a tenant shall be paid in four equal instalments, falling due on the last day of each quarter of the agricultural year. The introductory words of the section indicate that there may be an agreement in modification of the provision for four instalments; *Manahar Mukherjee v. Khetra Nath Sabui* (8). The agreement for payment of rent in monthly instalments in the case before us, would, consequently be operative, even if section 53 had been in force when the lease was granted. The appellant has contended that this raises the question, how is section 67 affected by section 53; in other words, how has interest to be calculated under section 67 when the instalments are not quarterly but monthly; and we have been pressed to hold that even when the rent is payable in monthly instalments, interest should be calculated on each instalment, not from the date when it falls due, but from the last day of the quarter

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in which it falls due. In support of this proposition, reliance has been placed upon the decision of the Judicial Committee in *Hemanta Kumari Debi v. Jagadindra Nath Roy* (11) which was explained in *Narendra Kumar Ghose v. Gora Chand Poddar* (7) and *Manohar Mukherjee v. Khetra Nath Sabui* (8). We are of opinion that the contention thus broadly raised need not be examined for the purposes of this case. Here the contract was made before the sections 53 and 67 of the Bengal Tenancy Act were enacted. The agreement to pay rent in monthly instalments was valid when made, and its validity has not been affected by the retrospective operation of a subsequent Legislative enactment. The contract further provided that, in default of payment of rent according to monthly instalments, interest would be paid according to law. The law has fixed the rate of interest at twelve-and-a-half per centum per annum *prima facie* interest had to be calculated at this rate from the date of default and this is what was ruled by the Judicial Committee in *Hemanta Kumari Debi v. Jagadindra Nath Roy* (11). The decision of the Judicial Committee was in fact so interpreted in *Narendra Kumar Ghose v. Gora Chand Poddar* (7) and *Manohar Mukherjee v. Khetra Nath Sabui* (8). We are accordingly of opinion that interest in the present case was payable on rent in arrear, calculated from the date of each instalment; and there is no controversy that the amount remitted on account of interest on rent in arrears was less than what was due according to this method of calculation. As regards the amount of cesses, there is no controversy that what was remitted was less than what was due. The valuation roll dated 28th June 1914, makes it abundantly clear that the amount of cesses annually leviable had been enhanced by the Revenue Authorities. The amount remitted as interest on cesses was consequently also smaller than what was due. The position thus is that what was due as rent was transmitted, but what was remitted as the entire amount due on account of interest on rent, cesses, and interest on cesses was less than what was legally due. This raises the question whether there was a valid tender. The concurrent answer of the Courts below in favour of the respondent has been

challenged before us as based on principles erroneous in law.

It is well settled that a creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt; *Dixon v. Clark* (3); *James v. Vane* (4). But, though a tender of smaller amount than that of which an indivisible and entire claim consists, will be invalid as a tender, there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, always provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole; *Bowen v. Owen* (13). The import of the term "indivisible and entire claim which is used in this connexion, will be fully appreciated, when it is said that though there can be no valid tender of part if such a debt, yet where the debt is of a conglomerate nature, that is to say, where the components exhibit the character of distinct debts in themselves, a debtor may make a valid tender of any one of such several distinct debts. If at the time he makes the tender, he takes care to indicate the debt on account of which he makes the tender; but if, in making the tender, he fails to specify the particular one of the several debts to which he wishes the tender to apply, and the amount tendered by him is insufficient to cover all, it will not be good for any. Thus tender of enough to pay one of several distinct items in a bill, if offered in satisfaction of the whole, will not be a good tender in respect of either, though if it were specifically applied by the debtor to that one item at the time of payment, it would be a good tender in regard to that item, in spite of its being a unit. With reference to this, Coltman, J., observed in *Hardingham v. Allen* (14) "In order that a tender of one portion of a combined claim may be effective as regards that one portion, it must be specifically applied to that portion of it, or it does

(13) (1847) 11 Q. B. 130; 75 R. R. 306; 17 L. J. Q. B. 5; 11 Jur. 972; 116 E. R. 425.

(14) (1848) 5 C. B. 793; 75 R. R. 839; 17 L. J. C. P. 198; 12 Jur. 584; 136 E. R. 1091.

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not sustain the tender." In the case before us, the amount due as arrears of rent was tendered in full, but what was tendered as the full amount due on account of interest on rent, cesses, and interest on cesses, was inadequate. We feel no doubt that the landlord was competent to refuse the tender so made.

The landlord was not bound to accept even the principal amount of rent, when the interest due thereon was not tendered in full. This is supported by the decision of the Judicial Committee in *Bamundoss Mookerjee v. Omesh Chunder Ræe* (15) where it was ruled that if principal as well as interest thereon is due, all payments should be applied in the first instance to interest, and thereafter to principal only in so far as those payments exceed the interest due. This was the rule recognised since 1809, in a long series of decisions of the Sadar Court, mentioned in the judgment of Bayley and Jackson, JJ., in *Lootf Ally v. Guneshur* (16) which was ultimately affirmed by the Judicial Committee in *Luchmeswar Singh Bahadur v. Syud Lutf Ali Khan* (17). See also *Syed Lutf Ali Khan v. Afzuloonnissa Begum* (18) which was reversed by the Judicial Committee in *Syud Lootf Ali Khan v. Afzuloonnissa Begum* (19). Again, in *Meka Venkataradi Appa Row v. Raja Parthasarathy Appa Row* (20), Lord Buckmaster reiterated the same view and relied upon the statement by Rigby, L. J., in *Parr's Banking Company v. Yates* (21) "where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled

under the contract." The substance of the matter is that, as pointed out by Lord Buckmaster in *Muhammad Hafiz v. Mirza Muhammad Zakariya* (22), the cause of action where principal and interest thereon are both due, is only one, so that if the creditor sues to recover only the interest, he cannot sue to recover the principal and subsequent interest in a second suit. The inference follows that in the present case the landlord was entitled to refuse the tender, because the principal and interest constituted one indivisible and entire claim, and the sum tendered was smaller than the amount really due. This is supported by the decision of the Judicial Committee in *Durga Prasad Singh v. Rajendra Narain Bagchi* (9). In that case, there were tenders in respect of rent and interest upon arrear of rent, based on an erroneous assumption as to the amount of rent payable. The amount really payable turned out to be larger than the assumed figure. It was ruled that the amounts tendered were not good tenders, either as tender of rent or of interest on arrears of rent, and were consequently ineffective.

We must further observe that the plaintiff not only tendered less than what was due, but tendered the insufficient amount for acceptance in full satisfaction of the claim of the landlord. A tender, however, must be unconditional, or at all events, free from any condition to which the creditor may rightfully object. The condition which the debtor is the most apt to impose is precisely the one which the law does not permit; the debtor has no right to insist that the creditor shall admit that no more is due than the sum tendered; *Bowen v. Owen* (13), see also *Huxham v. Smith* (23), *Evans v. Judkins* (24), *Griffiths v. Hodges* (25), *Cheminant v. Thornton* (26), *Strong v. Harvey*

(15) 6 M. L. A. 289; 1 Sar. P. C. J. 542; 19 E. R. 108.

(16) (1863) Sevestre 834a.

(17) 8 B. L. R. 110; 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461 (P. C.).

(18) 3 W. R. 113.

(19) 9 B. L. R. 348; 16 W. R. 20; 2 Sar. P. C. J. 701 (P. C.).

(20) 61 Ind. Cas. 31; 48 I. A. 150; 44 M. 570; 19 A. L. J. 465; 33 C. L. J. 447; 40 M. L. J. 549; 23 Bom. L. R. 644; (1921) M. W. N. 347; 3 U. P. L. R. (P. C.) 27; 14 L. W. 25; 26 C. W. N. 33; 30 M. L. T. 36; (1922) A. I. R. (P. C.) 233 (P. C.).

(21) (1898) 2 Q. B. 460; 67 L. J. Q. B. 851; 47 W. R. 42; 79 L. T. 321.

(22) 65 Ind. Cas. 79; 49 I. A. 9135 C. L. J. 126; 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922; (1922) A. I. R. (P. C.) 23; 44 A. 121 (P. C.).

(23) (1809) 2 Camp. 19; 11 R. R. 651.

(24) (1815) 4 Camp. 156.

(25) (1824) 1 Car. & P. 419.

(26) (1825) 2 Car. & P. 50.

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(27); *Finch v. Miller* (28), whether a tender is in fact intended to be conditional or not may give rise to refined controversies, as is clear from numerous cases in the books; *Mitchell v. King* (29), *Hough v. May* (30), *Sutton v. Hawkins* (31), *Hastings v. Thorley* (32), *Henwood v. Oliver* (33), *Bull v. Parker* (34), *Bowen v. Owen* (13), *Jones v. Bridgman* (35). No such question, however, arises here, as it is not disputed that what was tendered was tendered as the full amount due and was intended to be accepted only in full satisfaction of the claim; from whatever point of view the question is approached, it thus follows that the tender was bad.

As the money tendered was not on account, but was in full satisfaction of the dues it is not necessary to consider, whether, even if the tender were expressly in part satisfaction of the claim, the landlord would be bound to accept it. We may add, however, that we did not feel impressed by the argument that section 55 of the Bengal Tenancy Act was intended to abrogate the ordinary rule, recognised in a long line of cases such as *Cotton v. Godwin* (36), *Dixon v. Clark* (3), *Chunder Caunt v. Jodoonath Khan* (37), *Ram Kamlessuri Pershad Singh v. Sukhan Singh* (38) and *Bechu Singh v. Bichharam Sahu* (39), namely, that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. Section 55 appears to refer not to the right of a debtor to make a part payment, but to the appropriation of a payment when accepted by the landlord; in

other words, section 55 treats, not of tender but of appropriation. We must accordingly hold, in concurrence with the Courts below, that there was no valid tender on the first occasion and the subsequent deposit under section 61 of the Bengal Tenancy Act was equally ineffectual. The tender on the second occasion followed by a deposit in Court is, for similar reasons, of no avail.

As a last resort, a faint attempt was made to invoke the aid of principle, recognised in some judicial decisions, namely, that an unconditional tender of a sum which turns out in the end to be less than what is really due may be valid *pro tanto*, if there is a genuine dispute as to the amount due; *Bowen v. Owen* (13), *Read v. Goldring* (40), *Eckstein v. Reynolds* (41), *Henwood v. Oliver* (33), *Bull v. Parker* (34), *Greenwood v. Sutcliffe* (42), *Haji Abdul Rahman v. Haji Noor Mahomed* (43) and *Digambar Das v. Harendra Narain* (44). This doctrine, even if it be assumed to have been left unaffected by the decision of the Judicial Committee in *Durga Prasad Singh v. Rajendra Narain Bagchi* (9), is of no assistance to the appellant. In the first place, the tender was not unconditional; in the second place, there was no substantial ground for dispute; the amount had been miscalculated because it overlooked that interest was payable at twelve-and-a-half instead of twelve per cent. and that the amount of cess leviable had been enhanced by the Revenue Authorities. The inference is thus irresistible that arrears were due and that the landlord was within her rights when she took recourse to the provisions of Regulation VIII of 1819.

It has finally been urged that the sale was bad, because the proceedings under the Regulation were carried on against the previous *putnidar* who was dead and whose name still stood on the books of the landlord. In our opinion, there is no substance

(27) (1825) 3 Bing. 304; 11 Moore 72; 4 L. J. (O. S.) C. P. 57; 130 E. R. 530.

(28) (1848) 5 C. B. 428; 75 R. R. 774; 136 E. R. 945.

(29) (1833) 6 Car. & P. 237; 40 R. R. 810.

(30) (1826) 4 A. & E. 954; 43 R. E. 530; 6 N. & M. 535; 2 H. & W. 33; 5 L. J. (N.S.) K. B. 186; 111 E. R. 1042.

(31) (1838) 8 Car. & P. 259.

(32) (1838) 8 Car. & P. 573.

(33) (1841) 1 Q. B. 409; 1 G. & D. 25; 10 L. J. Q. B. 158; 113 E. R. 1189; 55 R. R. 290.

(34) (1842) 2 Dow. (N. S.) 345; 12 L. J. Q. B. 93; 7 Jur. 282.

(35) (1878) 39 L. T. 500.

(36) (1840) 7 M. & W. 147; 9 D. P. C. 763; 10 L. J. Ex. 243; 151 E. R. 715.

(37) 3 C. 468; 1 C. L. R. 470; 1 Ind. Dec. (N. S.) 883.

(38) 7 C. W. N. 172.

(39) 1 Ind. Cas. 677; 10 C. L. J. 91 at p. 98.

(40) (1813) 2 M. & S. 86; 14 R. R. 594; 105 E. R. 314.

(41) (1837) 7 A. & E. 80; 2 N. & P. 256; 6 L. J. (N.S.) K. B. 198; 112 E. R. 401; 45 R. R. 676.

(42) (1892) 1 Ch. 1; 61 L. J. Ch. 59; 65 L. T. 797; 40 W. R. 214.

(43) 16 B. 141; 8 Ind. Dec. (N. S.) 570.

(44) 5 Ind. Cas. 165; 11 C. L. J. 226 at p. 234; 14 C. W. N. 617.

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in this contention. As was pointed out by Tottenham, J., in *Rajnarain Mitra v. Ananta Lal Mondul* (45) "proceedings under the Putni Regulation, taken for the realisation of arrears of *putni* rent, are not taken against persons at all, but against the tenure; and the Zemindar is quite right in setting out in his petition and notices the name of the *putni* and the names of the *putnidars* as recorded in his books." This view was not dissented from by Petheram, C. J., and Ghose, J., indeed, if a different view had been taken by them on this point, it would not have been necessary for them to examine the point which led to difference of opinion and consequent reference to a third Judge. We are not unmindful that in *Golan Saitar v. Prodyat Kumar Tagore* (6) Chatterjea, J., although conceding that the proceedings under the Regulation were taken against the *putni* tenure, did not feel inclined to hold that the tenure could be sold by taking proceedings against wrong persons. The question, however, did not actually arise for decision in the case. It may be noted that the Regulation does not contemplate service of notice upon the defaulter personally. The petition and notice mentioned in section 8 (2) are stuck up in some conspicuous part of the Kacheri of the Collector. A similar notice is stuck up at the Sadar Kacheri of the Zemindar himself, and a copy of extract of such part of the notice as may apply to the individual case, is sent to be similarly published at the Kacheri or at the principal town or village upon the land of the defaulter. The proceeding is thus throughout against the tenure, and the mere fact that in the application to the Collector, the Zemindar mentions the names of one or two of the parties in possession, though not registered in his books, and omits to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid; *Raghub Chunder Banerjee v. Brojonath Koondoo Chowdhry* (46), *Gyanada Kantho Roy Bahadur v. Bro momoyi Dassi* (47), *Saibesh Chandra v. Bono wari Mukunda* (48). *Putni taluks* are made heritable by section 3 of Regulation

VIII of 1819 and it is incumbent on persons, who acquire an interest in a *putni* tenure by succession to get themselves registered in the books of the landlord under section 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Regulation on the ground that their names were not mentioned in the application to the Collector; *Durga Prosad Bundoopadhyaya v. Brindaban Roy* (49), *Khetter Mohan Pal v. Pran Kristo Kabiraj* (50).

We are of opinion that the Courts below have rightly dismissed the suit and that this appeal must be dismissed with costs. The cross-objection has not been pressed by the respondent and is dismissed without costs.

Appeal dismissed.

B. N. *Cross-objection dismissed.*

(49) 19 C. 504; 9 Ind Dec. (N. S.) 780.

(50) 3 C. W. N. 371.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 408 OF 1922.

July 28, 1922.

Present.—Mr. Justice Campbell.

BELA SINGH—DEFENDANT—APPELLANT
versus

BALI RAM AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Easement—Water, right to—Artificial water-course.

The right to water flowing through artificial water-courses is a right of easement and must rest on some grant or arrangement, either proved or presumed, from, or with the owners of the land from which the water is artificially brought, or on some legal origin. It is quite distinct from the natural right, which as a natural incident to the ownership of land, entitles *prima facie* each successive riparian proprietor to the unimpeded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land." [P. 490, col. 2.]

Second appeal from a decree of the District Judge, Ambala, dated 21st October 1921, affirming that of the Additional Munsif, Ambala, dated the 11th April 1921.

Mr. Rama Nand, for the Appellant.

Mr. Gullu Ram, for the Respondents.

JUDGMENT.—The facts as found by the learned District Judge which have led to the present second appeal are these. The

(45) 19 C. 703 at p. 717; 9 Ind. Dec. (N. S.) 911.

(46) 14 W. R. 489; 9 B. L. R. 91 n.

(47) 17 C. 162; 8 Ind. Dec. (N. S.) 647.

(48) 4 Ind. Cas. 371; 10 C. L. J. 453.

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plaintiff has been shown in the Revenue Records since 1888 as irrigating his fields from a certain *kul* or artificial water channel which runs through the defendant's lands. Shortly before suit, the defendants dammed the *kul* and proceeded to irrigate their own fields for the first time thereby decreasing materially the plaintiff's supply of water. The plaintiff sued for a permanent injunction restraining the defendants from using the water of the *kul* and enjoining them to remove their dam and obtained a decree which was upheld on appeal by the District Judge.

The defendants have come to this Court on second appeal.

It was argued before the learned District Judge on behalf of the appellant that the plaintiff had failed to show that he had a right to control his actions. The learned District Judge found that though there might be customs regulating the use of water carried by this *kul*, neither their existence nor their nature had been proved or even pleaded, but he held that on principles of justice and equity the plaintiff's decree granted by the Trial Court should be affirmed. He cited *Mangal Singh v. Hazara Singh* (1) in support of this view and also a discussion on the rights of the use of water in Goddard's Law of Easements and two English cases referred to therein.

These authorities are distinguishable. In *Mangal Singh v. Hazara Singh* (1) which was an order passed on revision, a prominent reason for non-interference with the decree of the lower Appellate Court was a finding that a custom had been made out. The rights dealt with in the passages cited from Goddard's book were those of riparian proprietors in the water of natural streams. The essential difference between rights in the flow of water in natural stream and those in water carried by artificial water-course has been pointed out in *Ram Kirpal Singh v. Hanuman Singh* (2) and again by this Court in *Nagina Singh v. Malhi* (3) and is expressed

lucidly as follows in Peacock's Law relating to Easements in British India, 2nd Edition, at page 112.

"The right to water flowing through artificial water-courses is a right of easement and must rest on some grant or arrangement, either proved or presumed, from, or with the owners of the land from which the water is artificially brought, or on some legal origin. It is quite distinct from the natural right, which is a natural incident to the ownership of land, entitles *prima facie* each successive riparian proprietor to the unimpeded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land."

In the present instance the *kul* has been found to be an artificial water-course, and it has also been found that no easement or customary right enjoyed by the plaintiff has been proved. The plaintiff alleges only diminution of supply and not complete stoppage, so the entry in the Revenue Records since 1888 that the plaintiff's fields are irrigated by a *kul* does not help him.

The statement of the *Patwari* that the lands now irrigated by the defendants are not recorded in the revenue papers as irrigated and the facts that the defendants pleaded that they have commenced to irrigate by a *panchayat* decision and that they have been held to have failed to establish this plea do not help the plaintiff either. He has not proved that he has used the whole water of the *kul* as of right and he merely pleaded that he had used it for a very long time. Hence section 26 of the Limitation Act, on which his Counsel relies, does not avail him.

He has failed, in my opinion, to establish that he is legally entitled to the injunction sought and I, therefore, accept the appeal, set aside the decree of the lower Courts and order that the suit be dismissed with costs throughout.

N. H.

Appeal accepted.

(1) 4 Ind. Cas. 1015; 101 P. L. R. 1909; 153 P. W. R. 1909.

(2) 59 Ind. Cas. 929; 6 P. L. J. 6; 2 P. L. T. 122.

(3) 64 Ind. Cas. 158; 3 L. L. J. 555.

SANKARAN NAMBI V. DEVAKI ANTHERJENAM.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL, No. 353 OF 1920.

January 10, 1922.

Present.—Mr. Justice Spencer and Mr. Justice Krishnan.

KOTASSERI EZHUTHASSAN VEETIL
SANKARAN NAMBI AND ANOTHER—
DEFENDANTS NOS. 1 AND 24—APPELLANTS
*versus*KANHOLIILLATHIL DEVAKI ANTHER-
JENAM AND OTHERS—DEFENDANTS

—PLAINTIFFS NOS. 2 TO 14 16, 17

AND 25 TO 31—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11 O. XXXII, r. 2—Non-joinder of parties—Dismissal of suit—Res judicata—Malabar Law—Tarwad—Trusteeship—Minor, competency of—Uraima right, transfer of—Trust—Fraudulent introduction of stranger—Breach of trust.*Dismissal of a suit for non-joinder of parties does not operate as *res judicata* in a subsequent suit between the same parties. [p. 493, col. 2.]

Explanation IV of section 11, Civil Procedure Code, deals with a case tried on the merits and does not apply to cases of dismissal for want of parties, non-payment of Court-fees or the like. [p. 493, col. 2.]

Where by mere inadvertence, no next friend is put in for one of the plaintiffs, who is a minor, but the defect is cured in the Appellate Court, there is no legal objection to the maintainability of the suit under O. XXXII, r. 2, Civil Procedure Code. [p. 493, col. 2.]

A minor is not incompetent to be an Uralan of a Malabar Illom or Tarwad when the trusteeship belongs to it and the duties of the minor trustee may be performed by a properly constituted guardian. [p. 493, col. 2.]

Somasundara Mudaliar v. Vythilinga Mudaliar, 19 M. 285; 6 M. L. J. 92; 6 Ind. Dec. (N. S.) 904, *Muthu Kumara Mudaliar v. Palaniappa Chettiar*, 10 Ind. Cas 300; (1911) 1 M. W. N. 303; 9 M. L. T. 495, distinguished.

A renewal of a Kanom by some only of the Uralars of a Devaswom without consulting the rest is invalid. [p. 494, col. 1.]

Koyittal Parambil Parakum v. Attimana Illeil Narayanan, 50 Ind. Cas. 371; 42 M. 335; 9 L. W. 413; 25 M. L. T. 272; 36 M. L. J. 295; (1919) M. W. N. 27, referred to.

It is incompetent for the last male member of a Malabar Illom to alienate the trusteeship of a temple by vesting the Uraima right by a Will in his sons. [p. 494, col. 1.]

The fraudulent introduction by some of the trustees of a stranger into the body of trustees amounts in law to a breach of the trust. [p. 494, col. 1.]

Second appeal against a decree of the District Court, South Malabar, in Appeal Suit No. 354 of 1918, preferred against a decree of the Court of the Principal District Munsif, Calicut, in Original Suit No. 97 of 1912.

Mr. C. Madhavan Nair, for the Appellants.

Mr. K. P. M. Menon, for Respondent No. 4.

JUDGMENT.**Spencer, J.**—This suit was brought for redemption of a Kanom and for setting aside a prior renewal granted by the 19th and 24th defendants. The suit was decreed in the District Court, and in second appeal several objections have been taken.

The fourth plaintiff is a minor and the fifth plaintiff was put forward in the District Munsif's Court as his agent. But in the District Court he was brought on record as the next friend of the fourth plaintiff and allowed to prosecute the suit. It is objected that this procedure was not legal on the ground that the property in suit was that belonging to a Devaswom belonging to an Illom and that the fourth plaintiff as a minor was not competent to represent the Illom. O. XXXII, r. 2 provides that "where a suit is instituted by, or on behalf of, a minor without a next friend, the defendant may apply to have the plaint taken off the file." But there is no legal objection for impleading the fifth plaintiff as the next friend of the fourth plaintiff and allowing him to continue the suit.

The frame of the suit as finally constituted is not open to objection. We have not been shown any authority for holding that a minor is competent to be an Uralan of a Dewaswom.

The second point argued is, that the present suit should have been dismissed as barred by *res judicata* on account of the prior suit in Original Suit No. 8 of 1901 filed for the same purpose having been dismissed for non-joinder and that decree having become final on account of the failure of the plaintiffs to appeal to this Court. But it cannot be said that the questions decided in the present suit were directly and substantially in issue in the former suit and decided between the parties.

The defendants' (appellants') Counsel wished to raise another point regarding the failure of the plaintiffs to join the Attaladakam heirs in this suit. But as this was not raised in first appeal we cannot allow it to be taken here.

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The last and substantial point in the case is, whether the renewal of 1911 was invalid. The District Judge found that it was so because the 24th defendant had introduced a stranger (19th defendant) who was not an Uralan in the deed of renewal. So far as the inclusion of this stranger tended to support pretensions on his part to have a right to deal with the properties of the Dewaswom, the action of the 24th defendant was a breach of trust, and the lower Court's decision can also be supported on the ground that the renewal was manifestly bad for want of consultation with the other members of the Illom. In my opinion, the lower Appellate Court was right, and the second appeal should be dismissed with costs. Time for redemption is extended for four months. The memorandum of objections is dismissed with costs.

Krishnan, J.—This second appeal is against the decision of the District Judge of South Malabar in Original Suit No. 97 of 1912 brought before the Principal District Munsif of Calicut, for the redemption of a Kanom granted by the then Uralars of the Cheruvannore Dewaswom in the year 1856. The District Judge has granted the redemption as prayed for, and the appeal is against that decree.

The appellants are the first defendant, who represents the mortgagee's interest at present, and the 24th defendant, who is one of the Uralars of the Dewaswom. The suit was originally brought by five plaintiffs, the first four plaintiffs being the members of Kanholi Illom, and the fifth plaintiff, their agent or Mukhtear. The plaint had been signed by this fifth plaintiff and not by any others. There was also another defect in the plaint that the fourth plaintiff, who was admittedly a minor, was not represented by his next friend on record. The case as it was originally before the District Munsif was, however, dismissed not on any of these technical grounds but on another technical ground that all the Uralars of the plaint temple were not parties to the suit. That decree having been affirmed by the District Judge, we had to interfere in Second Appeal No. 847 of 1914 where we pointed out that the dismissal for non-joinder was not a proper disposal of the case and directed the necessary parties to be added, and a decree passed in the case on the merits.

The case went back again to the District Munsif and before him several technical pleas were again taken and some of them found favour with him. As they are also pressed before us I shall deal with them now.

The first point taken is, that the plaint had not been signed by the Nos. 1 to 4 plaintiffs and that the fifth plaintiff was not the properly constituted agent of the plaintiffs,—that the plaintiffs Nos. 1 to 3 had no interest in the Dewaswom, but that the fourth plaintiff was the only Uralan of the Dewaswom, as representing his Illom and as he was on record only in his own name without there being a next friend, as required by O. XXXII, r. 1, he being admittedly a minor, the suit should have been dismissed on that ground alone. The District Munsif upheld this plea. But I agree with the District Judge in thinking that he was wrong. There is no reason for holding that the omission to put in the next friend was due to any design or in any way *malâ fide*, but it was a case of mere inadvertence. The District Judge was, therefore, right in holding that an opportunity should have been given to cure this defect. The defect has now been cured by the fifth plaintiff being brought on record as the next friend of the minor and the plaint, as it is before us and as it was before the District Judge at the final hearing, is free from any defect on this score.

The next point argued before us is again one of non-joinder of certain Attaladakkam heirs of Erampampalli Illom who owned Uraima rights in this plaint temple. The finding of the District Munsif is, and that was supported by that of the District Judge, that this Illom had become extinct, and that, though the last male member of the Illom attempted to vest Uraima right by a will in his sons, that had no effect, as the trusteeship of a temple could not be alienated in that manner. That has been laid down very long ago.

Then it was said that there were some Attaladakkam heirs of his family and that they must be treated as the representatives of the Erampampalli Illom's Uraima right and as Uralars of this temple. I am inclined to agree with the District Munsif that it is doubtful if such a right will pass by Attaladakkam

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as it is confined to a particular Illom or family and will not pass to any other Illom by inheritance or otherwise; it is not, however, necessary to decide this point in this case, as the appellants before us made no attempt whatever to raise the question before the District Judge. Having apparently abandoned the point in the lower Court, they cannot be allowed to raise the point before us again.

The next point urged before us was that even assuming that the plaint could be put right by allowing the fifth plaintiff to sue on behalf of the fourth plaintiff as his next friend, the suit must fail because the fourth plaintiff was a minor and as such could not be a trustee at all, and not being a trustee could not sue on behalf of the temple. The whole point depends upon whether a minor in Illom or Tarwad can be considered to be the proper trustee of the temple when the trusteeship belongs to his Illom or Tarwad. So far as I am aware, there is nothing to prevent a minor from being a trustee. He may not be in a position to look after the trust. He may not also be in a position to execute or carry out the trust. Nevertheless, there is nothing to prevent the minor trustee's work being done for him by a properly constituted guardian. At any rate, no authority has been cited before us to show that a minor cannot be a trustee. Two cases have been referred to us by the learned Counsel for the appellants, namely, *Somasundara Mudaliar v. Vythilinga Mudaliar* (1) and *Muthu Kumara Mudaliar v. Palaniappa Chettiar* (2), but they are very different cases which arose under the Religious Endowments Act. In the former case their Lordships held that as the case fell under section 4 of the Religious Endowments Act and as there was a dispute as to the trusteeship after the death of the then holder of the office it was open to the Court acting under section 5 to appoint a trustee till the question was decided by a properly instituted suit. In *Muthu Kumara Mudaliar v. Palaniappa Chettiar* (2) another Bench of this Court

followed the previous ruling and in upholding the removal of the trustees, also under the Religious Endowments Act, thought that, as the other claimants, third to fifth plaintiffs, were minors, it was suitable to put somebody else as a trustee, at least till one of them attained majority. There is nothing in this case to show that a minor could not be a trustee, although it may be inconvenient, if the Court were appointing a trustee, to appoint a person who is a minor as he must necessarily act through another person as his guardian; and the Courts would certainly avoid appointing any minor as a trustee. But so far as the present case is concerned, it has not been shown that this is a temple to which the Religious Endowments Act applies or that there is anything to prevent the fourth plaintiff from continuing as trustee of this temple, representing as he does, the Karnavanship of the Illom to which the trusteeship belongs. This point also, therefore, fails.

A plea was next taken on the ground of *res judicata* on account of a previous decision in Original Suit No. 8 of 1901 brought to redeem this very Kanom by one of the predecessors-in-title of the present fourth plaintiff. That suit, however, did not proceed to a decision at all but was dismissed on the ground of non-joinder of parties. It has not been shown to us how a decision of that sort made without going into the merits of the case can be treated as one in which the questions now raised were heard and finally decided by the Court. The questions here were not heard and decided then, and no question, therefore, of *res judicata* could arise on the basis of that decision. It was suggested that Explanation IV ought to be read with section 2 and, for some reason or other, the dismissal of the former suit should be treated as involving a decision on all the points that could possibly arise in the case. I am unable to follow this argument. Explanation IV deals with a case which has been tried on the merits but not with a case which has been rejected on the objection like the want of parties, or failure to pay Court-fees, or something of that sort. No authority has been cited to support this contention of *res judicata*. I think, therefore, that this contention also fails.

(1) 19 M. 285; 6 M. L. J. 92; 6 Ind. Dec. (N. S.) 904.

(2) 10 Ind. Cas. 300; (1911) 1 M. W. N. 303; 9 M. L. T. 495.

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Finally, coming to the merits the defence is this. The first defendant managed to obtain a renewal of the Kanom now sought to be redeemed in 1911 from the 24th defendant and the 19th defendant and he pleads that that renewal is valid as against the Devaswom and, therefore, this suit to redeem is premature as the 12 years' time has not expired. The validity of this plea depends upon the validity of the renewal. The District Judge has held that it is not valid for two reasons, firstly, because in granting this renewal no attempt was made to consult the fourth plaintiff who is the Karnavan of the Illom in whom the Uraima is vested or his guardian. That itself is a sufficient ground for holding the renewal to be invalid. See *Koylital Parambil Parkum v. Attimana Illeth Narayanan* (3).

There is the further point taken by the District Judge, namely, that by this renewal an attempt has been made to introduce as stranger, 19th defendant, into the Uraima right in the temple by joining him as one of the persons granting the renewal. It was contended before us that this was done *bona fide*, that the 24th defendant had no idea that there was anything unreasonable in doing so as he thought that the Will executed by the last male member of the Erampannapalli Tarwad in favour of the 19th defendant and others was a valid document. The appellants' Counsel also pointed out that in the renewal deed itself this right of the 19th defendant under the Will was recited. It is possible that the 24th defendant acted dishonestly and the District Judge was right in thinking that it was so. However, we need not rely upon this ground for setting aside the renewal. The other ground is sufficient for its being set aside. The renewal failing, there is no obstacle in the way of granting a redemption in favour of the fourth plaintiff as the District Judge has done.

As a last resort, the Counsel for the appellants suggested in his reply that the decree should be given in favour of the fourth plaintiff and the 24th defendant; but this point was not taken in the opening here or in his

grounds of appeal to the lower Appellate Court. When possession is given under the decree to the fourth plaintiff it would be on behalf of the trust and any trustee who is entitled to have joint management of the property can get it. It is not necessary to interfere with the decree on that ground.

I, therefore, agree with my learned brother that this second appeal fails and must be dismissed with costs.

Time for redemption is extended by four months from this date.

The memorandum of cross-objections is dismissed with costs.

V. N. V.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 17 OF 1923.

April 9, 1923.

Present.—Mr. Justice Daniels.

MAHADEO—DEFENDANT—APPLICANT

versus

KALLOO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Inherent powers of Court—Decree, setting aside of.

A Court has no jurisdiction under section 151, Civil Procedure Code, on its motion to set aside its own decree, to set aside which the plaintiff, if he so desired, could move the Court. Section 151 is intended only for exceptional cases for which there is no other remedy except the use of the Court's inherent powers.

Civil revision from an order of the Judge of the Court of Small Causes at Allahabad, dated the 19th January 1923.

Dr. K. N. Katju, for the Applicant.

JUDGMENT.—This is an application for revision of an order passed by the learned Judge of the Small Cause Court, Allahabad, under the following circumstances:—

In Small Cause Court Suit No. 2891 of 1922 on the case coming on for hearing the plaintiff himself was in attendance but had no witness present. The Pleader for the defendant was also present. The learned Judge dismissed the suit for want

(3) 50 Ind. Cas. 371; 42 M. 335; 9 L. W. 413; 25 M. L. T. 272; 36 M. L. J. 295; (1919) M. W. N. 247.

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of proof. The learned Judge afterwards discovered, or it was brought to his notice, that there was some documentary evidence on the record in support of the plaintiff's claim. He, thereupon, of his own motion and without any application set aside his own decree and fixed a fresh date for final hearing. If the learned Judge had made a mistake in overlooking evidence, the plaintiff had a remedy open to him by application for review under O. XLVII of the Code. When that remedy was open, it appears to me that the learned Judge had no jurisdiction under section 151 of the Code to set aside what, subject to review, was a final decree. Section 151 is intended for exceptional cases for which there is no remedy except the use of the Court's inherent powers. It is not intended to enable Courts to evade or ignore the provisions of law which govern their procedure. I, therefore, allow the revision and set aside the order complained of. The respondent is unrepresented and the applicant does not press for his costs.

M. A. A.

*Application allowed.***SAHU NAND RAM v. HIRA DEVI.**

JUDGMENT.—The question in this appeal is whether it is within the competence of a *Lambardar* to give permission to a tenant to erect a *kucha* house on land belonging to the joint *patti*. The Court below has held that he can do so and has pointed out that there are no less than 30 co-sharers in the *patti* and that unless such authority is recognised in the *lambardar* it would be practically impossible for a valid permission ever to be given at all. The learned Counsel for the appellant has drawn my attention to the enumeration of the duties of a *Lambardar* contained in the Board's Circular No. 8-III, reproduced at page 141 of Mr. Agarwala's Commentary on the Land Revenue Act. An enumeration of the duties of the *lambardar* cannot, however, be considered decisive on a question of the powers which the *Lambardar* can exercise as the implied agent of the co-sharers under section 194 of the Tenancy Act. There is admittedly no direct authority on the question at issue but the decision of the Court below appears to me to be sound common sense and I decline to interfere with it. The result is that the appeal is dismissed with costs.

M. A. A.

*Appeal dismissed.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 1570 OF 1921.

April 5, 1923.

Present.—Mr. Justice Daniels.

Shaikh ABDUR RAOOF — PLAINTIFF—

APPELLANT

versus

BACHCHOO AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 194—Joint patti—Lambardar's powers.

It is within the competence of a *Lambardar* to give permission to a tenant to erect a *kucha* house on land belonging to the joint *patti*.

Second appeal against the decree of the Judge of the Court, Small Causes, exercising the powers of the Subordinate Judge, Allahabad, dated the 6th August 1921.

Mr. S. P. Sinha for Mr. Iqbal Ahmad, for the Appellant.

Mr. S. N. Gupta, for the Respondents.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 132 OF 1922.

December 13, 1922.

Present.—Mr. Justice Piggott and Mr. Justice Walsh.

SAHU NAND RAM—PLAINTIFF—APPELLANT

versus

Musammât HIRA DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24—Plaint returned after recording evidence and hearing arguments—High Court's power of transfer.

Where a Court after recording all the evidence of the parties and hearing arguments on all the issues comes to the conclusion that the land in suit forms part of another district over which it has no jurisdiction and returns the plaint for presentation to some Court in that district, the High Court ought to exercise its powers

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of transfer and order the case to be sent back to the self same Court to hear and determine the same. The jurisdiction of the High Court is wide enough to enable it to dispense with the formality of directing the plaintiff first to take his plaint and file it in one of the Courts having jurisdiction, preliminary to an application to the High Court to transfer it back to the file of the first Court.

Appeal from an order of the Subordinate Judge, Bijnore, dated the 21st July 1922.

Messrs. Jang Bahadur Lal and S. P. Sinha, for the Appellants.

Mr. S. N. Gupta, for the Respondents.

JUDGMENT.—This was a suit about certain alluvial land situated on the river Ganges where that river forms the boundary between the Revenue Districts of Moradabad and Meerut. The plaintiff is a land-holder of a village called Bisoali in the Moradabad District. The contesting defendants are land-holders of a village known as *Mauza Raiba Nad Alipur*, in the Meerut District. The river Ganges admittedly flows between the two villages. The plaintiff's case is that certain proceedings in the Revenue Courts resulted in a considerable area of land, which belonged to him and was in his possession as proprietor of village Bisoali, being recorded in the revenue papers as appertaining to *Mauza Raiba Nad Alipur*. A consequence of this was that the plaintiff was dispossessed by the defendants, who are proprietors of that village. The suit was contested on a variety of grounds and it must be conceded that the defendants did, at the very outset, impeach the jurisdiction of the Moradabad Court to try the suit. The learned Subordinate Judge fixed a number of issues and took a considerable body of evidence. At a very late stage, however, he came to the conclusion that the order by which the Settlement Officer had caused this land to be recorded as forming part of village Raiba Nad Alipore, had effected its transfer to the Revenue District of Meerut and had, therefore, placed it in an area over which the Moradabad Courts possessed no territorial jurisdiction. He returned the plaint to the plaintiff for presentation to some Court at Meerut. If this action had been taken directly the learned Subordinate Judge of Moradabad inspected the plaint, or after a brief and summary enquiry directed only to the ques-

tion whether the Revenue Authorities had in fact taken action the result of which was to make the land in suit, whoever may be its proprietor in law, a part of the revenue paying district of Meerut, we might have felt disposed to affirm his order as it stands. We are, however, much impressed with the fourth plea taken in the memorandum of appeal to this Court, which calls attention to the practical inconvenience of the order under appeal, in view of the fact that the parties had produced all their evidence and the Court had heard arguments on all the issues, before it passed the order now under appeal. We think that this is a case in which this Court ought to exercise its powers of transfer. We intimated this fact to the opposite party at an early stage of the argument and we have, as a matter of fact, heard both parties on the question whether this suit, as it now stands, can most conveniently and properly be disposed of by the Court of the Subordinate Judge of Moradabad, or by some Court possessing territorial jurisdiction over the Meerut District, which would have to commence the entire trial of the suit over again. We have, therefore, in substance complied with the provisions of section 24 Civil Procedure Code as to the notice necessary before an order of transfer is made. It may be suggested that, as a matter of form, we ought to direct the plaintiff first to comply with the order under appeal and to take this plaint and file it in one of the Meerut Courts, preliminary to an application to this Court to transfer it back to the file of the Subordinate Judge of Moradabad. We think that our jurisdiction is wide enough to enable us to dispense with this formality. Our order on this appeal is that, without determining any of the other pleas raised in the memorandum of appeal, or pronouncing any opinion affecting the merits of the suit in any way, we, in the exercise of our power of transfer, order that the entire record, including the plaint, be sent back to the Trial Court with directions to hear and determine the same. Costs of this appeal, which will include fees on the higher scale, will be costs in cause.

N. K.

Appeal allowed.

SUKHIA V. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 241 OF 1922.

April 20, 1922.

Present.—Mr. Justice Piggott and
Mr. Justice Walsh.Musammât SUKHIA AND ANOTHER—
APPELLANTS

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss.
164, 286, 342—Sessions trial—Confession retracted
—Plea of not guilty—Procedure.*

Accused, in a murder case, made a confession which was duly recorded under section 164, Criminal Procedure Code. Before the Committing Magistrate also they pleaded "guilty," but in the Court of Session they pleaded "not guilty." Upon this the Sessions Judge proceeded to take in evidence, before the examination of any witness, the previous statements made by the accused, not only before the Committing Magistrate but prior to the commencement of proceedings in the Magistrate's Court. He then examined, and almost cross-examined the accused upon their confessions, and thereafter recorded the prosecution evidence:

Held, that the Sessions Judge had acted in contravention of the provisions of section 286, Criminal Procedure Code; that, although under section 342 of that Code the power given to the Court to examine an accused person is one which may be exercised at any stage of the trial in the discretion of the Court, this provision does not in any way supersede the clear directions contained in section 286 as to the manner in which a Sessions trial should be commenced. [p. 497, col. 2; p. 498, col. 1.]

When an accused is on his trial on a capital charge, it is not expedient that the Sessions Court should convict him even upon a plea of guilty entered before the Trial Court itself. As a matter of practice, the Court should, in its discretion, put such a plea on one side and proceed to record and consider the evidence, in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same. [p. 498, col. 1.]

Where a confession of guilt is retracted, the proper time for taking into consideration such confession is after the Court is in possession of the entire prosecution evidence and can estimate what the effect of that evidence would be, considered apart from any statement which the accused person may from time to time have made. [p. 498, col. 1.]

Criminal appeal from an order of the Sessions Judge, Banda.

Mr. Damodar Das, for the Appellants.

Mr. Lalit Mohan Banerji, Government
Advocate, for the Crown.

JUDGMENT.—In this case two women, Musammât Sukhia and Musammât Halki related to one another in this way, that Sukhia is the own sister of Halki's husband, Brahmins by caste, residents of a village, in the Mahoba sub-division of the Hamirpur District, were tried before the Court of Session on the charge of having murdered two little girls, the daughters of their own neighbour and caste-fellow, Madho. They have been found guilty and the case has been referred to us for confirmation of the sentence of death passed by the Sessions Court. The women have submitted to us petitions of appeal, in which they vehemently protest their innocence and we have had the advantage of hearing the case argued by Counsel on their behalf. We may say at once that we have come to the conclusion that the conviction cannot be sustained. The learned Sessions Judge has written a well-considered judgment, in many respects admirably thought out; but having said this, we feel it incumbent upon us to comment at the very outset on the procedure which he adopted at the trial and on his attitude towards certain statements by the accused women which constituted the principal (or we might rather say almost the sole) evidence against them. The two women had admitted their guilt in the Court of the Committing Magistrate and it would almost seem from the record as if their plea of "not guilty" in the Sessions Court took the learned Sessions Judge by surprise. At any rate, he proceeded at once to take in evidence, before a single witness had been examined, the previous statements made by the two women, not only before the Committing Magistrate, but prior to the commencement of the proceedings in the Magistrate's Court when they were examined under section 164 of the Code of Criminal Procedure. He then examined, and almost cross-examined, the two accused upon these confessions and having done this began to record the prosecution evidence. The Trial Court was certainly contravening the provisions of section 286 of the Code of Criminal Procedure and, although under section 342 of the same Code the power given to the Court to examine an accused person is one which may be exercised at any stage of the trial in the discretion of the Court, this provision must

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not be regarded as in any way superseding the clear directions contained in section 286 as to the manner in which a trial at Sessions should be commenced. We must point out further that, in our opinion, what is involved in this matter is something more than a mere error of procedure. It indicates a mistaken attitude on the part of the Trial Court towards the entire question of the value to be attached to a retracted confession. It is only very recently, in the case of *Dalli v. Emperor* (1), that his Court has found it necessary to re-affirm a rule of practice upon which it has long insisted. That rule is that, when an accused is on his trial on a capital charge, it is not expedient that the Court should convict him even upon a plea of guilty entered before the Trial Court itself. As a matter of practice, the Court should, in its discretion, put such a plea on one side and proceed to record and consider the evidence, in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same. Now, if this be the proper attitude to take up towards a plea of "guilty", it is clear enough what the duty of the Court should be when a plea of "not guilty" is entered by an accused person (and particularly by an accused person in a capital case) after the said accused has admitted his guilt before the Magistrate. It becomes particularly incumbent on the Trial Court to proceed with the hearing of the evidence, to enquire very carefully into the conduct of the Police investigation and the whole circumstances under which the confession of guilt now retracted was obtained. The proper time for taking into consideration such a confession comes after the Court is in possession of the entire prosecution evidence and can estimate what the effect of that evidence would be, considered apart from any statement which the accused person or persons may from time to time have made. In this particular case, indeed, we feel we cannot leave the subject without adding a word or two regarding one aspect of the matter which has struck us very strongly. We should like the Sessions

Judge to realise that, in adopting the irregular procedure on which we are commenting he ran what we can only describe as a terrible risk. It is easily conceivable that these two ignorant peasant women, finding themselves confronted immediately upon their plea of "not guilty" with the record of confessions previously made by them, might have been seized with a fit of unreasoning terror at the apparently hostile attitude of the Court and might have fallen back hopelessly upon a re-affirmation of the confessions which they desired to re-tract and an appeal to the mercy of the Court. If this had happened in the present case, we are satisfied that the result would have been a really disastrous miscarriage of justice.

We propose now to reverse the procedure adopted at the trial and to take into consideration at once the statements of the prosecution witnesses. The following recital of facts will make the evidence (what there is of it) easily intelligible. The two little girls named, Binia and Sumetra, aged, respectively, about eleven years and six or seven years, disappeared from their home sometime in the course of the afternoon or evening of the 12th of October 1921. So far as the evidence goes, their father, Madho, seems to have taken singularly little interest in the matter; but their mother *Musammatt* Ladli spent the following day in fruitless search for her missing daughters. The only information, if it can be called information, which she succeeded in obtaining was from the witness Kamta, to whom we shall refer presently; but on the 14th of October, in the morning, she presented herself at the Police Station, four miles distant from her village, and reported the disappearance of the two girls, saying that she knew nothing whatever as to what had become of them. The investigating Sub-Inspector, Munshi Sheo Ratan Lal, reached the village of Billbai on the morning of the 15th October. He was led astray at first by a false clue which suggested that the missing girls might have wandered off on their own account to attend a certain *mela*; but by 7 o'clock on the evening of October the 15th the Police, searching certain rocks in the neighbourhood of the village, discovered the

(1) 66 Ind. Cas. 427; 20 A. I. J. 326; 23 Cr. L. J. 283; (1922) A. I. R. (A) 233.

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corpses of the unfortunate girls roughly hidden under the brushwood. By the time those corpses were produced before the medical expert, Dr. Mauik Chaud, they were in an advanced stage of decomposition. The medical evidence is to the effect that no marks of violence could be traced and certainly no bones were broken. The Medical Officer, therefore, could form no conclusion whatever as to the probable cause of death and, so far as the medical evidence goes, we have no assurance that a murder had been committed at all. It is perhaps not particularly probable, but it is at least conceivable, that the little girls straying too far from the village may have been killed by some wild animal. Against this, however, there is the undoubted fact that the corpses when found had been more or less hidden and that the silver ornaments which the girls were wearing when they left their home had disappeared. On the other hand, again, it is possible that the corpses might have been found and plundered and hidden away after the girls had met with their death by some accident. The investigation dragged on for a full week and more, the Police Officer finding it exceedingly difficult to arrive at any clue. He seems to have had nothing to go upon at the outset beyond certain information which pointed to the witness, Kamta, as a person who possibly knew something about the matter. We do not wish to be in any way unjust to the Sub-Inspector, who had a very difficult and almost hopeless task before him; but we feel bound to say that his own admissions regarding his methods of investigation are not such as to inspire us with very much confidence. At one time or another he seems to have arrested quite a number of residents of the village, in each instance acting upon the vaguest possible suspicion. He has himself admitted that he did not feel it to be in any way inconsistent with his duty to threaten an apparently recalcitrant witness with personal violence in order to extract information from him. We will do him the justice to suppose that he wished the Court to understand that the threats used by him towards the witness, Kamta, were mere bluff, and not intended to be carried into execution; but even then such a method of investigation cannot be passed over without unfavourable remark. Finally,

certain information was obtained from Kamta and corroboration of the same, to a certain limited extent, was forthcoming. The ornaments which had been taken from the persons of the girls were eventually recovered, tied up in a dirty rag and more or less hidden in the ground, in a field belonging to this witness, Kamta, in the neighbourhood of a ruined shed which he had at one time used in the said field. The Police, however, believed that the presence of these ornaments in Kamta's field could be connected by evidence with their having at one time been in the possession of the two accused women, Sukhia and Halki. These accused were, therefore, finally arrested and the Investigating Police Officer set out to produce them before a Magistrate, in order that the confessions which he understood they were prepared to make might be duly recorded. It would seem that in the Hamirpur District it has not been found possible to enforce what is undoubtedly a very salutary rule observed in many districts, namely, that the duty of recording all confessions under section 164 of the Code of Criminal Procedure is laid upon the Magistrate working at head-quarters. The advantage of this rule is that the confessing accused can be at once released from Police custody and placed in the security of the jail lock-up. In this instance we know that the accused women had to be taken a very considerable journey, first by rail and then by road, before they were produced in the Court of the Parganah Officer, then sitting at a village 15 miles from the nearest railway station. Certain statement made by them under these circumstances on the 26th of October, that is to say, 14 days after the death of the two girls, were recorded by the Magistrate and the accused women, necessarily, remanded to Police custody, were taken away.

A great deal of the evidence at the trial is directed towards proving facts and circumstances which have no particular bearing on the question of the guilt or innocence of these two women. Putting their own statements on one side there are only three items of evidence to be considered against them.

(i) Kamta deposes that on Wednesday, the 12th October, the day on which the girls disappeared (he does not say at what

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hour of the day), he happened to be at the shop of one Ramadhin and, while there, heard a scream as of a child proceeding from a house which the witness spoke of as the house of the accused Sukhia, though he immediately admitted that it was not really Sukhia's house at all but that of her brother, Jagannath. According to the evidence of Kamta, of Ramadhin and of Ramadhin's mother, Piari Bahu, this screaming or crying of a child was heard more than once and Kamta and Piari Bahu actually went up to the house and entered the courtyard. They found themselves against an inner door which was closed. Piari Bahu says that she heard nothing inside the house. Kamta says that he heard the voices of some persons whispering inside. However this may be, none of the witnesses made any attempt to pass beyond the closed door or to attract the attention of the persons, whoever they may have been, who were behind that door. We have to consider, first of all, whether these statements can be relied upon at all. The witness, Kamta, has played a very curious part in this case. It seems that he has a local reputation as a medium or clairvoyant. He is apparently able to throw himself into a real or apparent trance and his utterances while in this trance state are supposed by the villagers to be inspired by the goddess Bhawani. *Musammāt* Ladli, the mother of the missing girls, obviously in good faith believes in the possession of these supernatural endowments on the part of Kamta. Her evidence shows that she went to him on the evening of October the 13th and that at her request he managed to throw himself into a trance and gave her certain information about the missing girls. According to *Musammāt* Ladli his statements were quite inconsistent with themselves. He told her that the girls were dead and had been robbed of their ornaments, but afterwards told her that if she would go quietly home the girls would return the same night. Kamta himself, with a naivete which is perhaps not surprising in a witness of his class, seems to take it as a matter of course that he is perfectly aware in his waking moments of what he had been saying while in a state of trance. His own account of what he told *Musammāt* Ladli is not quite the same. If we could be certain that Kamta said what *Musam-*

mat Ladli puts into his mouth, we should find it very difficult to avoid the suspicion that he knew a great deal more about the disappearance of these two girls than he has ever admitted. It is possible, however, that the man is a mere charlatan and that he was talking at random with a view to impress the woman and keep up his reputation. The Investigating Police Officer, having nothing else to go upon, made an attempt to extract more information from Kamta by getting the man to throw himself once more into the trance state. This time Kamta came out with specific accusations against two residents of the village with whom we are not further concerned. The search of their house led to nothing and there is no reason whatever to suppose that Kamta's trance utterances against them had any foundation in fact. It was after this failure that the Sub-Inspector, losing all patience, took it upon himself to threaten Kamta definitely with personal ill-usage unless he would say something more, and under these circumstances the witness, more than a week after the commencement of the Police investigation, came out with this story about the screams heard in Jagannath's house. We have certainly formed a very low opinion of the veracity of Kamta and we should not be prepared to accept any fact as proved upon his bare evidence. The question is whether his evidence, taken in connection with that of Ramadhin and *Musammāt* Piari Bahu, has any substratum of fact. We find it difficult to believe that, if that evidence were in any degree true, the circumstance of screams having been heard inside Jagannath's house on the evening of October the 12th (for the witnesses Ramadhin and Piari Bahu place the occurrence very shortly before sunset on that day) would not have been mentioned to *Musammāt* Ladli in the first instance, while she was wandering about the village making enquiries, or, at any rate, to the Sub-Inspector at any early stage of his investigation. There are, moreover, details in the story told by Piari Bahu and Kamta which the learned Sessions Judge himself has distrusted and which certainly look to us very like what a learned Judge of this Court used to describe as "padding." The only explanation which we can think of, consistent with a possible substratum of truth in this

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story, is one which Kamta himself offered at the close of his examination-in-chief. His explanation was that he had been terrorised into silence by Jagannath and his two brothers.

Now, the accused *Musammal Halki* is the wife of Bharosa, whose two brothers are Jagannath and Mullua. Bharosa is the only one of the three who is married. *Musammal Sukhia* is a widowed sister of these three men. She does not ordinarily live at Bilbai at all, but comes there from time to time to look after certain fields of which she seems to hold the tenancy. She was undoubtedly in Bilbai in the month of October last, but the fact she does not ordinarily reside there is of some significance when we come to consider the suggested motive for the crime. For the present, however, the point we have to make is this; that if Kamta was really being terrorised into silence by Jagannath, Bharosa and Mullua, then these three men knew something from the very beginning about the disappearance of the two little girls and were bestirring themselves to stifle enquiry into that disappearance. The conclusion which seems to follow inevitably is that, either this story of the screams heard in Jagannath's house is a pure invention, which has cropped up somehow or other amongst villagers rendered uncomfortable and almost desperate by the discomforts of a prolonged Police investigation in their midst; or, if there be any substratum of truth, it is evidence pointing towards the guilt, not of these two women whose cases are before us, but of one or more of the male members of that family. This is all we need say about this portion of the prosecution evidence.

(2) The next point against the accused is the solitary statement of a barber woman of the name of Dulari. She says that on the fatal Wednesday evening, October the 12th, shortly before sunset, the accused Sukhia had come to her to have her hair dressed. At that time the two girls Binia and Sumetra were playing in the lane in front of the barber woman's house. As Sukhia went away the two girls followed her up to Jagannath's house, at the door of which the accused Halki was standing. The two women and the two girls then entered the house together. If we could believe

this evidence it would certainly be of considerable importance, but we are unable to do so. The learned Sessions Judge himself has practically rejected it, that is to say, he has rejected the only part of it which is of any importance, namely, that part which brings the missing girls inside Jagannath's house. He has done this mainly on the ground that an examination of the map proved by the Investigating Police Officer has satisfied him that Dulari could not from her own house door have seen what she professes to have done. We might add to this that Dulari, while under cross-examination, admitted herself to be quite painfully short-sighted. She was unable to recognize the faces of the two accused women, where they stood in the dock in front of her. Finally, there is in the case of this evidence, as in the case of that of the group of witnesses of whom we have already spoken, the fact that Dulari made no mention of what she is supposed to have seen until a late stage of the investigation. We feel confident that her evidence, whatever may be the correct explanation of the fact of her having given it, must be put aside as wholly untrustworthy.

(3) There is the evidence regarding the recovery of the missing ornaments. A learned Judge of this Court of great experience in criminal matters took occasion, as long ago as the year 1895, to express a very decided opinion as to the small evidential value to be attached to the mere recovery of stolen property from a hiding place pointed out by an accused person, when the hiding place is not in itself such as to involve possession over the articles in question on the part of the person who is supposed to have made the disclosure. We refer to the case of *Queen Empress v. Narpat* (2). In the present case, however, the discovery of these ornaments is in itself no evidence whatever against the two women. They were not pointed out by any body; they were found by the Police on searching Kamta's field in the neighbourhood of his ruined hut. If their discovery is in itself evidence against any one it is evidence against Kamta. The way in which it is sought to make it evidence against the accused is this:—The search

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in Kamta's field was conducted upon information given by a cultivator named Antoo. Antoo deposes that he received information as to the probable whereabouts of the ornaments from Mullua, the brother of one accused and brother-in-law of the other. Mullua says that his sister, Sukhia, came to him, confessed herself guilty of the murder of the girls, told him that the missing ornaments were in a certain well and got him to take them out of the well and to hide them in Kamta's field. He then proceeded, in the most unscrupulous manner, to set to work through Antoo to get the Police to discover the ornaments where he had put them, presumably in order that they might constitute a serious item of evidence against Kamta. These facts are sufficient in themselves to show that Mullua is an utterly untrustworthy witness and that no importance whatever attaches to the statement he makes against his own sister. As a matter of fact, Mullua broke down in the witness-box in the most conclusive manner possible. He contradicted himself over and over again and finally told the Court in so many words that what he had said against Sukhia was a lie which had been put into his mouth by the Police constables who were attending on the Sub-Inspector at the investigation. We have said enough to show that this item of evidence is almost worse than useless as against the accused women.

There remains, therefore, only for us to consider the statements which the two women made on the 26th of October and the fact that they adhered to those statements when they were questioned by the Committing Magistrate on the 5th of November. This latter circumstance does at first blush appear to add very considerably to the weight to be attached to the confessions recorded under section 164 of the Criminal Procedure Code. We greatly fear, however, that the Committing Magistrate has fallen into an error precisely analogous to that on which we have commented in case of the Sessions Judge. He would have been well-advised in a matter of this sort to have entered upon the examination of the accused women with a peculiarly strict and scrupulous observance of the directions in the Code of Criminal Procedure regarding the examination of accused persons. He should have

asked the two women in the first instance regarding the statements made against them by prosecution witnesses and have been careful to ascertain whether they admitted those statements to be true in fact and what explanation, if any, they had to offer of those statements if they admitted them to be true. Instead of doing this, he confronted the two women at once, each in her turn, with the confessions of the 26th October and simply demanded to know whether those statements had been made by them and whether they were true. Under such circumstances it is scarcely surprising that the two women simply replied in a hopeless spirit that they had made the statements read over to them and that those statements were true. The fact of their doing so does not, under the circumstances, add appreciably to the evidential value of the statements themselves. We now come back to those statements. They seem to us unreal and unconvincing in a very high degree. Take, for instance, the question of motive. Both the women repudiate the suggestion that they had killed the girls for the sake of the ornaments. *Musammât Sukhia* starts off with a story, of which there is no corroboration to be found anywhere, as to a quarrel between the girls Binia and Sumetra and another little girl the daughter of Bhorasa and *Musammât Halki*. She really asks the Court to believe that she and Halki strangled the two girls in a fit of anger brought about by a quarrel of the most trumpery description. She adds certain details which practically give the lie to her own version as to the quarrel. *Musammât Halki* has something, at any rate, a little more plausible to suggest. She says that her own husband Bhorasa had for years been living in adultery with Ladli, the mother of Binia and Sumetra. She suggests that the motive for the murder was revenge on account of this long-standing unfaithfulness. The suggestion is in itself rather thin, in view of the allegation that the intrigue had been going on for years. But in any case the motive is one which would not touch *Musammât Sukhia* at all, and according to the story told in the confessions, it is *Musammât Sukhia* who takes the leading part in the commission of the crime. We

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have already commented upon the circumstances under which the confessions were made.

We think that the story told in the confessions is in all probability untrue. In saying this, it is not necessary for us to believe all the allegations against the Investigating Police Officer which the two women have put forward to account for their having made those confessions. It is far easier to believe that after this prolonged enquiry the two women were induced to sacrifice themselves in order to avoid the arrest and prosecution of one or more of the male members of the family. At any rate, it seems to us quite beyond question that these two retracted confessions, practically uncorroborated as they are by anything in the prosecution evidence, do not afford anything like a satisfactory basis for the conviction of the accused.

The result is that we allow this appeal, set aside the conviction and sentences, acquit *Musammatt Sukhia* and *Musammatt Halki* of the offence charged and direct that they be released.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 258 OF 1923.

April 27, 1923.

Present:—Mr. Justice Moti Sagar.

MAM CHAND AND OTHERS—

ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Nuisance—Inquiry—Procedure—Order based on oral inquiry, legality of.

The procedure to be followed in an inquiry under Chapter XI of the Criminal Procedure Code is that provided for a summons-case, and the Magistrate is bound to record the evidence produced by the parties.

Sita Ram v. Emperor, 41 Ind. Cas. 1000; 32 P. R., 1917 Cr.; 18 Cr. L. J. 888; 43 P. W. R. 1917 Cr., *Hingu v. Emperor*, 3 Ind. Cas. 482; 31 A. 453; 6 A. L. J. 685; 10 Cr. L. J. 297, *Srinath Roy v. Atanaddi Halder*, 24 C. 395; 1 C. W. N. 217; 12 Ind. Dec. (N. S.) 930, relied on.

An order under that Chapter based on an oral

inquiry is illegal and liable to be set aside.

Case reported by the Sessions Judge, Karnal, with his No. 247, dated the 30th January 1923.

FACTS appear from the following order of the Sessions Judge:

"A Magistrate of the First Class has under section 133 of the Criminal Procedure Code ordered two carpenters to remove a *chhan* which they had erected on the *Gorah Deh* of *Mauza Dhola*, Tehsil Kaithal, 17 persons, *biswadars* of the village have applied for revision.

The Magistrate passed the order at the instance of four petitioners who claimed that the place where the shed had been erected was a public way along which women used to pass to draw water and that cattle also lay there.

The Magistrate states that the complainant produced two witnesses while the respondents produced none. He ordered the removal of the *chhan*.

I can discover no evidence on the record and the index also does not refer to evidence. The respondents stated that the witnesses appeared but were not certain whether their statements were recorded. Apparently, the Magistrate made an oral enquiry.

The Magistrate originally intended to inspect the spot but was prevented from carrying out his intention.

I recommend that the order be set aside on the ground that it is not supported by any evidence. A minor point is that in the first instance the Magistrate passed no conditional order under section 133, Criminal Procedure Code.

Though it is not strictly within the terms of the reference, I think the respondents had better go to a Civil Court straight away as the matter will ultimately have to come before a Civil Court. The respondents strongly object to the *chhan* on various grounds, while the 17 petitioners claim that they have been in possession of this bit of the *Gora Deh* for a very long period."

Messrs. *Shamair Chand* and *N. C. Pandit*, for the Petitioners.

ORDER.—This case has been reported to this Court under section 438 of the Criminal Procedure Code by the Sessions Judge of Karnal. It appears that the accused constructed a certain shed on a public

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thoroughfare without the permission of the proprietors of the village. A complaint was filed before the Sub-Divisional Magistrate who ordered that a notice should be issued to the accused under section 133, Criminal Procedure Code, for the removal of the shed. The accused appeared in Court and filed certain objections. The Magistrate, without recording any evidence for the prosecution, made the order absolute and directed the shed to be removed.

It is clear that the order is illegal and must be set aside. There is abundant authority for holding that the procedure to be followed in such cases is as in a summons-case and that evidence must be recorded. *Sita Ram v. Emperor* (1), *Hingu v. Emperor* (2) and *Srinath Roy v. Anaddi Halder* (3).

I allow the revision and set aside the order passed by the Trial Magistrate as recommended by the learned Sessions Judge.

Z. K.

Revision allowed.

(1) 41 Ind. Cas. 1000; 32 P. R. 1917 Cr.; 18 Cr. L. J. 888; 43 P. W. R. 1917 Cr.

(2) 3 Ind. Cas. 482; 31 A. 453; 6 A. L. J. 685; 10 Cr. L. J. 297.

(3) 24 C. 395; 1 C. W. N. 217; 12 Ind. Dec. N. S. 930.

OUDE JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 6 OF 1923.

March 15, 1923.

Present.—Mr. Dalal, A. J. C.

EMPEROR—COMPLAINANT

versus

BALWANT SINGH AND OTHERS—

ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 107, 125, 435 (4)—Jurisdiction of District Magistrate under s. 125, nature of—Proceeding under s. 107—District Magistrate not moved—Jurisdiction of Sessions Judge to refer to High Court—District Magistrate's Court, whether subordinate to that of Sessions Judge.

The jurisdiction of a District Magistrate under section 125 of the Criminal Procedure Code is neither appellate nor revisional, it is merely con-

fined to examining the record to satisfy himself whether it is no longer necessary to keep the parties under the bond. [p. 505, col. 1.]

Panarsi Das v. Partab Singh, 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63 and *Sheo Singh v. Emperor*, 26 Ind. Cas. 169; 1 O. L. J. 541; 15 Cr. L. J. 721, relied on.

A Sessions Judge has jurisdiction to refer a proceeding under section 107 of the Criminal Procedure Code to the High Court even where no application has first been made to the District Magistrate under section 125 of the Code. [p. 505, col. 2.]

Sita Ram v. Emperor, 39 Ind. Cas. 998; 39 A. 466; 15 A. L. J. 469; 18 Cr. L. J. 630, relied on. *Lalji v. Emperor*, 43 Ind. Cas. 604; 16 A. L. J. 39; 40 A. 140; 19 Cr. L. J. 188, dissented from.

As a Court of revision, the Court of District Magistrate is not inferior to that of the Sessions Judge. But when a District Magistrate passes an order as a Court of original jurisdiction, that Court is subordinate to the Court of Sessions Judge which can exercise revisional powers. [p. 505, col. 2.]

Criminal reference made by the Sessions Judge, Hardoi, under section 438, Criminal Procedure Code.

The Government Pleader, for the Crown.

Mr. Raj Bahadur, for Accused Nos. 1, 3, 4 and 6.

JUDGMENT.—This is a reference made by the learned Sessions Judge of Hardoi in proceedings under section 107 of the Code of Criminal Procedure with a recommendation that the order binding over the eight applicants to keep the peace may be cancelled. A learned Pleader Mr. Raj Bahadur appeared on behalf of four of the applicants and put forward all the relevant arguments with much ability. The first point raised by the Deputy Magistrate in his explanation, dated 23rd January, questions the jurisdiction of the Sessions Judge to interfere in a matter of this nature before the applicants have submitted the proceedings to the District Magistrate under section 125 of the Code of Criminal Procedure. This view is supported by the view held in the matter by Mr. Justice Knox of the Allahabad High Court. In 1905 and 1917 he gave it as his opinion that the High Court would decline to consider the merits of an application to set aside an order calling upon certain persons to furnish security to keep the peace, when the applicant had not moved the District Magistrate under the provision of section 125 of the Code of Criminal Procedure to cancel the security bonds. With all respect, this opinion does not appear to be justified by the pro-

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visions of the Code. The discussion at present will be academic in view of the pending changes in the Code of Criminal Procedure, but this Court must give a decision as the jurisdiction has been questioned by the Deputy Magistrate. When the learned Judge, Mr. Justice Knox, delivered his judgment in 1917 [*Lalji v. Emperor* (1)] following his previous ruling [*Emperor v. Abdul Rahim* (2)] reported in Weekly Notes 1905, page 143] his attention does not appear to have been called to a Bench decision of his own Court, *Sita Ram v. Emperor* (3). A learned Judge of that Court referred the matter to a Bench because of the conflict between the opinion of Mr. Justice Knox expressed in 1905 and that of Mr. Justice Tudball in the case of *Banarsi Das v. Partab Singh* (4). The Bench approved of the opinion of Mr. Justice Tudball and held that the jurisdiction of the District Magistrate under section 125 of the Code is neither appellate nor revisional. The learned Judges pointed out that the Code had allowed an appeal expressly under section 406, Code of Criminal Procedure, to the District Magistrate against an order of a Subordinate Magistrate directing a party to give security for good behaviour. As no such appeal is allowed in a case where security is ordered for keeping the peace, the learned Judges drew the conclusion that the District Magistrate's power was merely confined to examining the record to satisfy himself whether it was any longer necessary to keep the parties under the bond. The act is not a judicial act which the District Magistrate is called upon to exercise.³ The same view was taken by the learned Judicial Commissioner of this Court in *Sheo Singh v. Emperor* (5). The judgment of this Court referred to in the explanation of the Deputy Magistrate, *Harkaran Singh v. Harnam Singh* (6) has no reference to the appellate or the revisional power of the District Magistrate.

(1) 43 Ind. Cas. 604; 16 A. L. J. 39 140 A. 140; 19 Cr. L. J. 188.

(2) A. W. N. (1905) 1431 2 Cr. L. J. 335.

(3) 39 Ind. Cas. 998; 39 A. 466; 15 A. L. J. 469; 18 Cr. L. J. 630.

(4) 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63.

(5) 26 Ind. Cas. 169; 1 O. L. J. 541; 15 Cr. L. J. 721.

(6) 34 Ind. Cas. 335; 19 O. C. 108; 3 O. L. J. 38; 17 Cr. L. J. 223.

As a Court of revision the Court of the District Magistrate is not inferior to that of the Sessions Judge as is clear from the provisions of section 435 (4) of the Code of Criminal Procedure. What was decided in the ruling quoted was that, when a District Magistrate passes an order as a Court of original jurisdiction that Court is subordinate to the Court of the Sessions Judge, which can exercise revisional power. The correct opinion is that the Sessions Judge had jurisdiction to make this reference.

Coming to the facts, I see no reason to interfere with the order of the Deputy Magistrate. On 18th July 1922 Ragha Singh lodged a petition to the District Superintendent of Hardoi complaining that his enemies Balwant Singh and about 50 others had surrounded his house that day; that information was brought over from his village Sandiawan by one Loney Singh, and that he was afraid of considerable harm being caused to his family unless prompt steps were taken by the Police. He also represented in the petition that Balwant Singh and others were on the lookout to assault him in Hardoi. In pursuance of this petition, proceedings were taken against Balwant Singh and others under section 107 of the Code of Criminal Procedure. After these proceedings were started, it appears that the party of Balwant Singh complained against Ragha Singh and others and prayed that Ragha Singh and others may be bound over to keep the peace. The other file is not before me so the exact date of the application cannot be ascertained. When Ragha Singh feared the probability of his being bound over also, he changed his tactics and on 15th September 1922 asked for the withdrawal of proceedings for keeping the peace and definitely charged the opposite party with committing offences of forming an unlawful assembly and of wrongful confinement on 18th July 1922. The Deputy Magistrate very rightly, I think, did not drop the proceedings under section 107 and continued to investigate the three cases separately. On 2nd November 1922 he ordered Balwant Singh and others to give security and on 8th November acquitted them of the offences with which they were charged.

It may be noted that Ragha Singh and

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others have also been bound over and that their petition to the District Magistrate under section 125 of the Code of Criminal Procedure has been dismissed.

The learned Sessions Judge is of opinion that Balwant Singh and others ought not to have been bound over because the order for security is based on exactly the same evidence which the Deputy Magistrate has disbelieved during the trial of these applicants on substantive charges. In my opinion the evidence under section 107 of the Code of Criminal Procedure goes far beyond the evidence in support of the substantive charges. When Ragha Singh saw the great probability of both parties being bound over he aimed only at proving the collection of his opponents outside his house on 18th July 1922.

The Deputy Magistrate, no doubt, disbelieved this story. There is, however, very valuable evidence to prove the probability of a breach of the peace. The first witness was Badar Ali, Sub-Inspector of Thana Bilgram, within which circle the applicants live. He has stated that the occurrence of 18th July 1922 did not stand by itself. According to his evidence both parties had made complaints of assaults on 10th April and on 6th June. The reports made by them are exhibited on the record. The second witness Ahmad Ali Khan, is a Constable of the beat. He disposed: "Neither party allows the cattle of other party to pass their way. There is great danger of the breach of the peace being committed by either party. . . . There has been exchange of abuse between Ragha Singh and Balwant Singh in my presence on several occasions." There has been the usual preliminary to a lathi fight—litigation in Revenue and Civil Courts. As pointed out by the Deputy Magistrate, he was in a position to judge from the demeanour of the parties what their feelings were against each other. So far, an appellate jurisdiction has not been granted to this Court in a matter of this nature and there is abundant evidence on which the Deputy Magistrate could come to the conclusion to which he did. There is, therefore, not the slightest reason to interfere by way of revision.

Let the record be returned.

N. K.

*Record returned:
Interference declined.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 34 OF 1923.

February 17, 1923.

Present :—Mr. Justice LeRossignol and
Mr. Justice Zafar Ali.

**JEHANA—CONVICT—APPELLANT
versus**

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164 (3), 533—Confession, mode of recording—Certificate of voluntariness, absence of—Enquiry failure to make, effect of.

The failure of a Magistrate recording a confession to append the certificate prescribed by section 164 (3) of the Criminal Procedure Code to the statement recorded by him can be cured by the evidence of the Magistrate, but his failure to make any enquiry as to the state of mind of the confessor at the time the confession was recorded is fatal and renders the confession inadmissible in evidence. [p. 507, col. 2.]

Appeal from an order of the Sessions Judge, Attock, at Campbelpur, dated the 14th December 1922.

Mr. M. M. Tufail, for the Appellant.

Kanwar Dalip Singh, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant, Jehana, has been convicted and sentenced to death for the murder, on the 1st of July 1922, of his brother-in-law, Ghulam Muhammad. The sentence is before us for confirmation and the appellant has preferred an appeal to this Court.

The alleged motive for the offence is the appellant's resentment at the marriage of his sister with the deceased. The marriage took place three years before the offence and in the interval Musammât Jahan Begam the sister of the appellant had been to her husband's house on two or three occasions and had stayed there a few days each time. Three or four days before the 1st of July the deceased had gone to Dhulial, the village of his bride, and had brought her home and some two days later had left for Dhulial, saying that he was going to see his parents-in-law. He left his own village with one Musammât Khatun, and accompanied her as far as village Tatral where he helped her to load some grain on a donkey, then parted from her saying that he was going towards Dhulial. He never returned home and on the 11th of July his brother Mehra made a report of

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the foregoing circumstances to the *thana* and suggested that a search should be made for him. A constable was sent to the deceased's village of Gangal and after making enquiries there proceeded to Dhulial which he reached on the 13th of July. On the 14th Jehana, appellant, made a statement and is said to have led the investigating party to the river Sil which is near by. Nothing was found there, but some distance away a pole P-10, some human hair P-11, a pair of shoes P-1 and a *kurta* P-8, were discovered. On the 16th the Investigating Constable was told that the body of the deceased had been found and on proceeding to another spot in the Sil stream, a considerable distance from the spot alleged to have been indicated by the appellant, a sack was found and on being opened was seen to contain a human skull and some bones. A few more human bones were found at the place where Jehana had taken the investigating party on the 14th. It is suggested that these bones are the remains of the body of the deceased. A turban also was found on the indication of the appellant and that has been found by the Chemical Examiner to be stained with human blood and there is evidence that it is the turban of Ghulam Muhammad.

The learned Sessions Judge has convicted the appellant on the finding that the bones recovered in the sack are the bones of Ghulam Muhammad and on the statements of Nizam Din, P. W. No. 2, and Mehra, P. W. No. 3, that the appellant told them he had killed Ghulam Muhammad and asked their aid in disposing of the body whereupon they helped him to cut it up, put it into a sack and sank it in the Sil at the place first indicated by the appellant whence, on the arrival of the Police in the village, they removed it to the place where the sack was found on the 16th. The learned Judge relies also on the evidence of Fateh Sher, P. W. No. 10, who states that he saw the deceased sitting near Jehana on his last visit to Dhulial. Finally, reliance is placed on a statement amounting to a confession made by the accused on the 24th of July.

In our opinion, the evidence is insufficient to support the conviction. The confession of the accused was recorded by an Honorary Magistrate who has ignored all

the essential provisions of the Code with regard to the recording of confessions. He made no enquiry from the confessant whether he was making a voluntary confession nor did he append any certificate to the recorded statement to certify that, in his opinion, the confession was a voluntary one. The absence of the certificate might be cured by the evidence of the Magistrate but the failure to make any enquiry as to the state of mind of the confessant at the time the confession was recorded is fatal and we must rule out the confession as inadmissible. The next question is, whether the bones recovered are those of Ghulam Muhammad. They do not by any means constitute a complete human skeleton. Most of the vertebrae, all the ribs, both thighs and nearly all the other bones of the legs are missing and not a scrap of the fleshy parts of the body was found. Even if the bag was broken, and it was removed when broken by P. W. No. 2 and P. W. No. 3 from the place where it was first deposited, we fail to see why so many portions of the body should have been missing. We note that close to the place where the sack was found there is a burying ground and it would not surprise us to learn that the relics produced had come from that burying ground. In short, we are not at all satisfied that the bones produced are the bones of Ghulam Muhammad. With regard to the evidence of Nizam Din and Mehra we are unable to agree with the learned Judge in describing it as the evidence of accomplices. According to their statements they took no part in the murder and had no knowledge of it till after its commission and they cannot, therefore, be described as accomplices. Their story appears to us to be very improbable for we fail to see why the appellant, who had relatives in the village, found it necessary to call in outsiders like Nizam Din and Mehra to aid him in concealing the dead body and it is remarkable that they should have removed the body from its first position to the second without communication with the actual murderer.

Then there is evidence of the recovery on the indication of the accused of a *chadar*, a *kurta*, and a *safa* which are alleged to have been in the possession of the deceased wher

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he left his home. These articles of clothing are stated to have been found not in one but in several places and the *kurta* at a place far distant from the alleged scene of the murder, and it is a remarkable circumstance that only the turban was found to be blood stained. If, however, the story given by the accused were true we should have expected both the *chadar* and the *kurta* to have been drenched with blood for the appellant in his confession stated that he killed Ghulam Muhammad by giving him two blows with the hatchet on the back of the neck. The absence of blood-stains on these two garments, in our opinion, is incompatible with the theory that they belonged to the deceased and were being worn by him at the time of his death.

Finally, there is evidence of persons who state that they saw deceased going towards appellant or sitting near him on the day of his disappearance. Such witnesses are Abdullah (P. W. No. 9) Fateh Sher (P. W. 10) and Nazra Khan (P. W. 8). But these witnesses made very belated statements to the Police and came forward with their deposition only after the Police had been several days engaged in the investigation in the village.

Before the Committing Magistrate and in the Sessions Court the appellant denied any knowledge of the murder and repudiated the discovery of the various articles alleged to have been found on his indication. He also alleged that the statement he made before the Honorary Magistrate was made at the suggestion of the Police and through fear of ill treatment.

In our opinion the evidence on which the appellant has been convicted is inadequate and unreliable. We accept his appeal and acquit him.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 182 OF 1923.

May 2, 1923.

Present.—Mr. Justice Walsh.

C. J. CADD—APPLICANT

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Hire-purchase agreement—Purchaser, rights of—Transfer of article during currency of agreement—Offence, nature of.

The purchaser of an article under a hire-purchase agreement has no title to the article other than that of a hirer with a right to become the owner if he choose to pay the last instalment, and if he transfers the article to a third person before all the instalments have been paid, his act amounts to the offence of criminal breach of trust under section 406 of the Penal Code. [p. 509, col. 2.]

Criminal revision from an order of the Sessions Judge, Allahabad, dated the 14th March 1923.

Mr. I. B. Banerji, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision to review an order of the Sessions Judge of Allahabad, confirming a conviction by the Magistrate for breach of trust. The charge is one which is only too familiar to lawyers, namely, a charge against the hirer of an article under a hire-purchase agreement for having sold it as his own before he had paid up all the instalments. The case is a perfectly clear one and there is really very little to be said about the very clear and interesting judgment of the Sessions Judge. On one point, with regard to the civil aspect of the matter, I do not quite agree with him, but he guarded himself against giving a confident opinion. When one is considering the decisions so well-known in England of *Lee v. Butler* (1) and *Hulby v. Matthews* (2) which latter case (decided by the House of Lords) practically settled all legal controversy about these agreements, one must remember that in those cases the Courts were deciding whether the hirer could confer a good title upon a purchaser. That is a totally different question from the question whether he had any legal right to sell, or any honest belief

(1) (1893) 2 Q. B. 318; 62 L. J. Q. B. 591; R. 563; 69 L. T. 370; 42 W. R. 88.

(2) (1895) A. C. 471; 64 L. J. Q. B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

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that he had a legal right to sell. It turns entirely upon section 9 of the Factors Act in England which, corresponding to section 43 of the Transfer of Property Act, gives a kind of statutory title to a purchaser in good faith who has bought from a commercial factor who has been left in possession of the goods with the consent of the true owner under the conditions laid down by that section which include a person "who has agreed to buy," and the question in these two cases was whether the agreement made him a person who had agreed to buy, and what the House of Lords held was that a person who has an option to return the goods and not complete the purchase, cannot be held in the eyes of the law to be a person who "has agreed to buy." It was never suggested in either of these cases that the hirer was in fact the owner. Nor was it doubted that the agreement was a hire-purchase agreement in the colloquial sense of the term. But this question of civil law has no bearing at all upon the relationship between the owner and the hirer and upon the state of mind of the hirer when he sells. Mr. Cadd, when he signed this agreement, knew perfectly well that he was hiring the lorry, and that he could never become the owner unless he paid the whole sum due, and that he had no right to sell it as though it were his. As the learned Sessions Judge says: "the agreement is straightforward and clear." There are four features in it which are conclusive against the honest belief of any commercial man signing this agreement that the car was his to sell:

1. He calls himself the hirer.
2. He binds himself by a legal obligation to insure the car, a thing which no owner ever did or could do.
3. He agrees not to deal with the car, and to allow the owner to recover possession in case of default.

4. On the very page where his signature appears, he agrees that it shall remain the property of the owner.

He clearly had no title other than that of a hirer with a right to become the owner if he chose to pay the last instalment, and it is idle to read a section from the Contract Act providing that the property shall pass on certain conditions, when the parties by their solemn agreement have stated that it shall not pass except on the performance

of one condition only. It is difficult to see how Mr. Cadd could possibly get a title to this car. I am not concerned to discuss this question, but, unless there is something in the law of India corresponding to section 9 of the Factors Act, the title always remained in the Motor Traders Limited and could not be transferred by Mr. Cadd in any way upon a third person, so that the person really defrauded is the purchaser. This brings me to the question of sentence. That question was not pressed upon the Sessions Judge but it has been pressed upon me and rightly pressed, because it appears to me that there are grounds for interfering with the sentence. I guard myself against saying one word in justification or palliation of a dishonest act of this kind, Mr. Cadd knew quite well that it was wrong to sell. He could have tested that question by sending a reply paid telegram to the Motor Traders Limited, asking their permission to sell. I know, and he knew quite well, what the answer to that telegram would have been. But it does appear that he made an honest attempt to carry out his agreement. He paid the insurance, he paid the expenses of the Motor Traders Limited representative, and he paid in the uncertain way in which these people always pay, instalments from time to time, and he went on paying even after he had sold. If these payments were made voluntarily, they show that his dishonest intention was very much qualified by a desire to do what was right and to avoid loss to the owner. If the payments were made and accepted to prevent criminal proceedings this is a vindictive prosecution by the Motor Traders Limited because they have failed to get their money. The Sessions Judge further says that the Bhagwan Ice Factory whose disposition to do well seems to be larger than their banking account, because their cheques were dishonoured, undertook to pay instalments out of Mr. Cadd's salary, and I rather assume that that undertaking was given to the Motor Traders Limited, so that, everything points to the latter having put pressure upon the accused and his employers to get their money. In addition to that, they are secured by a surety, who, if he is worth the money, will indemnify the Motor Traders Limited, against loss. He has given assurance of his desire to pay, but he has not followed them up by a payment in cash

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which would be the most satisfactory proof of his good intentions, and so far he has only filed an offer before the one Court which had no jurisdiction to enforce it. But, further still, in my opinion, the Motor Traders Limited, have a claim against the purchaser for the return of the car, and if they succeed in establishing that claim they will have done rather well except the inconvenience of having to prosecute one of their hirers. But, even further still, it appears that the accused has been made an insolvent, and what the value of a fine may be when inflicted upon a man who has got no assets to pay it with, I do not know. As it was inflicted after the adjudication, I presume the Receiver is not bound to pay, and it will, therefore, result in the accused having to serve another three months' imprisonment. Under all the circumstances, although the nature of the offence is not one to be condoned, the degree of guilt varies in different cases, and I am inclined to think that Mr. Cadd who undoubtedly has been unfortunate, made an honest attempt to meet the foolish and wrongful course of conduct into which he had drifted. On these grounds I should certainly, if there had been an appeal to me, have cancelled the fine and the imprisonment awarded in lieu thereof. I, therefore, alter the sentence to one of three months' simple imprisonment only and direct him to surrender to his bail and serve out under simple imprisonment the balance of the three months' imprisonment to which he was sentenced. The fine, if paid, will have to be re-paid to the receiver of his estate.

W. C. A

Sentence reduced.

LAHORE HIGH COURT.

CRIMINAL APPEAL, NO. 490 OF 1922.

August 9, 1922.

Presnt.—Mr. Justice Broadway.BAHADUR ALI—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 437, 503—Further inquiry—Notice to accused, necessity of—Additional District Magistrate, power of, to issue commission for examination of witness within jurisdiction—Penal Code (Act XLV of 1860), ss. 362, 365—Abduction, what constitutes—Woman, confinement of, pending negotiations for her release—Offence.

An order under section 437 of the Criminal Procedure Code for further inquiry should not be passed without notice to the person accused, and then only if the order of discharge was manifestly perverse or occasioned a grave miscarriage of justice. But an order for further inquiry passed without such notice is not illegal. [p. 511, col. 2.]

An officer appointed as Additional District Magistrate and authorised to exercise all the powers of a District Magistrate as contained in Sch. III, part V (18) of the Criminal Procedure Code is empowered to issue a commission under section 503 of the Code for the examination of a witness within his own jurisdiction. [p. 512, col. 1.]

R. J., a young woman, was abducted and taken to D. K. from where she, after a few days, made her escape, and was proceeding to a Police Station; on her way she met accused who represented himself to be a Police constable and offered to take her to the Police Station, but instead of doing this he took her to his house where he confined her and negotiated with her relatives who agreed to pay him for her release :

Held, that the action of the accused in falsely representing himself to be a Police constable and the inducement held out by him that he would take the woman to the Police Station amounted to abduction as defined in section 362 of the Penal Code. [p. 512, col. 2.]

Held, further, that in wrongfully confining the woman while he negotiated with her relative for the payment of a sum of money which was practically her ransom, his act fell under section 365 of the Penal Code. [p. 512, col. 2.]

Criminal appeal from an order of the First Class Magistrate, Rawalpindi, dated the 16th May 1922.

Mr. Kishen Chand, for the Appellant.

The Government Advocate, for the Respondents.

JUDGMENT.—Somewhere about the middle of December 1920 a young woman named Rakhmat Jan, wife of Fazal of Khurram Paracha, was

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kidnapped by Alaf Din and others and taken to Dhok Kureshi. Her abductors have been convicted and punished according to law. After Rakhmat Jan had been in Dhok Kureshi for a week or so she managed to effect her escape one afternoon and was going to Gobia Police Station where she met one Bahadur Ali who asked her who she was and where she was going. She told him she had been kidnapped and had escaped and was on her way to her friend. Bahadur Ali persuaded her to go home with him saying he was a Police Constable and would escort her to the *thana*. He took her to his house at Mera Ako where they arrived at sunset and at *khustanwela* she was locked into a *kotha* being threatened with being sent back to Dhok Kureshi if she created any trouble. Next morning he removed an earring from her person saying he would take it to her mother and in due course return her to her friends. He returned the following evening with some men to whom she was shown and a few nights later she was taken to Gobia to the *Pir Sahib* and made over to her mother.

The mother's story was that Bahadur Ali had come to her with the earring and promised to return the girl on payment of Rs. 600. Rs. 300 were raised and sent by the band of Gaba and others—but Bahadur Ali held out for the Rs. 600. A further sum of Rs. 200 was raised and paid but as the girl was not made over, the mother appealed to the *Pir Sahib* of Gobia who sent for Bahadur Ali and on the payment of another Rs. 100 the girl was handed back.

She was taken to the *thana* and examined on the following day (30th December 1920) by the Police to whom she detailed what had occurred. She mentioned the meeting with Bahadur Ali and going to his house but nothing was said of any ill-treatment or wrongful confinement. It appears that her relatives also refrained from saying anything about the payment of Rs. 600.

On the 19th April 1921 Bahadur Ali was sent up by the Police for trial under section 368, Indian Penal Code. Lala Chuni Lal examined all the witnesses produced by the prosecution and discharged the accused holding the offence not only not proved but without foundation. He was apparently influenced greatly by the fact that the *Pir*

Sahib of Gobia was not produced as a witness. This was on the 23rd May 1921. The Court Inspector then put up a note to the Superintendent of Police suggesting a revision, and this note was forwarded to the District Magistrate recommending a re-trial.

The District Magistrate took action on this informal reference and, without issuing notice to Bahadur Ali, directed a re-trial before the Court of another Magistrate.

Bahadur Ali having been discharged had gone away and for some time could not be found. He was, therefore, treated as an absconder and proceedings were commenced under section 512, Criminal Procedure Code in November 1921.

On the 17th March 1922 Bahadur Ali surrendered and was tried by the Additional District Magistrate who found the case proved, and sentenced him to rigorous imprisonment for five years including solitary confinement for three months.

On the 15th May 1922 Bahadur Ali moved this Court under section 439, Criminal Procedure Code, against the order of the District Magistrate ordering a re-trial and Campbell, J., issued notice and stayed proceedings on the 18th May 1922. The order had, however, been passed on the 16th May 1922, and Bahadur Ali has, therefore, appealed against his conviction and sentence through Mr. Kishen Chand. I have heard the learned Government Advocate for the Crown.

It has been contended that the order of re-trial was illegal and that all subsequent proceedings must, therefore, be regarded as worthless. I am, however, unable to concede this point. The order was, strictly speaking, not illegal having regard to the wording of section 437, Criminal Procedure Code. At the same time it was passed in complete disregard or ignorance of the many decisions of this and other High Courts in which it has been repeatedly pointed out that an order for a further enquiry should not be passed without notice to the person accused, and then only if the order of discharge was manifestly perverse or occasioned a grave miscarriage of justice. The attention of the District Magistrate is drawn to these authorities for future guidance.

As the order was not *illegal* and as proceedings had terminated before the

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order staying them were issued I must dismiss the petition of revision.

In the appeal it was contended that the evidence of the *Pir Sahib* of *Gobia* was not admissible in evidence and that as this was the only additional evidence produced at the second trial the appellants should be acquitted. Were the evidence of the *Pir Sahib* inadmissible I would have no hesitation in agreeing with the contention. Lala Chuni Lal's order of discharge was a considered one and cannot be described as perverse on the record before him. The *Pir Sahib* was examined on commission apparently under section 503, Criminal Procedure Code and it was contended that the Additional District Magistrate had no power to issue any such commission. This officer was, however, appointed an Additional District Magistrate and was authorised to exercise all the powers of a District Magistrate as contained in Sch. III, part V (18) and was thus empowered to issue a commission under section 503, Criminal Procedure Code. It was contended that this power did not entitle him to issue a commission for the examination of a witness within his own jurisdiction but I am unable to read any such limitation into the section and hold that the commission was not illegal. At the same time, I would note that it would have been better had the Additional District Magistrate proceeded to *Gobia* and examined this witness himself. The *Pir Sahib's* evidence is very damning to the appellant. There is no reason to doubt the truth of his testimony and he has sworn that the appellant admitted the woman to be in his possession and that her relatives had agreed to pay him for her release. This testimony considerably strengthens the evidence of the girl as to her detention by the appellant, and the statement of her mother and other prosecution witnesses relating to the negotiations between them and the appellant for the recovery of the girl.

It was contended that, even if the appellant did act as alleged, his action did not bring him within the purview of section 368, Indian Penal Code, inasmuch as there was no connection between him and the girl's original abductors. The learned Government Advocate was prepared to concede this

but contended that in any event section 365, Indian Penal Code, was applicable.

Now, when the appellant met the girl she had ceased to be a kidnapped woman in the strict sense. She was then a free agent but she would not have gone with the appellant but for his false representations to her as to his being a Police Constable and the inducement held out by him that he would take her to the Police Station. His action, therefore, amounted to abduction as defined in section 362, Indian Penal Code.

His intention can best be judged by his conduct and the evidence leaves no room to doubt, that he intended to, and actually did confine her wrongfully while he negotiated with her relatives for the payment of a sum of Rs. 600 which was practically her ransom. His act, therefore, falls under section 365, Indian Penal Code *vide Po Lan v. Emperor* (1).

There remains the question of sentence. The Magistrate seems to have believed the woman's statement that the appellant ravished her—but this view I am unable to accept. The appellant had his wife with him in the house and this charge is a development of the girl's story for, as far as I have been able to ascertain, she did not mention this matter till she was giving her evidence at the second trial. The offence is undoubtedly a serious one and the action of the appellant reprehensible, but I do not think it warrants the sentence that has been passed. I do not believe that he ill-treated the girl beyond keeping her confined while he was negotiating for her ransom and having regard to the time this charge has been hanging over his head, I reduce the sentence to two years' rigorous imprisonment including three months' solitary confinement.

W. C. A. & N. H.

Sentence reduced:

(1) 19 Ind. Cas. 167; 6 L. B. R. 160; 6 Bur. L. T. 77; 14 Cr. L. J. 167;

SADHU SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 530 OF 1922.

July 31, 1922.

Present.—Mr. Justice Abdul Qadir.

SADHU SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence, record of—Vernacular record not in agreement with English record—Procedure—Doubt, benefit of.

Ordinarily, where evidence is given by a witness in his own language, the vernacular record of the case is more reliable and entitled to greater weight. But where the Magistrate recording the evidence in English is an Indian gentleman of considerable experience as a Magistrate, his record should be preferred. Where, however, the record of such a Magistrate and the vernacular record are at variance, the accused is entitled to the benefit of any omissions from the latter and the doubts created thereby. [p. 514, col. 1.]

Criminal appeal from an order of the First Class, Magistrate, Ludhiana, dated the 31st May 1922.

Mr. B. R. Puri, for the Appellant.

Mr. Des Raj Sawhney, for the Respondent.

JUDGMENT.—The appellant, Sadhu Singh, has been convicted of an offence under section 376, Indian Penal Code, for committing rape on *Musammât* Ram Moorti, a girl of about 8 or 9 years, on the 15th March 1922, and has been sentenced to seven years' rigorous imprisonment and a fine of Rs. 500 or six months' further rigorous imprisonment in default. He has appealed to this Court through Mr. B. R. Puri, whom I have heard.

The story for the prosecution is, that the appellant caught hold of the little girl, whom he found alone in a field, when she was returning to her house, after giving her buffalo to a cowherd. He threw her down, broke open her *azarband* (the string with which her *pajama* was fastened) and forcibly committed sexual intercourse with her and left her unconscious. When she came to her senses, she got up, put on her *pajama* and went to her house. In the way she met Indar Singh and Jagat Singh and told them her story. Then she went and informed her mother. There were marks of blood on her private parts and on her *pajama*. *Musammât* Lilawati (P. W. No. 2), her mother, went and spoke to the appellant, who picked up a spade lying near him and ran after her to

assault her. She then came and informed one Ujagar Singh about the occurrence. In the afternoon she went to the *Thana* to make a report, but the Head Constable refused to record it. She then collected a *panchayat* of the village people and laid her grievances before them. They sent for the appellant, who is said to have confessed to them, and it was ordered by the *panchayat* that he should pay a fine of Rs. 100 and agree to be taken round the village on a donkey with his face blackened and with a garland of shoes round his neck. He and his uncles apparently consented to the proposed punishment, but next morning the accused declined to undergo the same. Thereupon Maghi Ram, an uncle of the aggrieved girl, went to the *Thana* and made a report. The evidence of Major D. H. Rai, Civil Surgeon, shows that he found the following injuries on the person of *Musammât* Ram Moorti on the 18th March 1922:

- (1) Stains of blood on her private parts,
- (2) Slight swelling of the external parts,
- (3) Rupture of her hymen,
- (4) Three small abrasions on her back.

The Doctor was of opinion that penetration had been completed and the abrasions could be caused by the back rubbing against hard ground. He also stated that the injuries were three or four days old. He examined the appellant but found no injuries on his private parts and added that it was not necessary that there should be any marks there. He was also of opinion that the appellant was capable of having sexual intercourse and was about 15 years old.

The prosecution evidence in this case consists of the statement of *Musammât* Ram Moorti, supported by that of her mother and Indar Singh, P. W. No. 6, as to her narrating the occurrence to them soon after the event. Three respectable and disinterested witnesses, namely, Balak Singh (P. W. No. 3), Gurdit Singh (P. W. No. 4) and Narinjan Singh (P. W. No. 5), prove the story as to the holding of a *panchayat* and, as to the confession of his guilt by the appellant. Abdul Salam, Head Constable, (P. W. No. 9), proves the fact that *Musammât* Lilawati did go to make a report on the 15th March, but her report was not recorded. Thus, so far as the facts of the case are concerned, they are very clearly established and there is not the slightest doubt about them. Mr.

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Puri has not disputed them before me and suggested no possibility of a false case. He has, however, urged two points for purposes of mitigation of the sentence.

Counsel urges that there is no direct evidence on the record to show that rape was completed and that penetration did take place. He refers to the statement of *Musammam* Ram Moorti (P.W. No. 1) as recorded in the vernacular where she states that after the appellant had broken the string of her *pajama* and had exposed his private parts, he thrust his finger inside her private parts and she felt such a pain thereby that she lost consciousness. It may be noted that this statement in the vernacular record is different to what the learned Magistrate has put down in the English record, where the girl says that the appellant "penetrated his private part into my private part and pushed forward." This part of the sentence does not find a place in the vernacular record at all, which is very unfortunate for the case for the prosecution. Mr. Puri urges that in cases where evidence is given by a witness in his own language, the vernacular record is always treated as more reliable and entitled to greater weight. That is true, but I am not sure if this maxim could always be safely applied in cases where a Magistrate who is taking down the evidence simultaneously in English, understands the language as well as his reader. In the present case the Magistrate who recorded the statement, is an Indian gentleman of long experience as a Magistrate, exercising section 30 powers. If it was simply a question of choosing between the two versions, I would certainly choose the version given in the record of the learned Magistrate in the present case, but I think after all there is considerable force in the contention of Mr. Puri, when he says that, even assuming that the Court Reader who took down the statement in the vernacular, inadvertently omitted the all important words or intentionally did so, the fact remains that these words are not there, and the appellant is entitled to the benefit of this omission and the doubts created thereby. He points out that the statement is supposed to have been read out to the witness and if the witness had made use of the words which have gone down on the English record, surely either the witness would have pointed

out, when hearing her statement, that the words had been omitted, or the learned Magistrate could have detected this mistake and got it rectified. But nothing of the kind was done. In fact, the learned Magistrate has signed the vernacular statement as correct. Under such circumstances, I think the appellant is entitled to the benefit of this omission. I am aware of the fact that the medical opinion favours the view that penetration had taken place, but Mr. Puri argues that in the case of a girl of such tender years, a rupture of the hymen might possibly take place by a forcible penetration of the finger of the appellant and blood may come out. In this connection he draws my attention to the fact that the *pajama* of the girl, which was sent to the Chemical Examiner, was found to be blood-stained, but no semen was found on it, which might indicate that possibly the appellant, after seeing the girl fainting or becoming unconscious, might have got afraid and might have desisted from completing his offence. He adds that this view is further strengthened by the absence of any marks on the male organ of the appellant. He concedes that it is not necessary that the marks should be there in every case of rape, but he says that it is not likely that there would have been an entire absence of all marks if the appellant had tried penetration of his male organ when raping a girl of such tender years. It is argued on the strength of the circumstances referred to above that this should be treated as an attempt at rape and not a completed offence. As indicated above, I would have been inclined to agree with the learned Magistrate's view that rape was committed, but for the unfortunate discrepancy created between the English and the vernacular record in the statement of the principal witness in the case. This does raise a doubt and, coupled with the absence of semen on the *pajama* and the absence of marks on the male organ of the appellant, I think a situation is created in which it would be safer to convict the appellant of an attempt, rather than of a completed offence. I, therefore, alter his conviction to one under section 376-511, Indian Penal Code. With this modification in the conviction, the maximum imprisonment that could be awarded to him would

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be five years. But I think he is entitled to a further reduction of the sentence on account of his extreme youth. He is said by the medical witness to be 15. He has placed his birth certificate on the record, which would make him out to be 14½. Though the learned Magistrate is of opinion, judging by his looks, that he is 17, yet I think, in view of the medical opinion, it must be taken that he is not more than 15. Though his offence is a very serious one, considering the tender age of the girl against whom the offence was attempted, yet the effect of his own youth cannot be lost sight of altogether. I think a sentence of four years' rigorous imprisonment would meet the ends of justice in this case, and his appeal is accepted to that extent and his sentence reduced accordingly. The sentence of fine, however, will stand, in default of which he would undergo six months' further rigorous imprisonment as ordered by the Magistrate.

In conclusion, I may add that it is not without some reluctance that I have altered the conviction in this case, from one under section 376, Indian Penal Code, to one under section 376-511. This has been occasioned mainly by the sad mistake pointed out above in the vernacular record. The attention of the learned Magistrate is drawn to this fact, who, if necessary, will call upon the reader, who recorded the statement to explain the circumstances in which he came to make the omission. The learned Magistrate, too, if he had carefully watched the reading of the vernacular statement to the witness as he is expected to do, would have found out this mistake and got it corrected there and then. Any repetition of such mistakes should be guarded against in future especially with regard to points which relate to the most material particulars affecting the fate of a case.

W. C. A.

Sentence reduced.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 301 OF 1922.

June 20, 1922.

Present:—Mr. Justice Adami.

MONMOHAN DASS—PETITIONER

versus

BABU LALL AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 125—Security for keeping peace—Appeal, right of—Jurisdiction of District Magistrate to take executive action.

No appeal lies from an order under section 107 of the Criminal Procedure Code, but where a person bound down under that section applies to the District Magistrate to consider the case under section 125 of the Criminal Procedure Code and cancel the bond, the latter is within his jurisdiction to take executive action for the settlement of the dispute and direct the applicant to be discharged from his security, that is, cancel the bond, if he comes to a finding that there was no real danger of a breach of the peace. [p. 516, col. 2].

Daya Nath Thakur v. Emperor, 5 Ind. Cas. 555; 37 C. 72; 14 C. W. N. 306; 11 C. L. J. 147, referred to.

Durga Singh v. Amar Dayal Singh, 66 Ind. Cas. 425; 3 P. L. T. 103; 23 C. L. J. 281; (1922) A. I. R. (Pat.) 334, distinguished.

Mr. G. C. Pal, for the Petitioner.

Mr. S. P. Varma, for the Opposite Party.

JUDGMENT.—The petitioner seeks in this application to have the order of the District Magistrate of Monghyr discharging the opposite party from the necessity to execute bonds under section 107, Criminal Procedure Code, set aside.

It appears that the *Zemindar* of Ulaa demanded enhanced rents from the tenants of village of Rani Shankarpura and, on their refusal to pay, instituted suits for enhancement, and this caused great discontent among the villagers, who determined to resist. They decided to refuse payment of rent to the landlord and to boycott his *amla* and servants; great friction arose and there were acts, and threats of violence which eventually led to an order being passed against the tenants, the five leaders of the opposite party, under section 107, Criminal Procedure Code, binding them down to keep the peace.

The opposite party then made an application to the District Magistrate to consider the case under section 125 and cancel the bonds.

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On the 25th October 1921, the District Magistrate passed the order:

"Admit appeal, send for record. Notice other party. As I shall be out on tour almost continuously for the next few months, I must hear the appeal in Camp. Beguserai will suit both parties. I will hear it on 11th November."

The District Magistrate accordingly started hearing the case on November 11th but came to the conclusion that it would be better if the parties came to terms, and gave time for this purpose. On January 12th he noted that the parties agreed to an enhancement of 3 annas 3 pies in the rupee instead of the admissible enhancement of 5 annas in the rupee. He then settled that time should be given for the deposit of rents by the tenants.

On the 6th of March he recorded that the parties had more or less settled their dispute and that 232 tenants had agreed to the figures of the rent settled and some 80 others were likely to settle their differences with the landlord. It was also agreed to settle the rent suits. On the 21st March after distribution of the rent receipts, the District Magistrate noted that though the five present petitioners had not settled their dispute direct with the landlord, there was no sufficient reason for postponing the disposal of the case. He remarked that the landlord had been almost as much to blame for the trouble as the tenants and then he wrote in the order-sheet:

"I do not consider that after the present settlement there is any danger of a breach of the peace. I accordingly allow the appeal and discharge the appellants from the necessity of giving security for their future behaviour, setting aside the order of the lower Court."

A *patwari* of the landlord has moved this Court against the said order. Mr. Gour Chandra Pal, on his behalf, argues that the District Magistrate had no jurisdiction to hear an appeal against an order in proceedings under section 107, and that the only order he could pass under section 125 was an order cancelling the bond. He relies on the decision in *Daya Nath Thakur v. Emperor* (1) and on a judgment of mine

in the case of *Durga Singh v. Amar Dayal Singh* (2).

There is no doubt as to the correctness of the contention that no right of appeal lies against an order under section 107, and that the order to be passed under section 125 is an order cancelling the bond. In the present case we find, however, that there was no appeal by the opposite party, in their petition they asked the Magistrate to consider their case under section 125, to set aside the order of the Court below and direct cancellation of the bonds. It is true that the Magistrate in the order-sheet described the petition as an appeal and proceeded to hear the parties, but he subsequently took purely executive action in bringing about a settlement between the landlord and tenants, and in his final order, though he states that he allowed the appeal, he also stated that in his opinion there was no real danger of a breach of the peace, and discharged the petitioners from the necessity of giving security, and this was equivalent to a cancellation of the bonds. The case of *Durga Singh v. Amar Dayal Singh* (2), mentioned above, was of a very different nature. There the Deputy Commissioner discussed the propriety and validity of the Deputy Magistrate's procedure and came to a finding that the proceedings were void as being without jurisdiction. He said nothing about cancellation of the bonds or discharge of the men bound down for their security.

I can find no reason to hold that in the present case the District Magistrate acted without jurisdiction. He took executive action for the settlement of the dispute and then came to a finding that there was no real danger of a breach of the peace and directed the opposite party to be discharged from their security, which meant cancellation of the bonds. That the District Magistrate wrongly described the proceeding as an appeal makes no difference.

It is complained that the petitioner was not given a hearing before the order was passed; the order-sheet shows that notice was issued to the landlord's party and that throughout the landlord was represented. Furthermore, the petitioner cannot con-

(1) 5 Ind. Cas. 555; 37 C. 72; 14 C. W. N. 306; 11 Cr. L. J. 147.

(2) 66 Ind. Cas. 425; 3 P. L. T. 103; 23 Cr. L. J. 281; (1922) A. I. R. (Pat.) 334.

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tend that the proceeding before the District Magistrate was an appeal, and at the same time demand that he should have the rights of a respondent to an appeal.

It is lastly argued that though other tenants settled their dispute, the five members of the opposite party did not do so. The finding of the District Magistrate that there was no further danger of a breach of the peace was sufficient for an order for cancelment of the bonds.

I can see no good reason to interfere; the application is rejected.

N. K.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 578 OF 1922.

July 15, 1922.

Present:—Mr. Justice Campbell.BISHNA AND OTHERS—CONVICTS—PETITIONERS
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 147, 325—Unlawful assembly—Rioting and grievous hurt—Rioting not complete without hurt—Separate sentences whether can be inflicted.

Separate sentences for the offences of rioting and grievous hurt cannot legally be imposed upon a member of an unlawful assembly where the offence of rioting is not itself complete until the grievous hurt is actually inflicted, that is to say, where the causing of the hurt is itself the form of force or violence which constitutes the offence of rioting.

Bhagwan Singh v. Empress of India, 4 P. R. 1901 Cr.; 59 P. L. R. 1901, relied on.

Petition for revision against the order of the District Magistrate, Ferozepore, dated the 15th March 1922.

Mr. D. M. Chand, for the Petitioners.

JUDGMENT.—In the case from which this petition for revision has arisen eight persons have been convicted, all under section 147 and three of them under sections 325 and 324, Indian Penal Code. The convicts with whom I am concerned are Chanan Singh, Jamiat Singh and Amrik Singh. The finding of the Magistrate which was upheld on appeal by the learned District Magistrate, is that the eight convicts formed an unlawful

assembly with the common object of attacking Dalip Singh and others; that they did so, and that they inflicted more or less severe injuries upon Dalip Singh, Baggu and Natha Singh including grievous hurt to Dalip Singh. The learned District Magistrate in maintaining the convictions found that the offence was deliberately premeditated.

In addition to sentence imposed under section 147, Indian Penal Code, of three months rigorous imprisonment and a fine of Rs. 30 each, Chanan Singh, Jamiat Singh and Amrik Singh were separately sentenced as follows on account of individual acts held to have been committed by each:—

(1) Chanan Singh to two months rigorous imprisonment and a fine of Rs. 50 for an offence under section 325 against the person of Dalip Singh.

(2) Jamiat Singh to three months rigorous imprisonment and a fine of Rs. 50 under section 324, Indian Penal Code, for hurt inflicted on Dalip Singh with an edged weapon; and

(3) Amrik Singh to a similar sentence for a like offence committed against Baggu.

Notice issued for consideration of the legality of the two separate sentences awarded to each of these three persons in view of what was laid down in *Bhagwan Singh v. Empress of India* (1) that separate sentences for the offences of rioting and grievous hurt cannot legally be imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting.

I have examined the evidence and I find that the injured persons Dalip Singh, Baggu and Natha Singh and three other professed eye-witnesses declare, that the first violence was an attack upon Dalip Singh who was struck three blows, one by Jamiat Singh with a *talwa*, another by Chanan Singh which broke his arm and a third by one of the other convicts Kartara. It appears, therefore, that the double sentences of Jamiat Singh and Chanan Singh cannot be maintained, since the unlawful assembly was

(1) 4 P. R. 1901 Cr; 52 P. L. R. 1901.

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converted into a riot by the acts which are the basis of their convictions under sections 324 and 325, Indian Penal Code.

As regards Amrik Singh, the evidence which has been believed by the two Courts below and which apparently has been accepted as substantially correct by the learned Judge who issued notice on this petition, is that he was a member of the unlawful assembly and that the blow administered by him on Baggu was not inflicted until after the unlawful assembly had become a riot by the attack on Dalip Singh.

So far, therefore, as Amrik Singh is concerned, the petition is rejected. In regard to Jamiat Singh and Chanan Singh, it is accepted to this extent that the sentence of three months' rigorous imprisonment and a fine of Rs. 3 under section 147, Indian Penal Code, imposed upon Jamiat Singh is set aside; and the sentence of two months' rigorous imprisonment and a fine of Rs. 50 imposed on Chanan Singh under section 325 is also set aside. Their respective sentences under sections 324 and 147, Indian Penal Code, will be maintained.

N. K.

Sentences reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 178 OF 1923.

May 16, 1923.

Present:—Mr. Justice Kanhaiya Lal.

JAMNA PRASAD AND OTHERS—

APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 5, 6—Warrant under s. 5—Boundaries of house not given—Warrant not addressed to definite Police Officer—Warrant, whether legal.

A warrant issued under section 5 of the Public Gambling Act, which omits to describe the boundaries of the house to be searched and which is not addressed to any definite Police Officer, is not a legal warrant, and the presumption authorised by section 6 of that Act cannot be raised. [p. 519, col. 1.]

Reference made by the Sessions Judge, Mainpuri, dated 16th March 1923.

Mr. Kumuda Prasad, for Applicant No. 1.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is a reference by the Sessions Judge of Mainpuri in a case in which certain persons have been convicted of an offence under section 4 of Act No. III of 1867, and sentenced to pay a fine of Rs. 10 each. It appears that on the 18th of October 1922 the Superintendent of Police received credible information that a common gaming house was maintained by Puttu Lal, son of Changi Mal, by caste Brahmin, resident of Mainpuri. Puttu Lal was employed as a miscellaneous clerk in the Court of the Subordinate Judge of Mainpuri, but at that time he was on leave. The Superintendent of Police issued a warrant for the search of the house of Puttu Lal but omitted to get the boundaries of that house noted in the warrant or to enter to whom it was addressed. The caste of Puttu Lal was also misdescribed. The Sub-Inspector to whom the warrant in question was handed over waited for a suitable opportunity to make the search. On the 2nd of December 1922 he is said to have received information from Sannu, an *ekka* driver, that gambling was going on in the house of Puttu Lal. He corrected the caste of Puttu Lal in the warrant with his own hand and went to the house of Puttu Lal and made a search with the result that certain instruments of gaming were found in the house and certain persons were arrested with money in their possession. The main question for consideration in the case was, whether the warrant of search was legal. There was a further question as to how far a presumption could be raised that the house in question was used as a common gaming house. The learned Sessions Judge finds that the warrant was illegal, inasmuch as the boundaries of the house to be searched were not given therein, and it was not addressed to any definite Police Officer. He further finds that the caste of Puttu Lal as originally entered in the warrant was misdescribed and that the Sub-Inspector who executed the warrant was not authorized to correct it on his own initiative. Section 5 of the Public Gambling Act, No. III of 1867, provides that if the Superintendent of Police

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has reason to believe that any house is used as a common gaming house he may either himself enter, or by warrant authorise any officer of Police not below such rank as the Local Government shall appoint in this behalf to enter, such a house and to take into custody all persons who may be found therein and seize all instruments of gaming, moneys and securities reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein. Where such a warrant is issued, the law raises a presumption, until the contrary is made to appear, that such house is used as a common gaming house and that the persons found therein are there present for the purpose of gaming.

The house in question was the residential house of Puttu Lal and his brother. The erroneous description of the caste in the original warrant may not be very material, but the omission to address it to a definite Police Officer and to describe the house by its boundaries or number renders the warrant vague and indefinite, and it cannot be said that under that warrant the Officer making the search was authorised to make it. The Superintendent of Police says, that he does not remember who took the warrant to him for signature or to whom it was handed over by him. The warrant in question cannot, therefore, be regarded as legal and the presumption authorised by section 6 of the Public Gambling Act, No. III of 1867, cannot be raised. In fact Puttu Lal who was convicted by the Trying Magistrate on a charge of keeping a common gaming house has already been acquitted by the learned Sessions Judge. The conviction of the other persons cannot, therefore, be upheld. The reference is accepted and the convictions and sentences passed on the applicants are set aside. The fines, if realised, will be refunded.

W. C. A.

*Reference accepted.
Sentences set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 588 OF 1922.

August 3, 1922.

Present:—Mr. Justice Abdul Qadir.

GANGA RAM—PETITIONER

versus

MURAD SHAH—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 145—
Final order—Finding of apprehension of breach of peace, whether necessary.*

In making a final order under section 145 of the Criminal Procedure Code, it is not necessary for the Magistrate to record a finding that there is an apprehension of a breach of the peace, such a finding is necessary only for the purpose of the preliminary order when the Magistrate assumes jurisdiction under that section.

Petition under section 439, Criminal Procedure Code, for revision of the order of the Magistrate, Jhang, dated the 31st March 1922.

Lala Harbhajan Das, for the Petitioner.

Mr. Shah Nawaz, for the Respondent.

JUDGMENT.—Sardar Sewa Singh, Magistrate, First Class, Jhang, passed an order on the 31st March 1922, purporting to act under section 145, Criminal Procedure Code, attaching a house, about which a dispute existed between Ganga Ram and Murad Shah, in connection with which a breach of peace was apprehended. He found that the house was not in the effective possession of either party at the time of the dispute, and that he was unable to determine as to who was in possession when he passed his preliminary order or two months before it. He referred both the parties to seek their respective remedies in Civil Courts.

Ganga Ram, who professes to have been in possession has applied to this Court for a revision of the said order on the ground that there being no finding as to any apprehension of the breach of the peace, the Court had no jurisdiction to take action under section 145, Criminal Procedure Code. There is a counter-application for revision on behalf of Murad Shah, who alleges that he was in possession at the time of the passing of the preliminary order and should have been retained in possession. I have heard Lala Harbhajan Das on behalf of Ganga Ram and Mr. Shah Nawaz on

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behalf of the Muṛād Shāh; and think the order must stand.

Lala Harbhajan Das has pressed before me the ground as to the absence of a finding about there being a danger of a breach of the peace, but it is pointed out by Mr. Shah Nawaz that the finding is necessary for the purpose of the preliminary order, when a Magistrate assumes jurisdiction under section 145, Criminal Procedure Code, but once he is satisfied that there is an apprehension that peace will be broken, it is unnecessary that he should record a finding to that effect again when passing his final order. He refers to *Kamāl Kuitiy v. Udayavarma Raja* (1) and several other authorities in support of this contention, which is, I think, correct. The Magistrate was, therefore, justified in taking action. As the Magistrate finds that none of the parties seems to be effectively in possession of the house, there seems to be no reason to interfere with his order attaching the house, and leaving either party to go to a Civil Court, though I am not satisfied that the action taken by him is, strictly speaking, correct according to the provisions of section 145. The proviso to sub-section (4) to section 145 enacts that if the Magistrate considers a case one of emergency, he may, at any time, attach the subject of dispute pending his decision under this section, but he has not said anything as to the emergency. This point was raised by Lala Harbhajan Das in his grounds of revision, but has not been pressed before me by any of the parties. It seems to me, however, that what the section really contemplates is that the Magistrate should decide which of the parties was actually in possession before the dispute. According to the learned Magistrate, the material before him was not sufficient to enable him to come to a decision on the question of possession and, therefore, he has tried to avert a possible breach of the peace by attaching the property, and referring the parties to a civil suit.

Under the circumstances, I do not see any reason for interfering with this order in revision and allow it to stand.

W. C. A. & N. H.

Interference declined.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 139 OF 1923.

March 22, 1923.

Present.—Mr. Justice Ryves and Mr. Justice Daniels.

SHEO CHARAN—APPELLANT.

versus.

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 412—Retention of property obtained in dacoity—Property belonging to different owners—Separate convictions.

A person found in possession of property which he knew or had reason to believe was stolen in a dacoity, and which property is identified as belonging to different owners, cannot be convicted separately in respect of the property identified by each owner unless there is evidence to prove that it was received by him at different times or from different persons.

Queen-Empress v. Mahan, 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 919; *Ishan Muchi v. Queen-Empress*, 15 C. 511; 7 Ind. Dec. (N. S.) 925, followed.

Criminal appeal from an order of the Second Additional Sessions Judge, Gorakhpur, dated the 20th January 1923.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Sheo Charan appeals from his conviction under section 412 of the Indian Penal Code. The facts found against him are as follows:—

On the 14th April 1922 a Sub-Inspector of Police had occasion to search his house with reference to another criminal charge. His suspicions were aroused by the condition of a small platform behind an oven in the kitchen and he dug up the place. He unearthed a bundle in which were a number of ornaments, some broken up and some intact. It was subsequently ascertained that one of these articles on which this charge is

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; 23 M. J. J. 499; (1912) M. W. N. 1154; 13 Cr. L. 753.

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based, was stolen in a dacoity which took place at the house of *Musammāt Dhanpatia* in the village of Marwatia on the 30th December 1921. There is further evidence that this dacoity in Marwatia was committed by the same gang that committed another dacoity at about the same time in the village of Ganwaria; and it has been satisfactorily proved that some of the ornaments found in the same bundle were taken in that dacoity. Sheo Charan has already been put on his trial and convicted under section 412 of the Indian Penal Code in connection with the articles stolen at the Ganwaria dacoity and was sentenced to five years' rigorous imprisonment.

He has now been put on his trial for being in dishonest possession of this particular ornament knowing or having reason to believe that it was stolen in a dacoity. In our opinion, Sheo Charan cannot on the evidence adduced in this case be convicted separately with regard to this particular ornament. There is no evidence that it was received by him on a different occasion to the ornaments which were stolen in the Ganwaria dacoity. Both the ornaments were found in the same bundle hidden at the same place. The case of *Queen-Empress v. Makhan* (1) [which followed an earlier Calcutta decision *Ishan Muchi v. Queen-Empress* (2)] is authority for the proposition that a person found in possession of stolen property identified as belonging to different owners cannot be convicted separately in respect of property identified by each owner unless there is evidence to prove that they were received by him at different times.

We have been asked by the learned Assistant Government Advocate to dissent from this case but we are not prepared to do so. It has stood unchallenged for nearly thirty years and has been treated as laying down the law by which the Courts should be guided. On principle also we consider that the ruling is correct. The essence of an offence under section 411 or 412 is the act of receiving or retaining stolen property. If a thief hands over to the accused a bundle

containing a number of articles; the offence committed by the accused in receiving those articles is a single offence and not a number of offences and it makes no difference whether the articles belonged to a single owner or to different owners. If there were evidence that the accused received the articles at different times or from different persons the case would be different but the Court cannot presume this against the accused in the absence of any evidence.

W. C. A. & N. H. Order accordingly.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1568 OF 1922.

January 15, 1923.

Present.—Mr. Justice Zafar Ali.

RAJA RAM—CONVICT—PETITIONER
versus

EMPEROR—RESPONDENT.

Public Gambling Act (I I I of 1867), ss. 3, 4—Search warrant, not specifying place to be searched, legality of—Magistrate issuing warrant, whether competent to try case—Evidence Act (I of 1872), s. 32—Co-accused in separate case, whether can be called as defence witness.

A Magistrate signed the printed form of a warrant for the search of a house under the Gambling Act and gave it to a Sub-Inspector of Police. The place to be searched was not specified in the body of the warrant when the Magistrate signed it, but the Sub-Inspector subsequently noted down at the bottom of the warrant the boundaries of the house to be searched.

Held, that as the warrant when signed by the Magistrate was not for the search of any particular place it was illegal. [p. 522, col. 1.]

Hargobind v. Emperor, 17 Ind. Cas. 576; 35 A. 1; 10 A. L. J. 355; 13 Cr. L. J. 832 and *Benwari v. Queen-Empress*, 11 P. R. 1895 Cr., relied on.

A Magistrate issuing a search warrant under the Gambling Act should not himself try any case which results from the search as the accused persons have the right to examine the Magistrate as a witness as to the circumstances under which the warrant was issued. [p. 522, col. 2.]

Petitioner who was being tried in separate trials for offences under sections 3 and 4 of the Public Gambling Act wished to examine a co-accused in the case under section 4 as his defence witness in the case under section 3. The Magistrate refused to permit this.

(1) 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 919.

(2) 15 C. 511; 7 Ind. Dec. (N. S.) 925.

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Held, that section 132 of the Evidence Act provided sufficient protection for the witness in such a case, and he could not be excused from appearing in the witness-box. [p. 522, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Ludhiana, dated the 28th August 1922, affirming that of the Magistrate, First Class, Ludhiana, dated the 30th June 1922.

Lala Nanwa Mal, for the Petitioner.

JUDGMENT.—Petition in Revisions Nos. 1568, 1627 and 1628 of 1922 arise out of two connected cases, one under section 4 and the other under section 3 of the Gambling Act (III of 1867), and will, therefore, be disposed of together.

The grounds for revision pressed before me are:—

(1) that the warrant authorising search of the house was illegal;

(2) that the Magistrate who issued the warrant should not have tried the case himself because the petitioners wanted to examine him as a witness in respect of the circumstances under which he issued the warrant, and

(3) that Mukandi Lal, petitioner, was prejudiced in his defence in the case under section 3, because the Magistrate refused to call and examine as a defence witness one Gora, who was a co-accused with him in the other case under section 4.

It is in evidence that Syed Ali Shah, Sub-Inspector of Police, gave information to the Magistrate on which the latter signed the printed form of the warrant and that Syed Ali Shah himself subsequently noted down at the bottom of it the boundaries of the house to be searched. It is, therefore, contended that it was not a legal warrant inasmuch as the house to be searched was not specified therein when the Magistrate signed it. I am of opinion that this contention must prevail. In the body of the warrant the place used as public gaming house was not stated at all and, therefore, the warrant when signed by the Magistrate was not for the search of any particular place and was illegal. See on this point *Hargobind v. Emperor* (1), *Benwari v. Queen-Empress* (2).

As regards the second point the accused had the right to examine the Magistrate issuing the warrant as a witness to enquire from him what was the information received by him and how the warrant was filled up by the Sub-Inspector. Therefore, he was materially prejudiced by the trial of the case by the very Magistrate who had issued the warrant.

As regards the third point, the Magistrate's reasons for refusing to call Gora as a defence witness in *Mukandi Lal's* case are quite unsatisfactory. According to section 132 of the Evidence Act (I of 1872), "a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any....criminal proceedings upon the ground that the answers to such questions will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind provided that no such answer, which a witness shall be compelled to give shall be proved against him in any criminal proceeding." This section provides sufficient protection for a witness compelled to give evidence in a case like the present and he could not, therefore, be excused as laid down in the section from appearing in the witness-box.

The irregularities stated above vitiated the trials and, therefore, I accept the revision and set aside the convictions and acquit the petitioners. The fines, if already received, will be refunded.

Z. K.

Revision accepted.

(1) 17 Ind. Cas. 576; 35 A 1; 10 A. L. J. 355; 13 Cr. L. J. 832.

(2) 1 P. R. 1895 Cr.

RADHIKA NATHA SAHA v. JOTISH CHANDRA SADHU.

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ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION

NO. 72 OF 1923.

May 21, 1923.

Present:—Mr. Justice Walsh.

RADHIKA NATHA SAHA—APPLICANT

versus

JOTISH CHANDRA SADHU—

OPPOSITE PARTY.

Jurisdiction—*Criminal case pending in another Province, stay of—High Court, jurisdiction of.*

A High Court has no jurisdiction to declare that a criminal case pending in a Court not subject to its jurisdiction is triable exclusively in another Court; nor has it jurisdiction to stay all further proceedings in a criminal case which is in course of hearing in a Court not subject to its jurisdiction.

Charu Chandra Majumdar v. Emperor, 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 320; 25 C. L. J. 165; 18 Cr. L. J. 81 (F. B.), not followed.

Criminal Miscellaneous application for transfer.

Mr. Saila Nath Mukerji, for the Applicant.

JUDGMENT.—This is, in my opinion, in substance an application for transfer. It is apparently proposed to do it by indirect means; first, getting a letter of request from Allahabad to Calcutta, then an order of stay or postponement out of the Magistrate at Calcutta, and then a declaration out of Allahabad that the case is exclusively triable in Benares. Nobody can doubt that all that complicated machinery is really an application for transfer. As an application for transfer it is bound to fail. This Court has no jurisdiction to transfer criminal cases which are in the course of hearing in another Province. Apparently Calcutta thought otherwise in the case of *Charu Chandra Majumdar v. Emperor* (1). But the Madras High Court did not agree and I prefer the Madras view. All that will be wiped out and irrelevant, by the new section 185 as amended by the Criminal Procedure Code of 1923 when it becomes law. *Mr. Saila Nath Mukerji* quite naturally objected to my describing the application as one for transfer, because as an application for transfer it was bound to fail, and I will, therefore, deal with it in the language in which this application is presented to this

Court. This Court is asked to declare that this case is triable exclusively in Benares and not in Calcutta. This Court has no jurisdiction to make any such declaration, and I should not, in any event, even if there were jurisdiction, make a declaration which was a nullity. Secondly, this Court is asked to stay all further proceedings in the Second Presidency Magistrate's Court at Calcutta. This Court has no jurisdiction over the Second Presidency Magistrate's Court at Calcutta. The application is dismissed. The certified copies of the Calcutta proceedings are to be returned forthwith to Mr. S. N. Mukerji.

W. A. C. & N. H. *Application dismissed.*

OUDE JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 116 OF 1922.

November 9, 1922.

Present.—Mr. Dalal, A. J. C.

BHAGWAN DAS—ACCUSED

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 137—Title, dispute as to—Conditional order, propriety of.

Where there is a genuine dispute as to title suitable for decision by the Civil Court, that is a sufficient ground within [the meaning of section 137 of the Criminal Procedure Code for holding that a conditional order under section 137 is not reasonable and proper.

Appeal against the order of the District Magistrate, Sultanpur, dated the 22nd September 1922, upholding the order of the Magistrate, First Class, Amethi, dated the 31st August 1922, ordering the demolition of applicant's house under section 133 of the Criminal Procedure Code.

Mr. Hardhwan Chandra, for the Applicant.
The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of an order passed under section 137 of the Code of Criminal Procedure directing the applicant to demolish a portion of his house which is alleged by the District Board to encroach on a public road.

(1) 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 320; 25 C. L. J. 165; 18 Cr. L. J. 81 (F. B.)

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There is no evidence on record to induce any Court to come to the conclusion that the order of the Magistrate was reasonable and proper. Only a Sub-Overseer was examined on behalf of the prosecution and his testimony is very vague. He had no personal knowledge and he conjectured from some map produced by him that the applicant had encroached upon the public way. He stated that the breadth of the road varied and did not definitely state what the breadth of the road was exactly opposite the applicant's house and at the place where the encroachment is alleged to have been made. It took the Court of the Magistrate nearly four months to obtain the presence of this Overseer in Court. The applicant was never examined by the Magistrate. He had appeared on every one of the 20 hearings in the case but was never ordered definitely to produce his witnesses. It would be hard to expect him to attend the Court with his witnesses 20 times during four months to be ready whenever it may please the Sub-Overseer to appear in Court and give evidence. On 29th of August after the Sub-Overseer's evidence was recorded sufficient time ought to have been granted to the applicant to produce his witnesses. Apart from this want of opportunity to the applicant to prove his defence, the order of the Magistrate cannot stand because the testimony of the Overseer is not sufficient to support it. In this connection the attention of the Subordinate Courts taking action under Chapter X of the Code of Criminal Procedure may be usefully drawn to the observations of the learned Judicial Commissioner, Mr. Daniels, in his order, dated the 5th October 1922 in Criminal Application No. 101 of 1922 (*Ram Lakham v. Emperor*, (1)). He observed that the existence of a genuine dispute as to title suitable for decision by the Civil Court is a sufficient ground within the meaning of section 137 of the Code of Criminal Procedure for holding that the conditional order is not reasonable and proper. The present appears to me to be such a case where the dispute ought to be decided by the Civil Court.

In the result I set aside the Magistrate's order dated the 31st August 1922.

W. C. A.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 74 OF 1920.

March 31, 1920.

Present:—Mr. Justice Wilberforce.

NADAR—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Criminal Procedure Code (Act V of 1898), s. 403—Detaining married women—Offence, nature of—Previous acquittal, whether bars prosecution for subsequent act of detention.

The detention of a married woman is a continuing offence, and the fact that a person has been acquitted of such an offence on one occasion, does not operate as a bar to his prosecution for any subsequent act of detention. To such subsequent prosecution the provisions of section 403 of the Criminal Procedure Code do not apply. [p. 594, col. 2.]

Emperor v. Harnam Singh, 6 Ind. Cas. 497; 22 P. L. R. 1910; 11 Cr. L. J. 366; 53 P. W. R. 1910 Cr., distinguished.

Case reported by the District Magistrate, Jhelum, with his No. 91 F. of 8th January 1920.

FACTS.—Jumma, the complainant, brought a complaint under section 498, Indian Penal Code, against Nadar, accused, on the 7th May 1917, urging that his wife, *Musamat* Begaman, was enticed away at night, when he was on the well outside the village. The Magistrate after taking defence evidence acquitted the accused on the 20th November 1917 on the ground that the evidence was too weak to base a conviction.

Again, on the 12th August 1918 Jumma, the complainant, brought the complaint under section 498/109, Indian Penal Code, against Nadar, accused, with four others on a charge of retaining his wife. The case was compromised and the accused acquitted on the 5th October 1918.

Again, on 29th October 1918 Jumma, the complainant, lodged the complaint under section 498/109, Indian Penal Code, against Nadar and three others urging that accused had abducted his wife a long time ago, but on the requests of some reliable persons he compromised and the accused

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were let off, but according to the verbal promise, the woman was not returned to him and he is living with her.

The accused, by Hakim Fazal Hussain exercising the powers of a Magistrate of the Second Class in the Jhelum District, was charged by order dated the 11th November 1919 under section 498 of the Indian Penal Code.

GROUND.—This is an extraordinary case. It would appear that a case on these facts under section 498, Indian Penal Code, was brought against accused on the 7th May 1917. Accused was acquitted. Again on the 12th August 1918 a further charge was made on the same facts under section 498, Indian Penal Code. This was compromised. Now a third case is in progress on the same facts. In view of section 403, Criminal Procedure Code, it would appear that even the second case was illegal on the principal of "*res judicata*." But, under any circumstances, as the second case was compromised and the compromise is on the file and not questioned, the ruling *Emperor v. Harnam Singh* (1) makes it clear that the Magistrate in the third case is acting "*ultra vires*."

I accept the petition and forward the proceedings to the High Court with the recommendation that the proceedings be quashed.

Dr. Nand Lal, for the Petitioner.

JUDGMENT.—Jumma, the present complainant, brought a complaint under section 498 against Nadar, on 7th May 1917, for enticing away his wife. Nadar was acquitted on 20th November 1917. In the following year on 12th August 1918 Jumma returned to the attack and brought a complaint against Nadar and others for detaining his wife. The case was compromised and the accused were acquitted on 5th October 1918. The allegation of the complainant is that Nadar promised to return his wife which he has not done. The alleged breach of his promise, however, is not material for the purposes of the present case. On 29th October 1918 Jumma again instituted a similar complaint for detention against Nadar and

three others. The Magistrate trying the case has framed a charge for this offence. The persons charged applied for revision to the District Magistrate, who has forwarded the proceedings, under section 438, Criminal Procedure Code, to this Court on the ground that a second complaint after an acquittal is against the provisions of section 403, Criminal Procedure Code, and that in a similar case reported in *Emperor v. Harnam Singh* (1), it had been held by this Court that after a compromise further proceedings were *ultra vires*.

I have perused the authority referred to by the District Magistrate and find that it was merely held that after a compromise in a section 498 case further proceedings in that case were *ultra vires*. This is an obvious proposition but it does not apply to the present case. In this case Jumma is now complaining in a new complaint, of the detention of his wife which took place since 5th October 1918, and I am unable to understand how he is in any way debarred from prosecuting this complaint. Section 403, Criminal Procedure Code, certainly can have no application as previous acquittals were in respect of previous detentions. Counsel for the applicants urges that the effect of the acquittal of 5th October 1918 was to indemnify the wrong-doers from any punishment in respect of the woman's detention. With this argument I agree with the qualification that the indemnity was only effective for an offence committed before the date of the acquittal. It is clear that detention of a married woman is a continuing offence and that a person committing such an offence is always liable to prosecution except for any period in respect of which he has been found innocent. I hold, therefore, that the action of the Magistrate in framing the charge is in no way *ultra vires*.

I may mention that Dr. Nand Lal also contended that it was clear from the complaint itself that the accused were being charged with the abduction and with previous acts of detention. The fact and date of the original abduction were certainly mentioned in the complaint as also the previous detention. But these references were merely preliminary and it cannot be argued that it was complainant's intention

(1) 6 Ind. Cas. 497; 22 P. L. R. 1910; 11 Cr. L. J. 366; 53 P. W. R. 1910 Cr.

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to prosecute again the accused for offences for which they had been acquitted.

I dismiss the application for revision. The record to be returned to the Magistrate for continuance of the proceedings.

W. C. A.

Interference declined.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 124 OF 1923.

March 28, 1923.

Present:—Mr. Justice Ryves.

SHIMBHU NARAIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 88, 92—
Chaining up insane person—Good faith.*

Where a person of education and wealth and living in a town, where medical attendance can easily be procured, chains up his occasionally insane brother in an unnecessarily cruel way for over 3 months and apparently would have continued so to confine him indefinitely, if the District Judge had not interfered, he cannot be said to have acted in good faith, i.e., with due care and attention and cannot be given the benefit of sections 88 and 92 of the **Penal Code**.

Criminal revision from an order of the Sessions Judge, Farrukhabad.

Messrs. C. Ross Alston and P. N. Sapru, for the Applicant.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an unusual case. Shimbhu Narain was convicted by a Magistrate of the First Class under section 344 of the Indian Penal Code and sentenced to one day's detention, till the rising of the Court, and a fine of Rs. 200. His appeal was dismissed by the learned Sessions Judge of Farrukhabad and he comes here in revision. The facts are not disputed.

Shimbhu Narain is a wealthy Zemindar and an Honorary Magistrate in the town of Kanauj. The charge against him is that of having wrongfully confined his brother, Maheshwar Narain, for more than ten days, in fact, from the 29th of March until the 3rd of July 1922. It appears that Mahesh-

war Narain is subject to fits of insanity, and, on such occasions, exhibits dangerous and violent tendencies. On or about the 29th of March he certainly became very violent and went about brandishing a sword and threatening to do violence to people. I think there is no doubt that on that date he was insane, and dangerously so. Shimbhu Narain had him chained up with very heavy chains and kept him in that condition until the 3rd of July, when, the matter having been reported to the District Judge, Shimbhu Narain was called upon to produce Maheshwar Narain before him. He did so and brought him to Court chained in the same fetters in which he had been confined. An examination of Maheshwar Narain's mental condition was then made by two medical practitioners and he was certified to be then sane. These facts are admitted.

It is argued that Shimbhu Narain was justified in what he did and that he acted honestly. As evidence of his honesty, attention is drawn to the fact that he produced Maheshwar Narain before the District Judge in the very fetters with which he had been chained. Both the lower Courts have held that the manner in which Maheshwar Narain was chained was unnecessarily cruel. This, it is argued, is irrelevant and does not affect his guilt. In my opinion, although the matter has not been considered in the same light by the Courts below, it is relevant on the question of the good faith of the accused. The accused relies on sections 88 and 92 of the Indian Penal Code as justification. The learned Sessions Judge has rightly held that an accused person who desires the benefit of this or any of the other exception in the Code must prove that he comes within its scope, and that the accused has failed to do so. Under both sections 88 and 92, the accused person must show that he acted in good faith. Now, "good faith," for the purposes of those sections, is explained by section 52 of the Code which says, "nothing is said to be done in good faith which is done without due care and attention." The evidence shows that although Maheshwar Narain is subject to fits of violent insanity nevertheless he has lucid intervals. It seems, in fact, that these fits only come on occasionally and are temporary. Under

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these circumstances, having regard to the fact that the accused is a person of education and wealth and that he lives in a town where medical attendance could easily be procured, he cannot be said to have acted with due care and attention in chaining up his brother in this unnecessarily cruel way for over three months, and apparently he would have continued so to confine him indefinitely if the District Judge had not interfered. If the definition of "good faith" as given in the General Clauses Act Act X of 1897, which says "a thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not" had been applicable, there might have been some force in the argument of the learned Counsel for the applicant, although even then I am doubtful whether the accused, having regard to his position in life, could be entirely exonerated. In my opinion the conviction is right. I decline to interfere.

M. D.

*Conviction upheld.***LAHORE HIGH COURT.**

CRIMINAL REVISION NO. 358 OF 1919.

May 10, 1919.

Present :—Mr. Justice Dundas.

LAKHMI DAS—CONVICT—PETITIONER
*versus***EMPEROR—RESPONDENT.***Penal Code (Act XLV of 1860), s. 441—Criminal trespass—Intention to cause annoyance.*

Where, with a view to attach the property of his judgment-debtor, a decree-holder enters the premises of a third person without having any right to do so, his act amounts to an invasion of the privacy of that person which would necessarily cause great annoyance, and comes within the definition of section 441 of the Penal Code, even though his primary object may not have been to cause annoyance, as he should be deemed to have intended the natural consequences of his act.

Ram Saran v. Emperor, 12 P. R. 1906 Cr.; 4 Cr. L. J. 293; 54 P. L. R. 1907, relied on.*Bhikam Singh v. Emperor*, 42 Ind. Cas. 1006; 15 A. L. J. 808; 19 Cr. L. J. 46, not followed.*Akshoy Singh v. Rameshwar Singh*, 35 Ind. Cas. 515; 43 C. 1143; 20 C. W. N. 1071; 17 Cr. L. J. 339, distinguished.

Petition for revision, under section 439 of the Criminal Procedure Code, of an order of the Sessions Judge, Jhelum, dated the 14th December 1919, confirming that of the Magistrate, First Class, Jhelum, dated the 10th October 1918.

Dr. Nand Lal, for the Petitioner.

JUDGMENT.—One Lala Lakhmi Das of Pari Darwaza, Jhelum District, had a money-decree against one Amir Khan of the same place.

On the 25th December 1917 he has been found to have entered the enclosed yard of one Dhuman Khan, son-in-law of Amir Khan, in order to seize and attach certain goats the property of Amir Khan.

On this finding of fact the Magistrate had convicted him of criminal trespass under section 448, Indian Penal Code, and the conviction has been upheld by the Sessions Judge.

Lakhmi Das applies for revision of this order and a number of authorities have been quoted to me in support of his contention that his act does not amount to a criminal offence.

Criminal trespass is defined in section 441, Indian Penal Code, and the definition is as follows :—

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property.....is said to commit criminal trespass."

The first case quoted is *Bhikam Singh v. Emperor* (1). In this case the decree-holder seized cattle belonging to the judgment-debtor from the house of a third party. It was held that he was not guilty of criminal trespass in the house of that third party.

The order is very brief and does not give any details of the facts but, no doubt, supports the contention of the applicant.

The next case *Akshoy Singh v. Rameshwar Singh* (2) is only to the point, in that it lays down that if a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intention of annoying the person in possession he cannot be convicted of criminal trespass. This, however, was a boundary dispute.

In *Meajan v. Sharafatullah Khan* (3) it is

(1) 42 Ind. Cas. 1006; 15 A. L. J. 808; 19 Cr. L. J. 46.

(2) 35 Ind. Cas. 515; 43 C. 1143; 20 C. W. N. 1071; 17 Cr. L. J. 339.

(3) 17 Ind. Cas. 415; 16 C. W. N. 1007; 13 Cr. L. J. 783.

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pointed out that to constitute criminal trespass as distinguished from a civil trespass there must be an intention by the trespasser to cause annoyance.

• In *Alladilla v. Empress* (4) it is remarked that to constitute the offence of criminal trespass it must be proved that some criminal intent was present in the mind of the accused and it does not at all follow that because an act is unlawful and is one that the Civil Law will restrain or for which it will compensate the injured party in damages that it is necessarily criminal. In *Ram Saran v. Emperor* (5) the conclusion was arrived at that the fact that the primary intention of the accused is to assert a *bona fide* claim to property does not necessarily justify an act by him which he knows or must be assumed to know to be likely to intimidate, insult or annoy the person in possession.

In the body of the judgment a remark is made that it is no violence to the language of the section to hold that a man shall intend the natural consequences of his act.

Now in this case it is clear that neither the bailiff nor the applicant had any right to enter the enclosed yard of Dhuman Khan and that, as a matter of fact, they must have known that, under the circumstances, the act was a decided invasion of the privacy of his household which would necessarily cause him great annoyance.

The Magistrate and the learned Sessions Judge are of one opinion on this question of fact.

Although, therefore, a desire to cause annoyance to Dhuman Khan may not have been the primary object of Lala Lakhmi Das he seems to have been in fact guilty of an act which comes within the definition of section 441, Indian Penal Code, and there is, therefore, no ground for interference in revision.

W. C. A. & N. H.

Revision dismissed.

(4) 29 P. R. 1882 Cr. (5) 12 P. R. 1906 Cr.; 4 Cr. L. J. 293; 54 P. L. R. 1907 (F. B.).

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION NO. 41 OF 1923.

February 23, 1923.

Present:—Mr. Justice Spencer.

VALAVARTY ANKANNA—

ACCUSED—PETITIONER

versus

PILLAMERI ADIRIBHOTLU—

COMPLAINANT—RESPONDENT.

Criminal trial—Stay of trial pending decision of civil suit—Proper procedure—Criminal Procedure Code (Act V of 1898), s. 344—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107.

An application for stay of trial in a criminal case pending the decision of a Civil Court ought to be made in the first instance to the Magistrate trying the case under section 344 of the Criminal Procedure Code and if the party fails to get a reasonable order, a revision against the order of refusal, should be filed to the High Court.

The High Court will not act under section 107 of the Government of India Act on an independent application for stay of proceedings.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of further proceedings in C. C. No. 2 of 1923, on the file of the Court of the Sub-Magistrate, Ponur, pending disposal of Original Suit No. 1 of 1923 on the file of the Court of the District Munsif, Bapla.

Mr. T. R. Subrahmanya Aiyar for Mr. K. S. Ganapathy Aiyar, for the Petitioner. Mr. Ch. Raghava Rao, for the Complainant Respondent.

ORDER.—There is no appeal or petition pending in this Court in this connection. This is not a case for the exercise of the extraordinary powers of this Court under section 107 of the Government of India Act. The petitioner may apply under section 344, Criminal Procedure Code, to the Sub-Magistrate to postpone the trial before him pending the decision of the Civil Court, and if he fails to get a reasonable order, he may then ask this Court to revise the order so passed. The petition is dismissed.

V. N. IV. Petition dismissed.

LAL, BAIJNATH SINGH v. CHANDRAPAL SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1518 OF 1921.

April 5, 1923.

Present.—Mr. Justice Daniels.

LAL, BAIJNATH SINGH—PLAINTIFF—
APPELLANT

versus

Thakur CHANDRAPAL SINGH AND
OTHERS—DEFENDANTS—RESPONDENTS.Landlord and tenant—Grove-holder—Right to
transfer trees.The general law is that a person who plants
a grove with the permission of the *zemindar* ac-
quires a transferable interest in the trees.*Jugdip Narain Singh v. Jokhan Ahir*, 5 Ind.
Cas. 256 and *Ram Sarup v. Jagan Nath*, 25 Ind.
Cas. 132, distinguished.*Muhammad Yasin v. Ilahi Bakhsh*, 16 Ind.
Cas. 455; 34 A. 545; 10 A. L. J. 73, referred to.*Haidar Ali Khan v. Gangu*, A. W. N. (1906)
204, *Haji Muhammed Ismail Khan v. Mithu Lal*,
17 Ind. Cas. 656; 11 A. L. J. 649 and *Jalesar Sahu*
v. Raj Mangal, 63 Ind. Cas. 437; 43 A. 606; 19
A. L. J. 616, followed.Second appeal from a decree of the Dis-
trict Judge, Allahabad, dated the 19th
July 1921.Messrs. *Lakhshmi Narain Tewari*, *Iqbal*
Ahmad and *Kumuda Prasad*, for the Ap-
pellant.

Dr. K. N. Katju, for the Respondents.

JUDGMENT.—The dispute in this case relates to a grove No. 168 in *Mauza Ghatampur* in the Allahabad District. The grove was planted by the ancestors of the second and third defendants with the permission of the *zemindar* on payment of *nazrana* and they occupied the land as grove-holders. They have transferred their rights in the grove by a sale-deed to the first defendant Chandrapal Singh. The plaintiff-appellant Lal Baijnath Singh thereupon instituted the present suit on the allegation that the transfer was unlawful and that it gave the *zemindar* a right to recover possession of the land. Both the Courts below have dismissed the suit. They held that under the general law a person who plants a grove with the permission of the *zemindar* acquires a transferable interest in the trees and that the plaintiff has failed to prove any custom disentitling the defendants from transferring their rights.

Two points arise in the appeal, (1) whether a custom forbidding grove-holders to transfer the trees is laid down in the *wajib-ul-arz* of the village, and, if so, whether it has been

rebutted; (2) whether the general law has been rightly laid down by the Courts below.

At the time when the *wajib-ul-arz* was prepared the village was owned by a single *zemindar*. The *wajib-ul-arz* states that there are in this village certain groves of which a separate list is given. The clause continues:—"Apart from eating the fruits and flowers, the planters have no kind of right of cutting down, selling or mortgaging without the permission of the *zemindar*. The *zemindar* has no right to a share in the produce, and no one can plant a grove in future without the permission of the *zemindar*, and when the land of the groves becomes vacant it will be under the *zemindar's* control." Read in connection with the previous sentence the natural reference of the word planters (*nasiban*) is to the planters of the groves which have just been enumerated. Having regard, moreover, to the form of the clause and to the prohibition which follows against planting fresh groves without permission, it seems highly doubtful whether this clause intended to lay down any general custom. At any rate, it appears to me that the natural construction of the clause relied on by the appellant is to limit it to the groves which are specifically referred to in the clause.

I find, therefore, that there is no evidence of any special custom governing the case. It becomes necessary to consider whether the Courts below have rightly laid down the general law prevailing in the Province. The appellant contends that when a grove is planted with the *zemindar's* permission the ordinary rule is that the grove-holder has no transferable interest in the trees. He has been unable to cite any reported case in support of this view, but he relies on two unreported decisions in Letters Patent Appeal No. 23 of 1909, [*Jugdip Narain Singh v. Jokhan Ahir* (1)] and a Single Judge decision in Second Appeal No. 118 of 1914, [*Ram Sarup v. Jagan Nath* (2)]. The former decision was considered and distinguished in the case of *Muhammad Yasin v. Ilahi Bakhsh* (3) relied on by the Court below. It was pointed out that in the unreported Letters Patent Appeal the *wajib-ul-arz* distinctly stated that the trees belonged

(1) 5 Ind. Cas. 256.

(2) 25 Ind. Cas. 152.

(3) 16 Ind. Cas. 455; 34 A. 545; 10 A. L. J. 73.

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to the *zemindars*. The *Muhammad Yasin's case* (3) laid down the law as being that *prima facie* every man has a right to dispose of any property he possesses whether it be a grove or anything else. It is, no doubt, open to comment that these remarks were *obiter* as the *wajib-ul-arz* in that particular case declared expressly that persons planting the groves should have rights of ownership in the trees. There are, however, other cases not depending on the terms of any special *wajib-ul-arz* which have laid down the law in the same sense. Two of these cases are referred to by the learned Judge, *Haidar Ali Khan v. Gangu* (4) and *Haji Muhammad Ismail Khan v. Mithu Lal* (5). The same view has very recently been taken in *Jalesar Sahu v. Raj Mangal* (6), a case which was specially referred to a Bench for the purpose of settling the law on the subject. In that case it was held that the planting of a grove with the permission of a *zemindar* even on occupancy land had the effect of changing the status of a tenant into a grove-holder and that the latter had a transferable right in the trees. I find, therefore, that the view of the law taken by the Courts below is correct and I accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed.*

(4) A. W. N. (1906) 204.

(5) 17 Ind. Cas. 656; 11 A. L. J. 649.

(6) 63 Ind. Cas. 437; 43 A. 606; 19 A. L. J. 616.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 6, 1923.

Present:—Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

SUDHAMANI DAS AND ANOTHER—
APPELLANTS

versus

SURAT LAL DAS AND OTHERS—
RESPONDENTS.

Hindu Law—Will—Absolute estate bequeathed to widow, legality of—Construction of Will—"Malik," import of.

A Hindu can give by Will an absolute estate in his property to his widow.

The word "*malik*" employed in a Will has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred. [p. 531, col. 1.]

Appeal from the Calcutta High Court.

Mr. Parikh, for the Appellants.

Messrs. De Gryther, K.C., and Dube, for the Respondents.

JUDGMENT.—The only question arising in this case is the proper construction of the Will, dated the 11th May 1896, of the testator, Banka Behari Saha Das. He left a widow and a brother, who has since died, and is represented by his son, who, if the testator's widow was only entitled to a life-estate, would be entitled to the property.

It has been well-established that, in the absence of anything to the contrary, the words of a Will—in India—are to be taken as having their ordinary meaning. It appears to their Lordships that nothing could be clearer than the following provisions of this Will. At the end of paragraph 1 the testator says:—

"I give my wife permission to adopt five sons in succession. My wife aforesaid is authorised to adopt one to five sons according to her will."

[Paragraph 2 commences]: "If my wife aforesaid should adopt a son in accordance with the authority given by me, the aforesaid adopted son and my wife aforesaid shall succeed to the ownership of the entire properties in equal shares, vested with the power of sale and gift, and no violation of such provision shall be permitted."

Therefore, if there was an adopted son, no stronger words could be used to confer upon the widow the absolute right and interest in one-half, and on the adopted son the absolute right and interest in the other half of the property.

This is followed by a provision about their living together in the ancestral home:—

"and in the event of disagreement between my adopted son and my wife, my estate shall be divided equally among my adopted son and my wife aforesaid, and after my death, my wife aforesaid shall take out Probate of this Will, and when the adopted son attains to the age of twenty-

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one my wife aforesaid shall make over his estate to him."

Then paragraph No. 4 provides as follows:

"If the aforesaid adopted son, or my wife aforesaid should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration."

And the last paragraph runs:—

"If no son is taken in adoption by my wife [which is the event which has occurred], she shall succeed to all the properties left by me after my death, with powers of sale and gift, and my wife aforesaid shall be *malik*, and be in possession, and she shall have power of sale and gift in accordance with the provisions in paragraph 4."

In every one of these provisions it is, therefore, clear that the testator's intention was to give the absolute property to the wife—either in the whole of the property, or, if there was an adopted son, in one-half of the property. As was pointed out in the Court below, the word "*malik*" in itself has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred.

The appellant's argument which is based on the provisions of paragraph 4 is fallacious. What paragraph 4 says is this:—

"If the aforesaid adopted son, or my wife aforesaid should find it necessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and co-sharers refuse to purchase it for an adequate consideration."

This only means that, before selling a portion to a stranger, which the widow has a perfect right to do she shall offer it—or give the opportunity of purchasing it at an adequate consideration—to the co-heirs. That by no means limits her power of sale in any degree, and it appears to their Lordships that the decision appealed from was right.

This appeal must, therefore, be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

A. M. & W. C. A. *Appeal dismissed.*

Solicitor for the Appellant:—Messrs. Downer and Johnson.

Solicitor for the Respondent:—Messrs. Barrow, Rogers and Nevill.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL.]

NO. 1353 OF 1922.

March 23, 1923.

Present:—Mr. Justice Walsh.

Musammat CHANDAN KUNWAR—

PLAINTIFF—DECREE-HOLDER—

APPELLANT

versus

NARAIN alias GIRDHARI—DEFENDANT

JUDGMENT—DEBTOR—RESPONDENT.

Easement—Light, easement of—Measure of right.

There is no rule defining the measure of a dominant owner's right to easement of light or requiring an angle of 45 degrees through which the rays of the sun are to be received. The principle is that interference with the dominant owner's right in order to be actionable, must be a substantial deprivation of light, enough to render the occupation of the house uncomfortable according to ordinary notions. This would differ in different places and different circumstances. [p. 532, col. 1.]

Colls v. Home and Colonial Stores Limited, (1904) A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475, followed.

Execution second appeal against a decree of the District Judge, Aligarh, dated the 23rd August 1922.

Mr. Panna Lall for the Appellant.

Mr. Gulzari Lall, for the Respondent.

JUDGMENT.—I think this is a question of fact and that no question of law is raised. The decree which the successful decree-holder obtained directs the defendant to open the *roshandans*. It is a very unfortunate expression because the *roshnadans* are on the decree-holder's property and the decree did not mean that the defendant was to touch the decree-holder's property but to remove the obstructions, which he has created, so as not to interfere with the plaintiff's right of light. The plaintiff complains that what the defendant has done in pretended compliance or attempted compliance with the decree does not in fact remove the obstruction or, in the words of the decree, "open the *roshandans*." The two grounds of appeal raised here are that there has been no compliance with the decree so far as the *roshandans* are concerned and that the decree entitles the decree-holder to light at an angle of 45 degrees which he has not got. I think the latest authority in principle is to be found in the decision of the House of Lords in

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Colls v. Home and Colonial Store Limited (1), which certainly altered the view of the law which had been entertained up to that date. It is clear law that there is no rule defining the measure of the dominant owner's right or requiring an angle of 45 degrees through which the rays of the sun are to be received. The principle laid down by the House of Lords is that there must be a substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions. That, as Lord Halsbury points out, must differ considerably in the City of London and in the country and obviously differ very considerably in *abais* or towns in these Provinces. All the foregoing observations really mean that it is a question of degree or fact in each case. In this case the Amin appointed by the Munsif reported that the decree had been complied with and the Munsif agreed with him. In appeal the learned District Judge appointed a Commissioner who reported on the 18th July. He says "as for compliance with the terms of the decree if it means that light and air may be allowed to the appellant I have seen the room which has the *roshandan* there, sufficient light and air come through them." On this the Court below has found that the decree has been complied with. That is a finding of fact and I cannot interfere. The appeal is dismissed with costs.

M. A. A.

Appeal dismissed.

(1) (1904) A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 46 OF 1921.

September 7, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

E. N. A. SAMU PATTER

—GARNISHEE—APPELLANT

versus

F. H. WILSON, THE OFFICIAL
ASSIGNEE OF V. M. APPACHI CHETTY
AND SONS—INSOLVENTS—PETITIONERS

—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909),

s. 56—Dominant motive to avoid bankruptcy—Fraudulent preference—Procedure.

To constitute fraudulent preference under section 56 of the Presidency Towns Insolvency Act, the giving of preference to a particular creditor must have been the dominant view of the debtor. Where the dominant motive of the insolvent was to keep a particular creditor quiet and avoid bankruptcy altogether and the desire to prefer and the giving of preference were incidental only, the obligation incurred by the debtor is lawful and the transaction does not offend against the Laws of Bankruptcy and must be upheld. [p. 534, col. 2.]

Sharp v. Jackson, (1899) App. Cas. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Mans. 264; 15 T. L. R. 418, *Official Assignee of Madras v. T. B. Mehta & Sons*, 49 Ind. Cas. 968; 42 M. 510; 36 M. L. J. 190; 25 M. L. T. 265; (1919) M. W. N. 293, followed.

In a motion by the Official Assignee to set aside a transaction of the debtor as being a fraudulent preference, the onus of proof is on the Official Assignee to make out his case before the Garnishee can be called upon to meet it. [p. 535, col. 1.]

Appeal from the judgment and order of Mr. Justice Phillips, dated the 18th February 1921, passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the Court, in I. P. No. 6 of 1919.

JUDGMENT.

Schwabe, C. J.—This is a motion by the Official Assignee in the Insolvency of V. M. Appachi Chetty & Sons, that a transaction of 9th December 1918 under which security was given to the present appellant, Samu Patter, called the Garnishee, for Rs. 43,668-5-11 should be set aside as a fraudulent preference or in the alternative, on the ground that it was not a *bona fide* transaction in that it offends against the Laws of Bankruptcy.

The matter came before Phillips, J., and it was tried in the following manner. The Official Assignee's report was read and the affidavits filed on behalf of the Garnishee were read presumably and then the deponents thereto were put into the witness-box and cross-examined on behalf of the Official Assignee; then the bankrupt was called by the Official Assignee and nominally examined but really cross-examined on his behalf; then two further witnesses were called on behalf of the Official Assignee and a speech was made on behalf of the Garnishee and Counsel for the Official Assignee replied. In my judgment the procedure is

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not correct, and if it is the usual procedure it should be altered. The onus is originally on the Official Assignee. A motion of this kind with witnesses against the bankrupt should be tried practically as if it were an action. The case should be opened on behalf of the Official Assignee, and his report read, at any rate, as if it were a pleading. Whether it is admissible as *prima facie* evidence of the facts under rule 117 of the Bankruptcy Rules is a matter which I should wish to consider when the point arises. The evidence to be called on behalf of the Official Assignee must be called in its proper place. If it is an evidence that can be properly reserved to be used to rebut the evidence given on behalf of the Garnishee it can be so reserved. The Official Assignee can, of course, if he so pleases, put in the respondents' affidavits and rely upon them. When he has closed his case, the case for the respondent should be opened, the affidavits, if not already in, read at the examination-in-chief of the deponents, supplemented with the leave of the Judge by oral evidence. If notice has been given for them to attend they can, then, and not till then, be cross-examined. Further evidence, can, with permission, be given on the Garnishee's behalf, and evidence in proper cases in rebuttal may be then called and the closing speeches made. The insolvent may be called as a witness by either party; if called, although usually considerable latitude is given, he must be examined by the party calling him and not cross-examined, unless he has shown himself hostile and permission is given to cross-examine. The other side can, of course, cross-examine him.

The procedure in the present case was, in my judgment, irregular in that the Garnishee and his witnesses were examined before the completion of the Official Assignee's case. The Garnishee, like any other defendant, is entitled to hear the case he has to meet, and the Official Assignee, like any other plaintiff, has to make out his case, before the Garnishee can be called upon to answer it. The Official Assignee has this advantage that he has the Garnishee's case before him on oath and can, if he wishes, use the Garnishee's affidavit as evidence. This matter is of considerable importance as it is the practice how far this practice is right, I do not discuss now, to proceed by

motion in practically all cases by the Official Assignee against strangers.

Turning to the questions in dispute in this case, it is to be observed, that the Official Assignee's report was directed mainly to establishing the second point, and not to establishing fraudulent preference; and though the two points were kept alive until the end and the learned Judge decided both in favour of the Official Assignee, the second point being, as far as I can understand, that the Garnishee obtained this security by promising to advance money to the insolvent and then did not carry out that promise properly; and that, therefore, the transaction is a fraud on the Bankruptcy Law, I have failed to discover on what principle of law the decree on this point was based, and it is enough to say that, although he had a decree in his favour on the point, the learned Advocate-General refused even to argue in support of it.

This leaves the question of fraudulent preference. Section 56 of the Presidency Towns Insolvency Act avoids the transfers of property or payments made by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, if such person is adjudged insolvent on a petition presented within three months after the date thereof. In this case the insolvent was undoubtedly unable to pay his debts as they became due from his own money and in giving the security in question he preferred the Garnishee over the other creditors. But the question remains whether he did so with a view of giving that preference. This has been explained to mean, looking at the mind of the bankrupt at the time, was the dominant view to give a preference to a particular creditor? See *Sharp v. Jackson* (1); *Official Assignee of Madras v. T. B. Mehta & Sons* (2). If his real object was to continue trading or to save himself from serious consequences or if he was really induced to make the payment or to give the security by the pressure of the

(1) (1899) App. Cas. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson 264; 15 T. L. R. 418.

(2) 49 Ind. Cas. 968; 42 M. 510; 36 M. L. J. 190; 25 M. L. T. 265; (1919) M. W. N. 293.

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creditor and those who were the dominant factors in his mind and the desire to prefer and the giving of the preference were incidental only, the preference is not a fraudulent preference within the meaning of the section. The insolvent, the Garnishee and his son, the Bills Manager of the Madras Bank, who negotiated the matter on his father's behalf, have all been called as witnesses and all treated by the Trial Judge as unreliable. Two agents or managers of the insolvent also gave evidence and their evidence was accepted by him. Looking at all the evidence and treating it all, except that of the last witness as suspicious and to be carefully scrutinized, I think the real relevant facts are that the insolvent was seriously involved by reason of the fall in the market price of piece-goods in Madras in September 1918, such fall being increased on the signing of the Armistice in November and was being pressed by his creditors in Bombay and elsewhere. The *hundis* which he had given to the Garnishee had been dishonoured, a very serious matter for a trader and there were other pressing claims. He had large quantities of piece-goods under mortgage-bonds and other persons and unless the market recovered he was hopelessly insolvent. But I am convinced that he believed that the market was going to recover. Whether he had reasonable grounds for the belief is to my mind immaterial. On December the 4th, his brother who had a similar business filed his petition. The Garnishee was getting very anxious as he was owed about Rs. 46,000 and was totally unsecured. About December the 3rd, there was an interview at Madras at which he pressed for payment or security and promised that, if he was secured, he would render further assistance to the insolvent by making further loans. About that date, the insolvent left Madras on private affairs. The bankruptcy of his brother made the Garnishee still more anxious and he sent his son, the Bills Manager of the Madras Bank, on a night's journey to Velampalayam to interview the insolvent and try to get from him payment or security. I am satisfied at the ensuing interview, the son pressed very hard for payment or security and probably also threatened to take action, which would have had the effect of bring-

ing the insolvent down, if he was not satisfied. I have no doubt that the bankrupt was speaking the truth when he said that the son would not have gone away without a promise of security. I am also satisfied that at that time the bankrupt was doing all that he could to avoid bankruptcy and to carry on his business until the market righted itself. Further, the son held out great inducement to the insolvent by promises, perhaps somewhat vague, that if his father was satisfied he would not only induce his father to make further advances but would also use his influence with Madras Bank to induce them to render financial assistance to the insolvent.

I agree with the argument of the learned Advocate-General that if all this amounts to a request for a preference, and a promise that if a preference is given, help will be forthcoming not to enable the insolvent to continue his business but either merely to stave off the bankruptcy for a short while or to assist in reinstating him after the bankruptcy it would be right to say that the dominant view was to prefer, and further I think that such a transaction might probably be set aside as a fraud on the Bankruptcy Law. But if the real intention and hope was to avoid bankruptcy altogether, then I think, that was the dominant view, and the preference merely incidental. The pressure also had a considerable bearing on the insolvent's action. I have little doubt because he must have known that if he did not keep this particular creditor quiet, the fact of the bills being dishonoured had only got to be made public to bring about immediate bankruptcy. In my judgment, the true view in this case is that the dominant view was to keep this particular creditor quiet and to get assistance from him and his son to enable the insolvent to keep going and to avoid bankruptcy altogether; but this is borne out by the fact that the insolvent proceeded to keep other pressing creditors quiet by payment or security and to carry on business as far as possible in the ordinary way for a month, when he called his creditors together and tried to persuade them to allow him to go on still further, a proposal which would have been accepted but for the refusal of certain Bombay creditors. Within two months the market had righted itself sufficiently to have enabled the business to be

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carried on and possibly he would have become entirely solvent but, of course, it was too late.

I think that on the evidence that the Garnishee did not give a liberal interpretation to his promise of further help, and he got payment of Rs. 5,000 of his debt in a manner which does not commend itself to me. But as I find that the dominant motive was not to give a preference to the Garnishee, this motion ought to have been dismissed with costs. It follows that this appeal will be allowed with costs here and below.

Wallace, J.—I agree. In this case I consider the following facts established by satisfactory evidence, and affording the only reasonable conclusions on that evidence:—

(1) that from October 1918 onwards the Garnishee Samu Patter was nervous about his commitment with his debtor, Muthukumara Chetty and was become annoyed (see letter of 30th October 1918,) on his continual delay in meeting his obligations to him, amounting to Rs. 43,000;

(2) that on the 3rd December 1918, he became so anxious that he left Palghat in search of his debtor, and when he did not find him at his place of business at Tirupur, followed him up to Madras and interviewed him there for some days probably pressing for payment, but not succeeding in getting any very definite arrangement made;

(3) that on 4th December 1918, his debtor's brother a partner in a separate but similar firm went insolvent;

(4) that the Garnishee probably became more importunate, and insisted, as he says, on cash payments, or if that was not possible, on some security for his debt;

(5) that when the debtor left on 7th December 1918 for Tirupur, the Garnishee sent his son, Narayana Aiyar, to continue the pressure on him and his son then clearly, as stated by the debtor himself, got him to agree to give security for his father's debt, made him understand that unless he got a letter to the debtor's agent in Madras arranging for the security, he would not leave him, and himself made some promise that he would get his father, in consideration of this security, to advance the debtor some cash to enable him to stave off the more pressing of his creditors in Bombay;

(6) that while no definite figure of advance was then fixed upon, the debtor in his letter (now lost) to his Madras agent must have mentioned such a promise of advance and probably suggested to his agent to stand out for Rs. 25,000;

(7) that his agent Vijayaraghavachari, when he received this letter, accordingly did so, demanding from Samu Patter an advance of Rs. 25,000 for the Bombay creditors, but was put off by Samu Patter, who said, not that there was no undertaking by him to advance money, but that he would pay some advance after the business of the pledge was carried through;

(8) that in order to get his security on December 10th, 1918, the Garnishee had to take over from the Indian Bank a loan of one lakh on pledged goods;

(9) that when Vijayaraghavachari found out that in Maya Nadar's deal on 9th December 1918, the Garnishee himself had benefited to the extent of Rs. 5,000 by having a *hundi* to the amount drawn by him on his debtor honoured, he indignantly called on the Garnishee to make good his promised advance;

(10) that the Garnishee finally in pursuance of the undertaking given by his son, on 13th December 1918 did advance Rs. 15,000 on a pro-note signed by the debtor and another, a substantial merchant, which money was remitted by the debtor to Bombay creditors;

(11) that the debtor was able to carry on his business till 8th January 1919, when Bombay creditors put him into the Insolvency Court, though his Madras creditors were willing to wait;

(12) that there is, until we come to the matter of this pledge, no suggestion that the debtor's methods of business were underhand or that his failure was due to any unscrupulous or fraudulent methods but solely to the slump in the piece-goods prices at the time, and that the failure might have been avoided if prices had recovered;

(13) that it was then difficult for any one to decide whether prices would or would not recover, while the Madras creditors were willing to give the debtor time to allow them to recover, and it is apparent that the piece-goods were not considered valueless or the Garnishee would not have incurred a further debt of one lakh on them.

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On these facts I have to decide whether the Official Assignee has established a proof that the security given by the debtor to the Garnishee one month before his insolvency was a fraudulent preference under section 56 of the Presidency Insolvency Act.

It appears to me clear on these facts that the debtor's firm on 16th December 1918 was not hopelessly insolvent; that the debtor was genuinely endeavouring to carry on, was trying to raise money to satisfy the more importunate creditors in Bombay, and that the Madras creditors were willing that he should so carry on. It appears to me further that the security secured by the Garnishee was definitely in consideration of a promise by the Garnishee's son to persuade his father to advance the debtor money, not for himself, but for his Bombay creditors, *i. e.*, to assist in tiding him over the crises and that as a matter of fact, that promise was carried out later by the Garnishee.

I cannot accept the learned Advocate-General's contention that the advance of Rs. 15,000 had nothing to do with the security given to the Garnishee. The fact that he was amply secured for that advance cannot affect the view that the debtor had already a promise of an advance when he agreed to the Garnishee's previous debt being secured, and I do not think that the Garnishee would have advanced a further sum even on adequate security to a man *ex hypothesi* hopelessly insolvent, unless he had some previous consideration therefor.

Nor can I agree that the debtor was hopelessly insolvent, and, therefore, the preference given to Samu Patter must have been actuated by some ulterior motive to prefer him at the expense of other creditors, though no doubt he was unable to pay from his own money his debts as they fell due. I have shown that even a month later than the date of the giving of the security, the Madras creditors were willing to give the debtor a chance of recovery. This fact, *viz.*, that the debtor was trying to keep his feet, coupled with the following, that the propelling force towards this arrangement came from the Garnishee, that the debtor had given the security in return for some definite promise of advance to enable him to stave off the Bombay creditors, and that he used the advance for that very purpose, and not

for himself, that no close connection of friendship or anything but a long business relationship is found as between the debtor and the Garnishee, people of wholly different castes, lead me to conclude that the giving of the security was induced in the mind of the debtor by pressure from the Garnishee, and by a promise that, if he gave it, he would obtain some money to enable him to stave off the threatened insolvency. These, to my mind, were the dominant motives in the debtor's mind, not any idea of conferring a favour on the Garnishee at the expense of his creditors but rather a real and genuine hope that in the outcome the giving of the security to this Garnishee would result in the recovery of his business to the benefit of all his creditors.

The law on the point is clear, see *Sharp v. Jackson* (1) and the *Official-Assignee of Madras v. T. B. Mehta & Sons* (2), where the dominant motive is not to prefer one creditor at the expense of the rest. Section 56 has no application and the obligation incurred by the debtor is lawful and must be upheld in a Court of Law.

I, therefore, agree that the appeal must be allowed with costs here and below, (costs in the original Court to be on the higher scale).

V. N. V.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1531 OF 1922.

January 5, 1923.

Present:—Mr. Justice Rafique and
Mr. Justice Lindsay.Musammat SHIB DEI—PLAINTIFF
—APPELLANT

versus

Musammat KANIZ FATIMA AND
OTHERS—DEFENDANTS—RESPONDENTS.*Construction of document—Wajib-ul-arz—Record of custom or contract.*

A village confiscated by the Government during the Mutiny was re-granted to a single individual. At a subsequent Settlement a record was made in the *wajib-ul-arz*, purporting to be a record of a custom of pre-emption in the village:

M. & S. M. RY. CO. v. K. RANGASWAMY CHETTY.

Held, that having regard to the history of the village there could not have been a custom of pre-emption in existence at the time of the re-grant and that the record must be deemed to be a record of contract and not of custom.

Second appeal from a decree of the Subordinate Judge, Muzaffarnagar, dated the 14th of July 1922.

Mr. K. C. Mital, for the Appellant.

JUDGMENT.—The lower Appellate Court has held in these three pre-emption suits that the plaintiff pre-emptor was not entitled to succeed on the ground that no custom of pre-emption is proved in the village.

According to what is set out in the lower Appellate Court's judgment, this village was confiscated by the Government during the Mutiny and a re-grant was made in the year 1859, when practically the whole village was granted to Uday Ram, with the exception of a small share amounting to one *biswa* odd. The learned Judge was, therefore, right in holding that when the re-grant was made, in the circumstances above mentioned, there could not have been any custom of pre-emption in existence. It seems that at some subsequent settlement made by M. Nasir Ali Khan, a record was made in the *wajib-ul-az* which purports to be a record of custom, but, as the learned Judge of the Court below observes, having regard to the history of the village, this record must be deemed to be a record of contract and not of custom.

It is argued that the lower Appellate Court has decided the case on a ground which was not taken in the First Court. That is not correct. It seems that the defendant raised the plea in the First Court that there was no custom of pre-emption at all. The Court of first instance did not decide this question but decided that, in any case, if there was a custom it could not relate to resumed *muafi* lands as the lands in suit. If, however, the plaintiff went in appeal to the Court below and raised the question of the existence of custom, he cannot complain if the learned Judge has decided the point, even if that decision is against him. We think that the decision of the Court below is correct in all these three appeals and we dismiss the three appeals under O. XLI r. II.

N. K.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 301 OF 1922.

March 16, 1923.

Present:—Mr. Justice Phillips.

THE M. & S. M. RY. CO. LTD.—

PETITIONERS

versus

K. RANGASWAMY CHETTY AND
ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s. 91—Railways Act (IX of 1890), s. 72 (3)—Delivery of goods by seller to Railway for consignment to buyer—Property in goods—Seller's right to sue for damages.

Where a seller delivers goods to a Railway Company for consignment to the buyer, the property in the goods passes to the buyer under section 91 of the Contract Act and the latter alone can sue the Railway Company for damages caused by non-delivery.

Dawes v. Peck, (1799) 8 T. R. 330; 3 Esp. 12; 101 E. R. 1417, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge, Salem, in Small Cause Suit No. 333 of 1921.

Messrs. *Brightwell* and *Morseby*, for the Petitioners.

Messrs. C. *Rajagopalachari* and V. N. *Sama Rao*, for the Respondents.

JUDGMENT.—So far as the goods bought from Kaveri Chetty are concerned, it is obvious that plaintiffs can claim no damages and this is practically conceded in argument. Under section 91 of the Indian Contract Act the other goods had been delivered to Munisami Chetty and properties in them had passed to him. Plaintiffs in consigning the goods, some of which had never been their property, only acted as Munisami's agents. If the property had passed from plaintiffs they have sustained no loss by the non-delivery of the goods and consequently no damages. *Dawes v. Peck* (1) is authority for holding that consignee alone can sue in such a case and it does not seem to me that section 72 (3) of the Indian Railways Act has any application here for the responsibility of the Railway Company is not affected, but that responsibility is to the consignee and not to his agent, the consignor.

The petition is allowed and plaintiff's suit is dismissed with costs throughout.

V. N. V.

Petition allowed.

(1) (1799) 8 T. R. 330; 3 Esp. 12; 101 E. R. 1417.

SHAURAN BIBI V. ABDUS SAMAD.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 117 OF 1922.

April 11, 1923.

Present:—Mr. Justice Banerji, and Mr. Justice Gokul Prasad.

Musammal SHAURAN BIBI AND ANOTHER

—PLAINTIFFS—APPLICANTS

versus

ABDUS SAMAD AND OTHERS—OPPOSITE

PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5—Application for leave to sue as pauper—Evidence on plaintiffs' title, whether can be taken.

In an application for leave to sue as a pauper, the Court is not entitled, before deciding whether to grant or refuse the application, to take evidence from the parties upon the question of the plaintiff's title with a view to find out whether the plaintiff has a cause of action. Taking such evidence amounts to exercising a jurisdiction not vested by law. [p. 539, col. 2.]

Jogendra Narayan Ray v. Durga Charan Guha, 52 Ind. Cas. 610; 46 C. 651, relied upon.

Charu Sita Dasi v. Haryan Chandra Mukherjee, 50 Ind. Cas. 520; (1919) Pat. 232; dissented from.

Kamrakh Nath v. Sundar Nath, 20 A. 299; A. W. N. (1898) 36; 9 Ind. Dec. (N. S.) 542 and *Chatterpal Singh v. Raja Ram*, 7 A. 651 (F. B.); A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854, distinguished.

Civil revision against the order of the Subordinate Judge, Gorakhpur, dated the 5th July 1922.

Mr. Shiva Prasad Sinha, for the Applicants.

Messrs. Sankar Saran and Haribans Sahai, for the Respondents.

JUDGMENT.—This is an application for the revision of an order of the Subordinate Judge of Gorakhpur dismissing the application made by the applicants for leave to sue as paupers. The claim was one for recovery of immoveable property by right of inheritance. One of the defendants disputed the title of the plaintiffs to maintain the suit and also denied that the plaintiffs were paupers. The Court below took evidence upon the question of the plaintiffs' title, and after considering that evidence came to the conclusion that the plaintiffs had no right to maintain the suit. It also was of opinion that the plaintiffs' pauperism had not been established. On these grounds the application was rejected. The first contention before us is that the Court in

proceeding to try the question of the plaintiffs' title exercised a jurisdiction not vested in it by law. In our opinion this contention is well-founded. Order XXXIII of the First Sch. to the Code of Civil Procedure lays down the procedure to be followed upon an application being presented to the Court for leave to sue as a pauper. Rule 5 of that Order specifies the grounds upon which the application may be rejected, and one of those grounds, as mentioned in clause (d) of the rule, is that the allegations do not show a cause of action. Rule 6 provides that if the Court does not reject the application on any of the grounds mentioned in rule 5, it should proceed to take evidence upon the question of pauperism. The only matter in regard to which evidence may be taken is the question of pauperism as provided in rule 6. Rule 7 provides that on the day fixed arguments may be heard and the evidence produced may be considered and the Court may grant or refuse the application. The only matter in regard to which evidence may be taken is, as stated above, that mentioned in rule 6, that is to say, the question of the pauperism or otherwise of the applicant. In our opinion clause (d) of rule 5 enables the Court to reject the application if upon the allegations made by the applicant in the plaint or in his deposition as recorded under rule 4, no cause of action is shown. It does not empower the Court to try the question of the plaintiffs' title after taking evidence on that question and in fact to try the suit on the merits, before the application for leave to sue is granted. In our opinion if, upon the allegations contained in the plaint and in the deposition of the plaintiff as recorded under rule 4, it appears to the Court that the plaintiff has no cause of action for maintaining the suit, the application may be rejected, but we do not think that the law contemplates that there should be a regular trial of the question of title upon taking evidence from both parties before the application is granted or refused. It would be prejudging the case if such evidence were taken. This view is in consonance with the decision of the Calcutta High Court in *Jogendra Narayan Ray v. Durga Charan Guha* (1). Our attention

(1) 52 Ind. Cas. 610; 46 C. 651.

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has been drawn to a ruling of the Patna High Court in *Charu Sila Dast v. Haran Chandra Mukherjee* (2). If the learned Judges who decided that case intended to lay down the rule that, in order that the Court may be satisfied that the plaintiff has a subsisting cause of action, the Court may take evidence upon the merits of the case, we are unable with great respect to agree with them. The learned Vakil for the opposite party relied upon the decision of this Court in *Kamrakh Nath v. Sundar Nath* (3). That case is, in our opinion, distinguishable from the present case. In that case what was held was that the Court should reject the application if on the statements which are placed before the Court it appears that the plaintiff has no subsisting right of suit. It was not held in that case that the Court might take evidence for the purpose of determining whether the plaintiff had the alleged right of suit. That was not a case in which any evidence had been taken. Apparently, the plaintiff was examined and, upon a consideration of the statements made by him in his examination, the Court came to the conclusion that no right to bring the suit was shown. That case, therefore, does not afford us any guide in the matter now before us. An earlier Full Bench ruling of this Court in *Chattarpal Singh v. Raja Ram* (4) was referred to by the learned Judges in their judgment. There the question was whether the only point upon which the Court could refuse the application was the absence of jurisdiction to entertain the suit. According to the wording of clause (d) of rule 5 of the present Code no question of jurisdiction can arise. What has to be seen is, whether upon the allegations made by the plaintiff, that is, the allegations contained in the plaint and in the plaintiff's examination under rule 4, a cause of action is disclosed. If these allegations did not show a cause of action the Court was bound to reject the application. But in our judgment the Court is not entitled to take evidence from the parties upon the

question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application. We think that in the present case in taking evidence on the question of title the Court exercised a jurisdiction not vested in it by law. As to the pauperism of the plaintiffs the Court below makes some general observations to the effect that the pauperism of the plaintiffs was not proved. The Court did not consider the evidence placed before it upon the question whether the plaintiffs had the means to pay the amount of Court-fee requisite for the institution of the suit. The learned Subordinate Judge said that in another suit the plaintiff had paid a large fee to a certain Pleader. It also said that she owned two sewing machines but it did not consider the value of the sewing machines, nor did it consider any point about the means of the plaintiffs to pay the requisite amount of Court-fee. In our opinion the question of pauperism was not tried by the Court below. Therefore, we hold that, in trying the question of title, the Court exercised a jurisdiction not vested in it by law and in not trying the question of plaintiff's pauperism it did not exercise the jurisdiction which was vested in it. We, accordingly, allow the application, set aside the order of the Court below and send back the case to that Court in order that the question of the pauperism of the applicants may be determined. We may mention that when notice was issued to the Government Pleader as to the pauperism of the plaintiffs no objection was put forward on behalf of the Government. This was a matter which the Court should also have taken into consideration. Costs here and hitherto will be costs in the cause.

M. A. A.

Application allowed.

(2) 50 Ind. Cas. 520 ; (1919) Pat. 232.

(3) 20 A. 299 ; A. W. N. (1898) 36 ; 9 Ind. Dec. (N. S.) 552.

(4) 7 A. 661 (F. B.) ; A. W. N. (1885) 156 ; 4 Ind. Dec. (N. S.) 854.

KANNIAPPA MUDALIAR v. CHINNASAMI CHETTIAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 882 OF 1922.

March 5, 1923.

Present:—Mr. Justice Krishnan.

KANNIAPPA MUDALIAR—

RESPONDENT NO. 1.—PETITIONER

versus

B. CHINNASAMI CHETTIAR AND AN-
OTHER—PETITIONER & RESPONDENT NO. 2

—RESPONDENTS.

Madras District Municipalities Act (V of 1920)
—Local Rules—Rules 13, 14, 15—*Municipal Election—Absence of initials of Polling Officer on ballot paper—Vote, validity of.*

Under the rules framed by the Governor-in-Council for the conduct of Municipal elections under the Madras District Municipalities Act, a properly recorded vote by a duly qualified voter cannot be treated as invalid and rejected on the sole ground that the ballot paper did not bear the Polling Officer's initials as required by rule 14 (1). [p. 540, col. 1.]

Rule 14, clause (1), is not a mandatory rule, the infringement of which will render the vote necessarily invalid. The rule is intended to identify the ballot paper as one given by the Polling Officer and where such identity can be established by other evidence, the absence of initials may be disregarded. [p. 541, col. 2.]

Rules 13 to 15 are intended to enable a duly qualified voter to give his vote secretly and freely on the ballot paper supplied to him by the Polling Officer to the candidate he approves of. Where this object is shown to have been attained in spite of the infringement of any rule, such infringement cannot justify the rejection of the vote more particularly when the infringement is not by the voter but by the Polling Officer. [p. 541, col. 2.]

Shyam Chand Basak v. Chairman of the Dacca Municipality, 53 Ind. Cas. 741; 47 C. 524; 30 C. L. J. 270; 24 C. W. N. 189, distinguished.

Ackers v. Howard, (1886) 16 Q. B. D. 739; 55 L. J. Q. B. 233; 54 L. T. 651; 34 W. R. 609, *Islington case*, (1901) 5 O' M. & H. 125, relied on.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order dated 8th December 1922, and made in O. P. No. 6 of 1922, on the file of the Court of the Subordinate Judge, Chingleput.

Messrs. T. R. Ramachandra Ayyar and S. Srinivasa Ayyar, for the Petitioner.

Mr. A. Krishnaswamy Aiyar, for the Respondents.

JUDGMENT.—This revision petition arises in connection with the election of a Councillor for Ward No. 5 of the Conjeevaram Municipality in October last. The petitioner

before me Mr. Mudaliar and the first respondent Mr. Chettiar were rival candidates. The latter got 2 more votes than the former and would in ordinary course have been declared elected but the Chairman held 2 of his votes to be invalid on the ground that the ballot papers on which such votes were recorded, Exhibits A and B, did not bear the initials of the Polling Officer as required by rule 14 clause (1) of the Rules framed by the Governor-in-Council for the conduct of Municipal elections and published in the *Fort St. George Gazette* as Notification No. 1120, dated 23rd November 1920. Having done so, he proceeded to act under rule 28 and draw lots as the number of votes for the two candidates had become equalised, and as the drawing resulted in Mr. Mudaliar's favour he declared him duly elected. Thereupon Mr. Chettiar filed an Election Petition before the Subordinate Judge of Chingleput claiming that the 2 votes in question were valid ones and were wrongly excluded. The learned Subordinate Judge has found as a fact that the two votes were actually given by two duly qualified voters who voted at the election and that the ballot papers, Exhibits A and B, themselves were the outerfoils of two counter-foils in the voting paper book kept by the Polling Officer and that there could be no question that the votes were genuine votes recorded by 2 voters entitled to vote. The only objection urged to the reception of these votes was, as already stated; that they did not bear the Polling Officer's initials. No other rule or provision is said to have been infringed. In these circumstances, the Subordinate Judge held that it was wrong to reject the votes as invalid and that they should be counted in Mr. Chettiar's favour. That made the number of votes in his favour larger than the number Mr. Mudaliar got. Consequently, he set aside Mr. Mudaliar's election and declared Mr. Chettiar as properly elected. The revision is against that order.

From what is stated above, it is clear that the question to be considered is, whether a vote is to be treated as invalid and rejected on the sole ground that it does not bear the Polling Officer's initials even though it is a properly recorded vote by a duly qualified voter. The decision of the point is obviously material in the present case

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as the result of the election entirely turns on it.

The learned Vakil for the petitioner contends that the mere absence of the Polling Officer's initials on the ballot paper is sufficient by itself to invalidate the vote and he relies upon the ruling in *Shyam Chand Basak v. Chairman of the Dacca Municipality* (1). In that case the question was not one of the invalidity of a vote given at an election properly held as here, but of the invalidity of the whole election itself on the ground of its having been held out of the proper hours fixed for it. There the election was begun later and continued later in the morning and begun earlier in the afternoon than the time fixed for it. The question before the learned Judges was, whether that irregularity vitiated the election *in toto*. After an elaborate discussion of the case laid on the point, the learned Judges held that the condition infringed was not a mandatory one and that the election could be upheld if it was shown that its result was not affected by the error or irregularity committed, the burden to prove which was on the person supporting the election but that, if there was reasonable ground to believe that the result was affected by the irregularity the Court should set it aside. If I may say so respectfully, I entirely agree with the views expressed in this case. Though the ruling is not strictly in point as we are dealing with a case of a vote being challenged and not the election itself, the principles laid down may be applied to the present case and, applying them, it will follow that if nothing more appeared than that rule 14, clause (1), was infringed as regards the two votes, that would be a *prima facie* ground for rejecting those votes; but if it is proved by evidence that the votes were given by duly qualified voters on ballot papers supplied to them by the Polling Officer they should not be rejected. In this case, such evidence is forthcoming and the learned Subordinate Judge has found that the votes are genuine and I must accept that finding in revision; on that finding I am of opinion that the Sub-

ordinate Judge's view that the votes should be counted is correct.

I do not consider rule 14, clause (1), as a mandatory rule the infringement of which will render the vote necessarily invalid. The rule is evidently intended to identify the ballot paper as one given out by the Polling Officer. If, as in this case, the paper can be so identified by other evidence the absence of initials may, I think, be disregarded. The difficulty in any particular case will be to prove such identity.

Rules 13, 14 and 15 show how votes are to be recorded. When a person presents himself to vote he is given, under rule 13, a signature slip on which his name and number in the Electoral Roll are entered and which he has to sign or put his thumb impression, if he is illiterate. The Polling Officer files the slip if, as in this case, there is no question of the voter's identity. Under rule 14 the voter is then given a ballot paper with the initials of the Polling Officer on its back and the Polling Officer has also at the same time to enter the voter's number on the Electoral Roll in the counter-foil and put his initials against his name in the Electoral Roll. Under rule 15, the voter who has got the ballot paper secretly puts a mark against the name of the candidate he votes for and folds and deposits the paper in the ballot box. These rules are evidently intended to enable a person who is a duly qualified voter to give his vote secretly and freely, on the ballot paper supplied to him by the Polling Officer, to the candidate he approves of. So long as this object is shown to have been attained in spite of the infringement of any rule, such infringement cannot, I think, justify the rejection of the vote; more particularly when the infringement is not by the voter but by the Polling Officer for whose default he cannot properly be held responsible.

Rule 17 provides what irregularities necessarily invalidate a vote; there is no reference in this rule to the failure on the Polling Officer's part to initial as required by rule 14 as invalidating a vote. It is clear, therefore, that rule 14 is not a mandatory rule, the non-compliance with any part of which would necessarily invalidate a vote. In the corresponding Ballot Act of 1872 in England there is a provision in Part I

(1) 53 Ind. Cas. 741; 47 C. 524; 30 C.L.J. 270; 24 C. W. N. 189.

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section (2) which requires the ballot paper to be officially marked on both sides and the second paragraph of that section says that any ballot paper that has not the official mark on its back shall be void and not counted. A question arose in England whether the absence of the official mark on the front of the ballot paper would vitiate a vote or not in the case of *Ackers v. Howard* (2). Their Lordships held that a ballot paper conforming in other respects to the requirement of the Ballot Act was not void because it has not the official mark on its face. That case is very similar to the one before us. In the *Islington* case (3), it is observed by Kennedy, J., that "an election ought not to be held void by reason of the transgressions of the law committed without any corrupt motive by the Returning Officer or his subordinates in the conduct of the election, where the Court is satisfied that the election was, notwithstanding these transgressions, an election really and in substance conducted under the existing Election Laws, and that the result of the election, that is, the success of the one candidate over the other, was not, and could not have been, affected by these transgressions." It may be said with equal force and justice that a vote ought not to be held void on account of the mistake of the Polling Officer, in the conduct of the election made without any corrupt motive, where the Court is satisfied that the vote was really given in substantial accordance with the Election Rules by a duly qualified voter to a candidate.

For the above reasons, I would hold that on his findings of fact the Subordinate Judge's view is correct and dismiss this civil revision petition with costs.

V. N. V.

Petition dismissed.

(2) (1886) 16 Q. B. D. 739; 55 L. J. Q. B. 233; 54 L. T. 651; 34 W. R. 609.

(3) (1901) 5 O' M. & H. 125.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 164

OF 1920.

APRIL 11, 1923.

Present:—Justice Sir John Bucknill, Kt.,
and Mr. Justice Ross.

Babu RAM BAHADUR SEN—

DEFENDANT—APPELLANT

versus

Mahanth GANESH BHAGAT—

PLAINTIFF AND ANOTHER—DEFENDANT—
RESPONDENTS.

Construction of document—Document making mention of executant's heir—Intention to convey title—Hindu Law—Reversioner, interest of, nature of—Reversioner, whether can assign or bind interest—Family settlement, principles applicable to—Minor, whether bound—Arbitration—Minor—Award based on misapprehension, whether binding.

A Hindu lady who had an absolute estate in certain property executed a *mukhtarnama* in favour of one G, her son-in-law, which contained the following clause: "My daughter's son R is my heir, but he is now a minor and is unable to manage the village and Court affairs personally. I, the executant, am a *parda nashin* lady, and it is impossible for me to manage the village and Court affairs unless I appoint a general agent. Therefore, of my own accord, and free will I have appointed G, as my general agent. This *mukhtarnama* shall remain in force until my grandson R attains his majority. On attaining his majority he shall either look after his affairs personally, or appoint a *mukhtar*." ¹

Held, (1) that the whole object of the power-of-attorney was simply to arrange that as R, whom the executant, believed to be her heir was a minor, and as she herself was unable to manage her affairs personally, G, who was R's father, should look after the estate until the latter attained his majority; [p. 549, col. 1.]

(2) that the expression "my daughter's son R is my heir" was merely a statement of belief and was not intended to convey title; [p. 549, col. 1.]

(3) that the expression "on attaining his majority he should either look after his affairs personally or appoint a *mukhtar*" did not, and was not intended definitely to, confer any right, but was merely a statement of what would take place in normal course on the assumption that in law R was the executant's heir; [p. 549, col. 1.]

(4) that, therefore, the clause in the power-of-attorney was not a Will or a disposition of property in any sense, nor could it be regarded in any way as a declaration of trust conveying any definite rights. [p. 549, col. 1.]

A Hindu reversioner has no right or interest *in presenti* in property which a female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot

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bargain with it on his behalf or bind him by any contractual engagement in respect thereto. [p. 552, col. 1.]

Amrit Narayan Singh v. Gaya Singh, 44 Ind. Cas. 408; 27 C. L. J. 296; 23 M. L. T. 142; 22 C. W. N. 409; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 C. 590; 45 L. A. 35 (P. C.), followed.

When a dispute with regard to the rights of the members of a family has been settled by a fair compromise, such compromise will be upheld by the Court, although perhaps resting upon grounds which would not have been considered satisfactory if the transaction had been between strangers, but it must be established that the right compromised could at least have formed the subject-matter of a claim, though a doubtful claim. [p. 553, col. 1.]

A reversionary heir, however, who has only a *spes successionis* cannot enter into a compromise with regard to such interest as he may have in the estate of the person whose reversionary heir he claims to be. [p. 553, col. 1.]

But a compromise of a doubtful claim by the holder of a limited interest binds the reversionary heir if it is established that the compromise was a fair and honest one and that the limited holder entered into the transaction as representing the estate and for the protection of the estate and not as representing herself and for her own protection. [p. 553, col. 1.]

Whenever a question is raised whether a transaction is an alienation or a compromise of a doubtful claim the true test to apply is to see whether the alienee derives title from the holder of the limited interest. Where a transaction is based on the assumption that there was an antecedent title of some kind in both the parties and the agreement acknowledges and defines what that title is, the transaction is not an alienation but a compromise of a doubtful claim. [p. 557, col. 1.]

Bhagwati Kuer v. Jagannath Sahay, 62 Ind. Cas. 933; 6 P. L. J. 604; 2 P. L. T. 471, followed.

A family arrangement might be upheld even though there were no rights actually in dispute at the time of making it, and the Courts will not be disposed to scan with much nicety the *quantum* of consideration. [p. 554, col. 1.]

It is a mistake to suppose that the doctrine of family settlement extends no further than arrangements for the settlement of doubtful or disputed rights. The principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace but also to cases in which arrangements are made between them for the preservation of its property. [p. 554, col. 1.]

Helan Das v. Durga Das Mundal, 4 C. L. J. 323, relied on.

Williams v. Williams, (1867) 2 Ch. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657; *Satya Kumar Banerjee v. Satya Kirpal Banerjee*, 3 Ind. Cas. 247; 10 C. L. J. 503 and *Satis Chandra Ghosh v. Kaldasi Das*, 68 Ind. Cas. 577; 34 C. L. J. 529; 26 C. W. N. 177; (1922) A. L. R. (C.) 203, referred to.

In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or

any similar ground, a family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from. If the parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of them more than that which he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them. [p. 554, col. 2.]

There is nothing in this doctrine of family arrangements opposed to the general principle, that, when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate an arrangement in the case of adults; but when there is no defect of this nature the settlement of a doubtful claim is of as much advantage to a minor as to an adult and where a genuine dispute has been fairly settled, the dispute cannot be re-opened solely on the ground that one of the parties to the family arrangement was a minor. [p. 555, col. 1.]

Keramutulla Meah v. Keramutulla Meah, 49 Ind. Cas. 886; 23 C. W. N. 118, relied on.

Hardeo Sahai v. Gauri Shankar, 28 A. 35; 2 A. L. J. 493; A. W. N. (1905) 171; *Srinath Bose v. Nibaran Chandra Roy*, 53 Ind. Cas. 945; 25 C. W. N. 859; *Kanhai Lal v. Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 L. A. 118 (P. C.), *Beni Prasad v. Lajja Ram*, 35 Ind. Cas. 63; 38 A. 452; 14 A. L. J. 438 and *Ram Niranjun Singh v. Prayag Singh*, 8 C. 138; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 88, referred to.

Where there is in the minds of both parties to an arbitration, and of the arbitrators, a complete misapprehension as to the true, legal position of the parties, and this misapprehension is the cause of the non-inclusion for consideration in the arbitration proceedings of the legal rights of some of the parties, the award is bad and is not binding on the parties. [p. 553, col. 2.]

(Case-law discussed.)

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family settlement under consideration. [p. 553, col. 2.]

In some cases in which although as an arbitration proceeding the result of an award cannot be supported it is still capable of support on the ground that the award represents what is in effect the outcome of a family compromise. [p. 553, col. 2; p. 554, col. 1.]

Defendant No. 1, a Hindu minor, had a reversionary interest in the property in dispute. His mother, acting on his behalf, agreed to refer the dispute to arbitration, but neither in the agreement of reference nor in the course of the arbitration proceedings were the true legal position and rights of defendant No. 1 put forward or considered,

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The arbitrators finally gave an award which had the effect of retarding the vesting in the defendant No. 1 of his reversionary interest for an indefinite period after the date when in law it should vest in him:

Held, (1) that the award being based on a complete misapprehension of the legal position and rights of defendant No. 1 was bad in law and was not binding on him; [p. 558, col. 1.]

(2) that the award could not be held binding on defendant No. 1 as a family settlement inasmuch as the result of the award was that the reversionary interest of the minor was affected in a manner very prejudicial to him and that no acquiescence on the part of his mother could make the award binding on defendant No. 1. [p. 558, col. 1.]

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 17th May 1920.

Messrs. G. C. Das and B. N. Mitter, for the Appellant.

Messrs. M. Lall and N. K. Prasad II, for the Respondents.

JUDGMENT.

Bucknill, J.—This was a first appeal from a decision of the Subordinate Judge of Muzaffarpur dated the 17th May 1920.

The facts are very simple.

A lady named Rani Bigya Kumari Devi, the widow of one Raja Pirthipartap Sen, owned the *lakhrājbrīt* right in the entire 16 annas of two *mouzas* called Langri and Bastha in Tappa Ramgir, Parganna Manjhowā, in the Champaran District, which are the properties in dispute; she died in 1901 or 1902.

She had a daughter Prem Kumari Devi who married one Babu Gambhir Singh, she died in 1908; her husband predeceased her. They had a daughter and a son, the former called Bishun Kumari Devi and the latter Raja Rajkumar Singh. Bishun Kumari Devi married one Sri Parkash Sen and had two sons Babu Ram Bahadur Sen (who is a minor and is the defendant 1st party in this suit being represented by his guardian one Bachu Babu alias Bachu Singh who was so appointed in 1918 by the Court of the District Judge, Muzaffarpur) and Babu Shyam Bahadur Sen who died a minor before suit. Bishun died about 1917; Sri Parkash Sen is the defendant 3rd party in this suit.

Raja Rajkumar Singh married one Rani Sri Kumari Devi: they had no issue: he died in 1902 and his widow is the defendant 2nd party in this suit. Neither the 2nd nor 3rd party defendants entered appearance.

The above observations show who the defendants are. The plaintiff's position may be thus explained. As a result of certain occurrences—the legal effect of which is really the issue in this litigation—Rani Sri Kumari Devi, the defendant 2nd party who, after her husband's death, had, in 1905, already executed a *thica patta* in favour of a Mr. S. E. Coffin in respect of the *mouzas* in suit, found herself in 1908 with what purported to be a life interest in the property and, omitting immaterial intermediate transactions, in 1912, she executed a "*sadhua putana*" (usufructuary mortgage) deed under which this Mr. Coffin (who was part proprietor of the Bhusrari Indigo Factory) continued in possession of the estate: she borrowed in 1916 Rs. 8,000 and in 1917 Rs. 3,500 from the plaintiff on mortgage-bonds, and, finally, in 1918 executed in favour of the plaintiff a *rehan*-deed (usufructuary mortgage bond) for Rs. 22,250: out of this sum about Rs. 5,700 were borrowed for the purpose of enabling the sum due to Mr. Coffin, who did not wish to remain any longer in possession of the property, to be paid off; about Rs. 14,300 were set aside to liquidate the amounts due to the plaintiff under the two mortgage-bonds to which reference has just been made above; whilst the balance, amounting to some Rs. 2,300, was lent by the plaintiff to the defendant in order to meet, as was alleged to be the case with the two previous loans made to him by her, her "legal necessities". The plaintiff in 1918 thus purported to be entitled to possession of the property as a *zarpeshgidar*. In the meantime, however, Bachu Babu alias Bachu Singh had obtained in 1918 from the District Judge of Muzaffarpur a grant of a certificate of guardianship of the defendant 1st party; a dispute arose between him and the plaintiff in connection with the possession of the properties which culminated in 1919 in proceedings under section 145 of the Criminal Procedure Code this quarrel was decided in favour of Bachu Singh who is in possession. Hence this suit,

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The plaintiff claimed the following reliefs :—

1. That upon adjudication of the *lakhrāj brit* right of the defendant, 2nd party, and the *zarpeshgi* right of the plaintiff under the defendant 2nd party, and want of title of the defendant 1st party in the properties in suit, a decree awarding possession of the same might be passed in favour of the plaintiff and that he might be put in possession thereof by dispossessing the defendant 1st party.

2. Mesne profits.

3. Costs with interest.

4. Such other relief as the plaintiff might be deemed entitled to.

The Subordinate Judge decreed the suit in favour of the plaintiff. The defendants 2nd and 3rd party did not appear although duly served; the defendant 1st party was ordered to pay the plaintiff's costs. Now it is necessary to see what the defence to the plaintiff's claim was as put forward by the defendant 1st party in his written statement. He claimed, in effect, that under a Will dated the 8th February 1908, his mother's mother bequeathed to him and his now deceased brother, Shyam Bahadur Sen, all the properties of *Musummat* Bigya Kumari Devi which had devolved upon his mother's mother as her heir. He also maintained that the occurrences, as the result of which his uncle's widow (the defendant 2nd party) found herself in possession of the property, had no legal binding effect upon himself (the defendant 1st party). Incidentally, he denied that she was under any legal necessity to borrow any amount whatsoever. He further traversed the allegation that the plaintiff was really ever in possession of the properties as a *zarpeshgidar* or otherwise.

It is now necessary to turn to examine those occurrences by which the defendant 2nd party found herself in possession of the property and was able to execute these deeds purporting to deal with the property by way of usufructuary mortgage. It may, at the outset, be desirable to state that there is now no dispute as to what, in the absence of any of these occurrences, would have been the normal devolution of the property. It is admitted that Rani Bigya Kumari Devi had a complete estate in the property,

it is agreed that, on her death, a life interest only in it would descend to her daughter, Prem Kumari Devi; it is also admitted that as Prem Kumari's son died prior to her death the property would devolve upon her daughter, Bishun Kumari Devi, who, again, would have only a life interest therein and that, finally, it would descend to the defendant 1st party.

The first of the occurrences which took place, however, was that on the 18th of October 1894 Rani Bigya Kumari Devi executed a *mukhtarnama* in favour of Babu Ghambir Singh, the husband of her daughter, Prem Kumari Devi. This document which is Exhibit 16 is of considerable importance in this case but it is unnecessary to set it out in full detail. It recites that the executant had many business transactions and much litigation in connection with her estate and, after these recitals, continues "My grandson (daughter's son) Raja Rajkumar Singh is my heir, but he is now a minor and is unable to manage the village and Court affairs personally, I, the executant, am a *parda-nashin* lady and it is impossible for me to manage the village and Court affairs unless I appoint a general agent. Therefore, of my own accord and free will, I have appointed Babu Gambhir Singh as my general agent..... This *mukhtarnama* (general power-of-attorney) shall remain in force until my grandson Raja Rajkumar Singh, attains his majority. On attaining his majority he shall either look after his affairs personally or appoint a *mukhtar*." The executant affixed her mark in the presence of one Badri Lal. Two other persons appear to have witnessed the document which was written out by a scribe; the document was registered in due course. Now, one of the questions which arises in this case is, as to whether this document created and title to the property in favour of Raja Rajkumar Singh. It is admitted that at that date the executant could have disposed of all her property by gift or by Will; it is also admitted that, if she made no gift nor Will, the property (which was her own *ajantuk strikhan*) would have descended to her daughter, Prem Kumari Devi, and not to her daughter's son, Raja Rajkumar Singh. It is also admitted that the document shows that the executant was under the impression that Raja Rajkumar Singh was her heir. The

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Subordinate Judge has found that this document did not create any title in Raja Raj-Kumar Singh. Gambhir Singh apparently, accordingly, looked after the property. Rani Bigya Kumari Devi died in 1901 or 1902. In 1908 on the 8th of February, Prem Kumari Devi made a Will (Exhibit A); in this Will, after reciting that her mother owned various properties she referred to the fact that her mother had executed a general power-of-attorney in favour of her (the testatrix's) husband Gambhir Singh. She also recited that, as her mother had no son, all her mother's acquired properties were given to her (the testatrix) as *stridhan* and that she and her husband had been, since the death of her mother, looking after the estate, she being the absolute proprietress thereof. The testatrix further recited that her own son Rajkumar Singh had died during his minority and, then, stated that, out of love and affection for her two grandsons (who she states will be, after her own death, her heirs) and fearing that there might be disputes over the estate after her death, she bequeathed all her properties to them. She further stated that, if she (the testatrix) should die whilst they were still minors, their father, Sriparkash Singh, as general agent, should look after the property on their behalf. It is, again here, now common ground that the testatrix was under a misapprehension in thinking that she had more than a life interest in the property assuming that it came to her on her mother's death. It is also common ground that the defendant party has always been under the impression that he obtained title under this Will. Not long after the execution of this Will Prem Kumari Devi died and, almost immediately, disputes arose which seems to have been referred in the first instance to the manager of the Court of Wards, Bettiah Raj, who suggested that the disputing parties should refer the matter to arbitration. Rajkumar's widow, on the one side, and Sri Parkash Singh, on the other, agreed to the appointment of three arbitrators named Munshi Dost Mohammad Khan, Harnandan Dube and Munshi Dasrath Lal. These three gentlemen very wisely thought that it was necessary that before they undertook any investigation there should be drawn up a formal agreement of submission to

arbitration; and this was accordingly done on the 16th of April 1908 by an *ekrarnamah* which is Exhibit 2. This again is a very important document. The opening words read as follows:—

"We are Bishun Kumari Devi, daughter of Babu Gambhir Singh, deceased and wife of Babu Sri Parkash alive, and mother, guardian and next friend of Ram Bahadur Sen and Shyam Bahadur Sen, minors; Sri Parkash Sen, son of Babu Atal Bahadur Sen, deceased; and *Musammam* Rani Sri Kumari Devi, widow, of late Raja Raj Kumar Sen and daughter-in-law of Babu Gambhir Singh, deceased..... There is a dispute going on among us; the executants, about the moveable and immoveable properties acquired by our maternal grandmother, *Musammam* Bighya Kumari Devi, and this is likely to ruin our properties. We have, therefore, in concurrence with one another filed a petition before the manager of the Bettiah Raj for settlement of our dispute and have, according to our choice, appointed three persons, *i.e.*, Harnandan Dube, son of Gopal Dat Dube, deceased, by caste Brahman, by occupation *Zemindar* and service holder, resident of *Mouzah* Bettiah, '*tappa*' Khadda, Munshi Dasrath Lal, son of Munshi Subh Narain Lal, deceased, by caste Kayasth, by occupation a *Zemindar* and (also) a cashier, resident of *Mouza* Hasanpur Mathiya, *Parganna* Dangsi, District Saran, and at present residing at Bettiah, *Mohalla* Ganjdoo; Munshi Dost Muhammad Khan, son of Munshi Chiragh Ali Khan, deceased by caste a Pathan, by profession a *mukhtar*, resident of *Qasha* Bettah-Kalibagh, as arbitrators. Hence, in order to have the dispute settled by the arbitrators and to do away with future dispute, if any it is necessary for us to execute an *ikrar nama* and have it registered. Therefore, of our own accord and free will, in a sound state of mind and body, we make a trustworthy declaration and reduce to writing that the said arbitrators shall (settle our disputes) as regards the properties owned in proprietary interest *maufi*, *lakheraj* *brit* and *zerait* lands, etc., lying in Ramnagar Raj and *thikadari* and *kashikari* rights and cattle, etc., in Bettiah Raj, *i.e.*, all the moveable and immoveable properties and household goods in whatever manner they like,

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never was the slightest idea in the minds of any of the parties concerned that the *mukhtarnama* itself was intended specifically to confer any title to the estate upon him or that it was more than what it ostensibly purported to be, a power-of-attorney. It has, however, been raised before us that the *mukhtarnama* did in law confer title on Rajkumar. I do not think that it did. It has been suggested to us that it is a Will or a declaration of trust either of which conferred upon Rajkumar a title to the property. The phrase which is used by the executant "My grandson" (daughter's son) "Raja Rajkumar Singh is my heir" is, in my opinion, merely a statement of belief and was not intended to convey title. The whole object of this power-of-attorney was simply to arrange that, as Rajkumar Singh, whom the executant believed to be her heir, was a minor and that as the executant herself was unable to manage her affairs personally, Gambhir Singh, a grown man and the minor's father, was appointed to look after the estate until the boy attained his majority. The expression "on attaining his majority he should either look after his affairs personally or appoint a *mukhtar*" does not and was not intended, in my view definitely to confer any right but was merely a statement of what would take place in normal course on the assumption that in law Rajkumar was the executant's heir. The mere fact that the execution of this power-of-attorney appears to have been witnessed by three persons does not seem to me to be material in considering whether the document is of testamentary character. I do not think that it is a Will or a disposition of property in any sense nor do I consider that it is a document which can be regarded in any way as a declaration of trust conveying any definite rights. I cannot think that, in a document of this kind, it can be possibly, with any cogency, suggested that it intended to convey or did convey any title.

The validity of the arbitration proceedings was attacked upon several grounds. The first and least important of these grounds was based upon a suggestion that the ladies did not understand their rights which were not properly explained to them. An attempt was made to indicate that, from the evidence, it did not appear that

the ladies were clearly informed of what was taking place. The cases of *Satis Chandra Ghosh v. Kalidasi Dasi* (1) and of *Kamawati v. Digbijai Singh* (2) were drawn to our attention in this connection in order to show that it is of the highest importance that a Court, when called upon to consider the execution of deeds by a *purda-nashin* lady, must be satisfied that she understood what she was doing. An endeavour was made to show that in this suit there was very little evidence to indicate that the ladies had been made fully acquainted with what was being transacted. In my view this attempt has failed. So far as I can see, from such evidence as there is, there is no reason for thinking that, although they may have been mistaken as to their real legal rights, the submission to arbitration owing to the dispute which had arisen was not fully understood by these ladies.

It was next contended that the award was not really the award of the arbitrators as it was couched in such excellent language as could not have been produced by the three gentlemen who purported to have dealt with the matter. It was suggested that it was really the production of the officers of the Bettiah Raj Court of Wards. I can only say with regard to this idea that I am not in a position to be able to state whether or not in the actual wording of the award the parties were assisted by the officers of the Bettiah Raj but I do not think it would matter much even if that had been the case. All that one can observe is that it is a clear and well phrased document and, although it may have proceeded on mistaken premises, it certainly effected a not unreasonable arrangement. The arbitration proceedings were further attacked on the ground that from the submission to arbitration it was impossible to gather what was the nature of the dispute. Here, again, I am not much impressed by this argument. There was undoubtedly a dispute of a genuine character and although that fact is merely stated

(1) 68 Ind. Cas. 577; 34 C. L. J. 529; 26 C. W. N. 177; (1922) A. I. R. (C.) 203.

(2) 64 Ind. Cas. 559; 26 C. W. N. 490; 43 A. 525; 15 L. W. 1; 30 M. L. T. 471; 42 M. L. J. 87; 24 Bom. L. R. 626; 4 U. P. L. R. (P. C.) 27; (1922) A. I. R. (P. C.) 14 (1922) M. W. N. 336 (P. C.).

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in general terms in the submission, it is quite clear from the award that its nature was very fully explained to the arbitrators.

It was further urged that the award was bad because on its face it was erroneous in matters of law: (*vide* Halsbury's Laws of England, Vol. I, p. 479): The errors in law which are suggested, are that the arbitrators thought that Rajkumar was Rani Bigya's heir and that after his death the property would pass to his widow instead of, as is admitted, originally devolving upon Prem Kumari and on her death upon Bishun Kumari and through her eventually to her sons as reversioners. It was also maintained that the award could not be supported because neither Bishun Kumari's title nor that of her minor sons was ever considered by the arbitrators. It was further contended that, in any case, the minor's reversionary interest could not be dealt with in any way and that the defendant 1st party could not be bound in any way by this award by which it was adversely affected.

I think that there is considerable force in some of these arguments. It is, of course, agreed that where a life tenant and all the reversioners are properly represented *sub jure* the freehold of a property can be affected by their agreement; but it is suggested here that in the arbitration proceedings Bishun Kumari, who was, properly speaking, in law the holder of a life interest, was not aware of and was not represented her own title but was simply acting on behalf of her two minor sons who were the reversioners. On the other hand, it is contended that even if this was the case her interest was in no sense adverse to that of her son and that she properly represented them and that, if she was not aware of or if she chose to sink her own life interest and support only the interest of her sons, such action would not adversely affect the validity of the arbitration proceedings. Reference was made to several cases in connection with this proposition: In *Lansdown v. Lansdown* (3) the facts were as follows:—

There were four brothers; the second died and the eldest entered into possession of the deceased's lands. The youngest of the

four brothers, however, claimed a title whereupon they applied to a school-master who decided in favour of the youngest brother because in his view the lands could not ascend. When the school-master then gave his decision, the eldest brother agreed to divide the estate with the youngest and declared that, although he still thought he had a right of inheritance, he would rather agree to such a division than go to law. The school-master then drew up deeds of lease and re-lease of the moiety which were duly executed by the eldest brother; the youngest brother then died and the moiety descended to his minor son and heir. The eldest brother then brought a suit claiming the property and the Lord Chancellor held that he was entitled thereto on the ground that the deeds of lease and re-lease had been obtained by mistake and misrepresentation. In the case of *Cooper v. Phibbs* (4) it was held that where two parties, under a mistake of fact, enter into an agreement either of them has a title to come to equity to be relieved from it; but that relief will only be given on the principles of good conscience. The basis of the decision in that case is that, where parties had entered into an agreement which had been made in mutual mistake of their rights, either party was at liberty, even though there was no fraud, to have the agreement set aside. According to Halsbury (Laws of England, Vol. I, p. 442) it would seem that in England a submission to arbitration made by an infant could not be enforced against him during his infancy and would be voidable by him on attaining his majority; but that in England such submissions by infants out of Court are very rare. In *In re Roberts; Roberts v. Roberts* (5) it was laid down by the Court of Appeal that a compromise between members of a family of their supposed rights under a Will or other document made after a joint consultation with the family Solicitor acting as an agent for all is, in general, binding upon all the parties even though it may not be quite in accordance with their exact legal rights;

(4) (1867) 2. H. L. 149; 16 L. T. 678; 15 W. R. 1049.

(5) (1905) 1 Ch. D. 704; 74 L. J. Ch. 483; 93 L. T. 253.

(3) (1730) 25 E. R. 441; Mosely 364.

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provided that the Solicitor had, first, fully explained to the parties what those rights are. But, if any one of the parties has entered into the compromise in consequence of what afterwards proves to have been an erroneous view taken by the Solicitor of the facts or of the law or merely because the Solicitor may have considered a compromise would be for the advantage of all parties irrespective of their legal rights, that party may have the compromise set aside. Vaughan Williams, L. J., in the course of his remarks stated: "Generally speaking, we should be disposed to support an agreement of compromise entered into after the parties have jointly consulted the family Solicitor, even though the agreement may not be quite in accordance with the rights of the parties, because we think that, generally, the very object of the compromise is to avoid the necessity of having the exact relative legal rights determined by litigation; but I cannot agree with Kekewich, J., if he means by his judgment that the family Solicitor is entitled to keep those consulting him in the dark as to their rights because he thinks that it is for the advantage of all parties to the compromise, and that if they knew their exact rights there would be no chance of compromise." In the case of *Vithaldas Ganpat v. Dattaram Ramchandra* (6) the circumstances were that the step-mother of a minor, against whose estate the defendants had claims, referred the matter to arbitration, purporting to act on the minor's behalf. No suit had then been filed by or against the minor. An award was made in 1899 directing the minor to pay to the defendants a sum of Rs. 950 and a decree was passed in terms of the award. In the following year the minor, by his next friend, brought a suit to set aside the decree on the grounds (a) that the minor had not been properly represented, and (b) that leave of the Court under section 462 of the Civil Procedure Code (XIV of 1882) had not been obtained. The lower Courts allowed the plaintiff's claim and set aside the decree; but it was held in the High Court of Bombay that the section was not applicable, as, when the agreement was entered into

there was no suit or a guardian for a suit. The case was remanded to the lower Courts for hearing on the merits; the minor's next friend being, presumably, at liberty to show, if he could do so, that the minor had not been at the agreement properly represented by his step-mother. In the case of *Balaji Narayan Gokhale v. Nana* (7) it was held that a manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference, of a dispute with any outsider regarding any family property, to arbitration provided such reference be for the benefit of the family; and that minors in the family are bound by the reference and consequently by the award made upon it. In the case of *Bibee Solomon v. Abdool Azeem* (8) it was held by the High Court that, where a compromise had been entered into affecting adversely the rights of the plaintiff, a minor, in the suit in certain property to which she was entitled by inheritance; such compromise having been sanctioned by the Court under a misapprehension of material facts and such misapprehension having been brought about by culpable ignorance and neglect of duty on the part of those who had entered into the compromise, it could be set aside. In that case the minor had been represented by her mother in a compromise with certain executors who represented the estate of the person from whom the minor derived her inheritance. There had been some uncertainty as to the value of the deceased's property and the compromise resulted in the minor receiving very much less than what she would have received had the executors not been, as the Court thought, culpably ignorant and neglectful in ascertaining the real value of the deceased's estate. But the decision was really based upon the view taken by the Court that the action of the executors practically amounted to a form of fraud.

Perhaps, the most important case which was quoted to us in this connection was that of *Amrit Narayan Singh v. Gaya Singh*

(7) 27 B. 287; 5 Bom. L. R. 95.

(8) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

(6) 26 B. 298; 3 Bom. L. R. 887.

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(9) in which it was held by the Privy Council that a Hindu reversioner has no right or interest in *præsenti* in property which a female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. This decision of their Lordships was given by Mr. Ameer Ali, who, in the course of his decision, observed as follows:—"This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants-respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu Law. Kar Koer died in 1905, and this action was brought in 1908. The suit is, therefore, clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

"On Jhamman's death, Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's Records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent. They claimed the property both under the general Hindu Law as also under some undefined family custom. Their objections were overruled by the Revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother

of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajender Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, the compromise was arrived at, in which also Rajender purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immoveable property of her father, receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate. The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrator ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the Civil Court under the provisions of section 327 of Act X of 1859 (the law that regulated at the time the procedure of the Civil Courts in India) for a decree on the award. The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge. It accordingly dismissed the application of the agnates under section 327. They appealed to the District Judge, who apparently considered that as Rajender, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree 'to have the award filed and enforced under section 327.' From this decision Kar Koer preferred a special appeal to the High Court of Calcutta which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of

(9) 44 Ind. Cas. 408; 27 C.L.J. 296; 23 M. L. T. 142; 22 C. W. N. 409; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 165; 1918 M. W. N. 366; 7 L. W. 581; 20 Bom. L. R. 346; 45 C. 590; 45 I. A. 35 (P. C.).

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these decisions was to put her out of possession of the property covered by the compromise, and which form the subject-matter of the present action."

Mr. Amcer Ali then proceeds to point out that the guardian of a Hindu reversioner cannot bargain with that reversionary interest or bind the minor with any contractual engagement in respect thereof. He further points out that, even if the minor had an existing right, the father could not enter into any arrangement which would bind him and which was not for his benefit. In this Court, in the quite recent case of *Bhagwati Kuer v. Jagdam Sahay* (10) it was held by Das and Adami, JJ., that, when a dispute with regard to the rights of the members of a family has been settled by a fair compromise, such compromise will be upheld by the Court although, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had been between strangers; but that it must be established that the right compromised could at least have formed the subject-matter of a claim, though a doubtful claim. That a reversionary heir who has only a *spes successionis* cannot enter into a compromise with regard to such interest as he may have in the estate of the persons whose reversionary heir he claims to be. That a compromise of a doubtful claim by the holder of a limited interest stands on the same footing and binds the reversionary heir if it is established that the compromise was a fair and honest one and that the limited holder entered into the transaction as representing the estate and for the protection of the estate and not as representing herself and for her own protection.

Now, if we endeavour to apply such principles as are enunciated in the decisions which I have mentioned to the circumstances in this case, one must first observe that the parties to the arbitration were obviously acting under quite a mistaken view of their real rights. Sri Kumari Devi was under the impression that Rajkumar Singh was endowed with title to the property by virtue of the *mukhtarnama* of 1894. The arbitra-

tors seem also to have adopted that view. I have already given my reasons for thinking that Rajkumar Singh acquired no title under this *mukhtarnama* but, even supposing there was something to be said for that idea as a result of which the arbitrators considered that for her life time Sri Kumari was entitled to enjoy the properties, the position of Bishun Kumari, as taken up by her in the arbitration proceedings, was based upon a still slenderer foundation. She had no idea that she was the life tenant of the properties or that her sons could claim otherwise than under, what is admitted to be the invalid Will of Prem Kumari. It seems clear from the terms of the submission to arbitration and of the award that she did not put forward any claim based on her own title or any claim based on the reversionary title of her sons but only on the Will. I think, therefore, that the arbitration proceedings and the award therein cannot be supported on two broad grounds, firstly, because there was in the minds of both parties and of the arbitrators a complete misapprehension as to the true legal position: this misapprehension was the cause of the non-inclusion for consideration in the arbitration proceedings of either Bishun's own life interest or the reversionary interest of her sons. The second reason is that, although it might perhaps be said that Bishun Kumari acted as she would have if she had waived her own claim, or at any rate purported to be acting solely on behalf of the reversionary heirs, yet in arbitration proceedings it would be difficult to justify her entering into a compromise adversely affecting her sons' reversionary interests which, in fact, were apparently never even considered at all.

I must now pass to the next and very important question which arises as to whether the arrangements which took place through the medium of arbitration can be supported as some form of family compromise. There is no doubt that the principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family agreement is under consideration. I think that there is ample authority indicating that in some instances in which although as an arbitration proceeding the result of an

(10) 62 Ind. Cas. 933; 6 P. L. J. 604; 2 P. L. T. 471.

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award cannot be supported, it is still capable of support on the ground that the award represents what is in effect the outcome of a family compromise. It is suggested here that even assuming that much greater latitude may be extended to the support of a family arrangement than is the case in maintaining an award under an arbitration, nevertheless, where a reversionary interest is in fact affected by a family arrangement such a compromise could not be supported; and here *a fortiori* because the reversionary interest was never in any way dealt with or even envied. Numerous cases have been quoted to us on this point. In that of *Helan Dasi v. Durga Das Mandal* (11) it was held that a partition or a family arrangement, made in settlement of a doubtful if not a disputed claim by arbitrators appointed by the parties, effecting a division of a family property and drawing up a list thereof which was signed by the parties, carried out and acted upon by them for some time, is a valid and a binding arrangement which the parties to it cannot deny, ignore or resile from. Mr. Justice Mukerjee in that case remarked that a family arrangement might be upheld even though there were no rights actually in dispute at the time of making it and that the Courts will not be disposed to scan with much nicety the *quantum* of consideration. That it is mistake to suppose that the doctrine of family arrangement extends no further than arrangements for the settlement of doubtful or disputed rights; and that the principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace but also to cases in which arrangements are made between them for the preservation of its property. In the case of *Williams v. Williams* (12) the facts were as follows:—

A died leaving a wife and two sons. A had made a Will by which he gave all his property to his two sons in equal shares. But this Will was incomplete and was not admitted to Probate. The brothers, however, orally agreed that the invalidity of the Will should make no difference and for

20 years they dealt with the property as if it belonged to them equally. The widow never insisted on her claims. The younger brother died and his legal representative filed a bill for the equal division of the property. The Court upheld the family arrangement although there were in law no rights whatever in dispute. Turner, L. J., in the course of his decision remarked: "It was strongly argued for the appellant that this case does not fall within the range of those authorities; quoted that those cases extend no further than to arrangement for the settlement of doubtful or disputed rights, and that in this case there was not and could not be any doubtful or disputed right; but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much farther than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of the family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property."

In the case of *Satya Kumar Banerjee v. Satya Kirpal Banerjee* (13) the same principles were followed. See also *Ramji Ram v. Salig Ram* (14). Perhaps, the most important case bearing upon this point is that of *Keramutulla Miah v. Keramutulla Meah* (15). In that case it was held that in the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or any similar ground a family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from, that if the parties have settled a dispute such settlement will not be set aside on the ground that it gave to one of them more than that which he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them. That the Courts will not be disposed to scan with much nicety the *quantum* of considera-

(11) 4 C. L. J. 324.

(12) (1867) 2 Ch. 294; 36 L. J. Ch. 419; 16 L. T. 92; 15 W. R. 657.

(13) 3 Ind. Cas. 247; 10 C. L. J. 503.

(14) 11 Ind. Cas. 481; 14 C. L. J. 188.

(15) 49 Ind. Cas. 886; 23 C. W. N. 118.

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tion. That there is nothing in this doctrine of family arrangements opposed to the general principle that, when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. That if improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate such an arrangement in the case of adults; but that when there is no defect of this nature the settlement of a doubtful claim is of as much advantage to a minor as to an adult and that where a genuine dispute has been fairly settled, the dispute cannot be re-opened solely on the ground that one of the parties to the family arrangement was a minor. Halsbury, (Laws of England, Vol. 14, p. 542) in dealing with what family arrangements can and cannot be supported, points out that an agreement dividing up family property though entered into under a misapprehension of the legal rights of the parties, provided such misapprehension is not induced by any party to the agreement is entitled to support even where the fact that misapprehension existed has been established by subsequent legal decision. On the other hand, at page 544, he points out that an agreement as to division of property can be set aside where the heir give up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance even though there was no evidence of fraud or undue influence. See also *Hardeo Sahai v. Gauri Shankar* (16), *Srinath Bose v. Nibaran Chandra Roy* (17), *Kanhai Lal v. Brij Lal* (18), *Bent Prasad v. Lajja Ram* (19), *Ram Niranjan Singh v. Prayag Singh* (20).

(16) 28 A. 35; 2 A. L. J. 493; A. W. N. (1905)

171.

(17) 53 Ind. Cas. 945; 25 C. W. N. 859.

(18) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

(19) 35 Ind. Cas. 631; 38 A. 452; 14 A. L. J. 438.

(20) 8 C. 138; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 88.

In order to see what should be the principles properly to be applied in this case, it is, in the first place, important to try and see clearly what was the position prior and which gave rise to the arbitration or compromise. Sri Kumari Devi certainly had a claim: it may not have been a good claim; it may have been founded possibly upon two misapprehensions, (a) that Raj Kumar was the heir in law to Rani Bigya and that on her death he (if indeed he survived her) came into her property to the exclusion of her mother Prem Kumari. But this was a mistake: Prem Kumari was Rani Bigya's heir. Rajkumar died before Prem Kumari, in law he was not Rani Bhigya's heir at the time of the dispute: (b) that Rajkumar had been made her heir by Rani Bigya by the *mukhtarnama* which she executed on October 19th 1894. This may also have been and, in my opinion, was a second mistake: but it was one about which there was certainly an element of doubt, it was one of, if not the main, grounds of the dispute; the arbitrators thought the claim was well founded: the question has been actively agitated and closely argued in the present litigation.

Added to all this, Sri Kumari Devi's claim seems to have been recognised after Bigya's death by Prem Kumari. Rajkumar is said to have died shortly after Bigya in the same year (1901-02) and after his death Prem Kumari and Sri Kumari lived together. Sri Kumari was, apparently recognised by Prem Kumari as the rightful possessor of the property for in 1905 Sri Kumari granted the *thicca patta* in favour of Coffin who was part proprietor of the Bhusrari Indigo Factory without any objection on the part of Prem Kumari. It is only in 1908, eight days before her death, that Prem Kumari seems to have by her Will shown that she thought that she and not Sri Kumari was the owner of the estate and to have believed that she could bequeath it to her daughter—Bishun's two sons. Prem Kumari's husband had predeceased her: and Parkash Sen, her daughter's husband, may possibly have influenced Prem Kumari to make a Will in favour of his sons though that is mere surmise.

At any rate, the above observations clearly show that after Prem Kumari's death and

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at the time of the arbitration, Sri Kumari had a claim which though it may in law actually have been a doubtful claim was nevertheless one of quite a formidable character. It was one indeed which in my view justified Bishun Kumari in entering into negotiations with her. Next, let us look at Bishun Kumari's position prior to the arbitration. Neither she nor her husband seem to have contemplated that she on Prem Kumari's death could be the person entitled to a life interest in the estate; such a claim never seems to have been put forward at all by her; nor to have suggested itself to anyone at the time of the arbitration. She represented not herself but her minor sons and her claim for them based itself on Prem Kumari's Will. She certainly could not possibly be said to be in any way entering into a compromise as representing herself or for the protection of her own interest for she was not even aware that she had one.

But, if she had been aware of her own claim, could she not, acting for the protection of the estate and not on her own behalf, have properly, in order to avoid litigation and to settle the strongly advocated claim of Sri Kumari, have entered into the compromise which she did? If she could, it seems difficult to see why without knowing of her own claim, but with the same object, she could not act similarly: the only possible objection which occurs to my mind is that she was ignorant that she had in her hands a very strong weapon to use in the dispute. Now what was the result of the compromise, intrinsically not at all an iniquitous one.

Bishun's own interest is lost sight of. She was afraid that if Sri Kumari's claim is successful her own sons whom she thinks are entitled under the Will of Prem Kumari would never get anything from the estate: there seems a general but dim or at any rate not very clear impression even in the minds of the arbitrators that perhaps apart from the Will Bishun's two sons ought to come into the property after Sri Kumari's death. What Bishun does do in reality is to set the duration of her own life against that of her sister-in-law, if she (Bishun) dies after Sri Kumari the reversionary interests of her sons are not in any way

affected: but if as actually happened she (Bishun Kumari) predeceased Sri Kumari then the reversionary interests of her sons are affected inasmuch as they would not own the estate until Sri Kumari's death. If there had been no compromise then on the death of Bishun Kumari which occurred in about 1917 Ram Bahadur Sen would have immediately been entitled to come into possession of the property. As it is, if the compromise is upheld, he will not do so till after Sri Kumari's death. The immediate claim here is one of possession. The minor's guardian is in fact in possession of the property and the plaintiff, by virtue of his *zarpeshgi*, is seeking to eject the minor's guardian from possession. If the compromise is supported, the plaintiff must succeed, but in any case his possession under his *zarpeshgi* would only be good until the death of Sri Kumari Devi; and whether the plaintiff could recover what he has advanced in connection therewith from Ram Bahadur Sen after Sri Kumari's death depends upon considerations with which we are not here concerned.

Mr. Justice Das in the case of *Bhagwati Kuer v. Jagdai Sahay* (10) expresses his view that the law as it at present (1921) stands indicates that:

1. "A reversionary heir can under no circumstances convey or agree to convey or relinquish any future right or expectancy, nor can his guardian if he happens to be a minor bargain with his possibility of succession or bind him by any contractual engagement in respect thereto."

If that was the end of the position, there seems no doubt that the arrangement in this case could not be supported for Bishun in it undoubtedly though unknowingly did something which might and actually did affect adversely her minor sons' reversionary interest. But the 2nd proposition is,—

2. "An alienation by a limited owner does not bind the reversioner; but a limited owner can bind the reversionary heir by a compromise in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties, if it appears that the compromise was a fair and a *bona fide*

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compromise and that the limited owner entered into the compromise as representing the estate which was for the time being vested in her and acted for the protection and preservation of that estate:" and with this must be read the 3rd proposition:

3. "Whenever a question is raised whether a transaction is an alienation or a compromise of a doubtful claim, the true test to apply is to see whether the alienee derives title from the holder of the limited interest. Where the transaction is based on the assumption that there was an antecedent title of some kind in both the parties, and the agreement acknowledges and defines what that title is, the transaction is not an alienation, but a compromise of a doubtful claim."

Now, admitting that the compromise was a fair and *bona fide* one what would Bishun's powers be in entering into it?

I assume, in the first place, that she was aware of her own life interest and of her son's reversionary interests. Could she for the sake of peace have given Sri Kumari her (Bishun's) own life interest? I think the answer must be in the affirmative. Could she have given out and out to Sri Kumari and her side of the family a reasonable amount of the property? I think again the answer is probably in the affirmative: for though by so doing she diminished the amount of property which might come to the reversioner's hands she had for the benefit of the estate power to alienate. Could she give to Sri Kumari a longer estate in the whole property than her (Bishun's) own life interest? For example, could she give to Sri Kumari and her side of the family a limited interest in the whole property for her (Bishun's) own life and for 20 years after her (Bishun's) death? I am of the opinion that the answer is in the negative: for if she did so, she would be doing something purporting to bind the minor reversioners by a contingent retardation of the date (*i.e.*, the date of Bishun's death) upon which their reversionary interest might vest in them. She cannot do away with her minor sons' reversionary interest she cannot bind them by entering into the contractual engagement in respect of it: she could not in my view deal with it by introducing into it a feature of time which would retard definitely the vesting of the reversionary interest in the

reversioners assuming, of course, that they outlived her.

I have, therefore, not without reluctance under the circumstances of this case come to the conclusion that it was not competent for Bishun to do what she did in this case, *i. e.*, to agree to a compromise which in giving a life interest in the whole property to Sri Kumari for her (Sri Kumari's) life might have and in fact has introduced a new condition into the reversionary interest of her minor sons; that new contingency being a postponement for an indefinite period (*i. e.*, the period intervening between Bishun's death and the unascertainable date in the future when Sri Kumari dies) of the vesting of the reversionary interest in the 1st defendant. The transactions cannot, therefore, in my opinion be supported as a family settlement. Summarising then my conclusions, they are:—

1. I do not consider that the *mukhtar-nama* executed on October 19th 1874 by Rani Bigya Kumari Devi in favour of Babu Gambhir Singh, the husband of her daughter, Rani Prem Kumari Devi, endowed the executant's grandson Raja Rajkumar Singh with any title to her (the executant's estate). On this point I agree with the Subordinate Judge;

2. I do not see any grounds for considering

(a) that Ram Bahadur Sen and Shyam Bahadur Sen the two minor sons of *Musammatt* Bishun Kumari Devi and of her husband, Babu Sri Parkash Sen, were not sufficiently represented in the arbitration proceeding by their mother and father,

(b) that the two *parda-nashin* ladies, *Musammatt* Bishun Kumari Devi and Sri Kumari Devi, who were parties to the arbitration proceedings were not adequately acquainted with or insufficiently informed of what was taking place in connection therewith,

(c) that the arbitration award was not the award of the arbitrators. On these points I agree with the Subordinate Judge so far as he had to deal with them.

3. I do not consider that the arbitration proceedings can be supported for the following reasons:—

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- (a) the parties went to arbitration under a complete misapprehension of their respective real legal positions and rights,
- (b) The award of the arbitrators was given under a similarly almost complete misapprehension of the respective real legal positions and rights of the parties,
- (c) The award was bad in law in that
 - (1) the arbitrators wrongly thought that the *mukhtarnama* of October 19th 1894 executed by Rani Bigya Kumari Devi in favour of Babu Gambhir Singh endowed Raja Rajkumar Singh with title to the estate through which Sri Kumari Devi could claim;
 - (2) the arbitrators wrongly thought that the Will made by Rani Prem Kumari Devi on February 8th, 1908 in favour of Ram Bahadur Sen and Shyam Bahadur Sen was valid;
 - (3) the arbitrators did not take into consideration the life interest which *Musammam* Bishun Kumari Devi held in the estate after the death of her mother, Rani Prem Kumari Devi;
 - (4) the arbitration did not (apparently) take into consideration the reversionary interest of Ram Bahadur Sen and Shyam Bahadur Sen.

On this point I disagree with the Subordinate Judge.

4. I do not consider that the first defendant would in any case be bound by the award of the arbitrators because by that award his reversionary interest was subjected to the imposition of a condition under which the vesting in him of his reversionary interest might have been and in fact is retarded for an indefinite period after the date when in law it should vest in him. To such a course he, being a minor, could not be bound by any acquiescence therein on the part of those purporting to represent him in the arbitration proceedings.

On this point I disagree with the Subordinate Judge.

5. I do not consider that the arrangements which resulted from the arbitration proceedings can be supported as a family settle-

ment as binding the 1st defendant: because as the effect of the compromise the reversionary interest of the 1st defendant was affected in the manner which I have detailed in the preceding paragraph. I may also here add, although it may not strictly be here material, that the complete ignorance of *Musammam* Bishun Kumari Devi of the fact of her on claim to a life interest in the estate deprived her of utilising on behalf of the reversioners a very potent weapon in the controversy. On this point I disagree with the Subordinate Judge.

The result will be that the appeal by the first defendant will be allowed: the judgment of the Subordinate Judge will be set aside so far as it relates to the appellant: the respondent must pay the costs of the appeal both of the appeal and in the Court below.

Ross, J.—I agree.

Z. K. & N. H.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION No. 389 OF 1922.

January 11, 1923.

Present:—Mr. Justice Abdul Raoof.

SHEO NATH—PLAINTIFF—PETITIONER
versus

BEG RAJ—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Wrong decision on point of law or fact—Illegality or material irregularity—Revision.

A Court which comes to a wrong conclusion on a point of law or fact, in deciding a question which it had jurisdiction to decide, cannot be said to have acted illegally or with material irregularity so as to justify interference in revision by the High Court under section 115 of the Civil Procedure Code.

Civil revision of a decree of the Second Class Munsif, Hissar, dated the 1st March 1922.

Lala Namwa Mall, for the Petitioner.

Mr. Shamair Chand, for the Respondent.

JUDGMENT.—The petitioner was the plaintiff in this case. He claimed the land in dispute as his property while the defendant claimed it as his. The parties referred the matter to an arbitration. The whole case was referred through the Court. The arbitrator gave an award according to which neither the plaintiff nor the defendant had any title to the land. The plaintiff occupies the position of a trustee of a temple. According to the award the temple is the owner

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of this piece of land. The arbitrator, therefore, decreed the claim for possession in favour of the plaintiff in his capacity as a trustee. The plaintiff filed certain objections against the award, one of them being that the arbitrator had travelled beyond the terms of the reference and had decided matters which did not form the subject-matter of the suit. The Court below took into consideration those objections and overruled them. The plaintiff has preferred this revision through Mr. Nanwa Mall, a learned Vakild of this Court. The initial difficulty in the way of the learned Vakild is that in such matters the High Court has no power to interfere. It is not denied that the learned Munsif had jurisdiction to decide the objections raised by the plaintiff before him and has decided those objections, and if in deciding those objections he has come to a wrong conclusion on a question of law or fact he cannot be said to have acted illegally or with material irregularity, *vide Amir Hassan Khan v. Shco Bakhsh Singh*(1). I have no power to interfere with the order of the Court below and I, therefore, reject this application for revision with costs.

N. H.

Revision rejected.

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

PATNA HIGH COURT.

CIVIL REVISION No. 16 OF 1923.

May 30, 1923.

Present :—Mr. Justice Macpherson.
THAKUR PATHAK AND OTHERS—PETITIONERS

VERSUS

RAGHO PATHAK AND OTHERS—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 2, 8—Specific Relief Act (I of 1877), s. 42—Suit for declaration—Admission by one defendant—Date fixed for appearance of guardian ad litem of minor defendant—Dismissal for default—Form of order.

In a suit for declaration one of the several defendants who disclaimed all interest in the property in dispute, appeared and admitted the claim. There was some difficulty in serving the guardian *ad litem* of one of the minor defendants, and a date was fixed for his appearance. On that date the guardian filed a written statement and then absented himself. When the suit was called on none of the parties were present and the suit was dismissed for default under O. IX, r. 2, of the Civil Procedure Code. It was urged that the suit should not have been dismissed and that at any rate the dismissal should have been under O. IX, r. 8 of the Code:

Held, (1) that the fact that one of the defendants had admitted the plaintiff's claim did not entitle the latter to have the suit decreed against that defendant and dismissed as against the rest under O. IX, r. 8 of the Civil Procedure Code, inasmuch as the provisions of that rule must be read with section 42 of the Specific Relief Act which makes the grant of a declaratory decree discretionary and the discretion would obviously have been wrongly exercised in this case by granting a decree against one defendant only and that the least important defendant who had disclaimed all interest in the property in dispute; [p. 560, col. 1.]

(2) that the mere filing of a written statement by the guardian *ad litem* of the minor defendant before the case was called on did not amount to an appearance within the meaning of O. IX, r. 8, of the Civil Procedure Code; [p. 560, col. 1.]

(3) that, however, the date on which the suit was dismissed having been fixed only for the appearance of the guardian *ad litem* of the minor defendant, the Court should not have dismissed the suit on that date owing to the absence of the plaintiff but should have fixed a further date for the hearing of the suit. [p. 560, col. 2.]

Civil revision from a decision of the Munsif, Aurangabad, dated the 11th November 1922.

Mr. Sambhu Saran, for the Petitioners.

Mr. D. P. Sinha, for the Opposite Party.

JUDGMENT.—This is an application for revision of the order, dated the 11th November 1922, of the learned Munsif of Aurangabad, in Miscellaneous Case No. 245 of 1922, purporting to be made under O. IX, r. 4, of the Code of Civil Procedure.

The present petitioners who are father and sons instituted a suit for a declaration that certain plots of land entered in the Records of Rights in the name of the first petitioner and the opposite party Nos. 1 (father of minor opposite party Nos. 2 to 6) and 7 belonged exclusively to the plaintiffs. A written statement was filed on behalf of the minor opposite party No. 7 through his mother-guardian admitting the claim. There were many adjournments in the suit,

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but eventually on the 10th August the Pleader guardian *ad litem* of the minor defendants Nos. 2 to 6 declined to act and the comparing clerk of the Munsif's Court was appointed in his place. On the 29th August, which was the next date fixed, it was found that the new guardian *ad litem* had not been served with summons and the case was adjourned till the 9th September for his appearance. The order sheet for the 9th September shows that the service return on the guardian *ad litem* had not been placed on the record and the case was put up on the 13th September for orders, when the parties did not appear and the suit was "dismissed for default," it being further ordered that the written statement filed on that day by the guardian *ad litem* of the minor defendants be placed with the record. The plaintiffs then filed an application, purporting to be under O. IX, r. 4, to set aside the dismissal on the ground of the prolonged illness of the plaintiff in charge of the suit, and the learned Munsif having disallowed it, they have appealed to this Court to revise his order.

On behalf of the petitioners it is urged in the first place, that the dismissal ought to have been under O. IX, r. 8, because the defendant No. 7 had admitted the claim and the suit ought to have been decreed against him. But it is to be remembered that O. IX, r. 8, is to be read with section 42 of the Specific Relief Act which makes the grant of a declaratory decree discretionary and the discretion would obviously have been wrongly exercised in this case by granting a decree against one defendant only and that the least important defendant who had disclaimed all interest.

It is then urged that the dismissal ought to have been under O. IX, r. 8, because the guardian *ad litem* was present. But there is nothing to show that such was the case, and it would appear that the guardian who was an *amla* of the Court simply filed a written statement at the opening of the Court and then probably advisedly failed to enter appearance at the hearing when he saw that the plaintiffs were absent.

It is then contended that on the merits the application ought to have been allowed. The reason for absence given was that the applicant No. 4 was ill. The learned

Munsif did not find the evidence of illness sufficient and convincing and considered that, even if he was ill, the other applicants might have taken the necessary steps. I do not agree with these findings, but I prefer to base the order which I am about to make on the simple ground that the order of dismissal was altogether unreasonable. The 9th and then the 13th September were fixed, so far as can be gathered, for the appearance of the guardian *ad litem* of the minors and it is not easy to see what steps the petitioners or their Pleader were to take or could have taken on the 9th or 13th September. The fault lies mainly with the order-sheet of the learned Munsif, most of which he apparently allowed to be written by an unintelligent subordinate. Cases will constantly occur where the litigants will be prejudiced by such a procedure and in point of fact the course of the suit during August and September is an example of this. In view of its previous obscure orders and the appearance of the guardian *ad litem*, the Court ought, on the 13th September, to have fixed a date.

In these circumstances, the application is allowed, the order of dismissal is set aside and the suit is restored to the file on condition that within a month from this date the petitioners pay to the contesting defendants a sum of sixteen rupees as costs; if the payment is not made this application will stand dismissed.

There will be no order for costs.
Let the record go down at once.

Z. K. & N. H.

Application allowed.

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PATNA HIGH COURT.

DEATH REFERENCE CASE NO. 9 OF 1923.

CRIMINAL APPEAL NO. 34 OF 1923.

March 20, 1923.

Present.—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.
GANSA ORAON—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 154, 162, 288.—Information of cognizable offence, what is—Written statement obtained from witness during investigation, admissibility of, as evidence—Statement made before Committing Magistrate transferred to Sessions record, whether can be used as substantive evidence.

The information referred to in section 154 of the Criminal Procedure Code is something in the nature of a complaint or accusation, or at least information of a crime, given with the object of putting the Police in motion in order to investigate, as distinguished from information obtained by the Police when actively investigating a crime [p. 564, col. 1.]

Circumstances may arise in which information is given to the Police of such a vague and indefinite character that it cannot be treated as coming under section 154 of the Code, so as to make it incumbent upon the officer in charge of the Police Station to start an investigation and he may reasonably require more direct information before doing so, and such further information given to him in such circumstances might not come under the provisions of section 162 of the Criminal Procedure Code. Or the information referred to in section 154 may come from more sources than one, and more than one such information may be recorded at or about the same time. [p. 564, col. 1.]

But once definite information has reached the Police relating to the commission of a cognisable offence under section 154 of the Criminal Procedure Code and the Police have taken active steps to investigate, whether the information has been taken down in the book kept for that purpose as provided in section 154 or not, all further statements taken from the witnesses are taken in the course of a Police investigation and are inadmissible in evidence under section 162 of the Code. [p. 564, col. 1.]

Under section 288 of the Criminal Procedure Code a Sessions Court is not restricted to admitting the evidence of a witness duly taken before the Committing Magistrate merely for the purpose of contradicting that witness when giving evidence in the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. [p. 565, col. 1.]

Queen-Empress v. Dorasami Ayyar, 24 M. 414 at p. 416; 2 Weir 377, *Maruti Joti Shinde v. Emperor*, 63 Ind. Cas. 332; 23 Bom. L. R. 820; 22 Cr. L. J. 636; 46 B. 97; (1922) A. L. R. (B.) 108; relied on: *Queen-Empress v. Jeochi*, 21 A. 111; A. W. N. (1898) 196; 9 Ind. Dec. (N. S.) 780, *Emperor v.*

Dwarika Kurmi, 28 A. 683; 3 A. L. J. 852; 4 Cr. L. J. 61; A. W. N. (1906) 187, referred to.

It is, however, a matter for the discretion of the Judge whether he thinks that such evidence should be used in the interest of justice, for many cases may arise in which it would be dangerous to rely upon such evidence where witnesses have proved themselves before the Sessions Judge altogether unworthy of credit. [p. 563, col. 1.]

Per Mullick, J.—Information, within the meaning of section 154 of the Criminal Procedure Code, is an allegation in the nature of a complaint, made to a Police Officer with a view to his taking action, and when such an allegation is made the Police Officer must record it as an information under the section, and the writing will attract the provisions of section 35 of the Evidence Act; and if the Police Officer should record more than one information relating to a cognisable offence they will all share the privilege of being exempt from the disability imposed by section 162 of the Criminal Procedure Code. In every case it is for the Court to decide whether the communication is an information in this technical sense and whether and when the Police investigation had in fact begun. [p. 562, cols. 1 & 2.]

Criminal appeal from the judgment of Mr. Williams, Judicial Commissioner, Chota Nagpur, dated the 10th February 1923.

Mr. Sambhu Saran, for the Appellant.

Mr. H. L. Nand Keolyar, for the Crown.

JUDGMENT.

Miller, C. J.—In this case Gansa Oraon was tried and convicted of murder and sentenced to death by the Judicial Commissioner of Chota Nagpore on the 10th of February last. The proceedings have been referred to this Court under section 374 of the Code of Criminal Procedure and the convict has appealed.

The appellant and his brother, Tikua Oraon, who were joint in estate and occupied the same house in Mouza Bongeloya in the Ranchi District. The appellant was married whilst his brother was single. There had been some dispute between them as to the division of the paddy crops on their land and Tikua endeavoured, but without success, to bring about a partition. The appellant had promised that when Tikua got married, he would agree to a partition of the land.

According to the prosecution case they had quarrelled about 7 o'clock on the night of the 15th of December last on the question of the division of the crops, with the result that the appellant picked up a *balua* with which he struck his brother on top of the head a severe blow cutting

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through the scalp and exposing the brain. Two persons are said to have been present and witnessed the occurrence. One of them was *Mussammât* Budhni, the wife of the appellant, the other is Khurloo, his cousin.

The First Intimation which the Police received of the occurrence was at 4 P. M. on the 16th of December when Rup Singh, the *chowkidar* of the village, arrived at the Police Station at Basia, about 10 miles distant from Mouza Bongeloya, and reported to the Sub-Inspector that the same morning the mother of the accused and Tikua had told him that her elder son Gansa, Oraon, had assaulted his younger brother, Tikua, the previous evening, whilst they were under the influence of *handia*, with a *tangi* and that he had gone to the house and seen Tikua who had a blood stained wound on his head, but on asking him who had assaulted him he gave no reply. This report was entered in the Police Station Diary but not signed by the *chowkidar*, nor was it treated by the Sub-Inspector as an information within the meaning of section 154 of the Criminal Procedure Code. The Sub-Inspector proceeded the same afternoon to Bongeloya and reached the village at about 8 P. M. He found Tikua at the house with a big wound on his head. He was unconscious and unable to speak. He thereupon questioned *Mussammât* Budhni, the wife of the appellant, whose statement he took down in writing and obtained her thumb impression in the presence of two witnesses treating it as what is known as the First Information Report which, under section 156, Criminal Procedure Code, would entitle him to hold an investigation. He then proceeded to obtain evidence from other persons with the result that the appellant was arrested on the 17th of December, and on the following day, at 9 o'clock in the morning, made a confession at the sub-jail at Gumla before a Magistrate. The statement made by the appellant at that time was to the following effect:—

"There was a division between my brother, Tikua, and myself. I struck him with a *balua* on his head. We are nine members including my children, and Tikua is along with his mother. He picked up a quarrel for his share. I have no motive in saying this. No body has tutored

me. He took 2 annas while I have 1½ annas of the land."

On the following day the 19th of December Tikua, who had in the meantime been removed to hospital, died of his wound without having recovered consciousness.

When before the Committing Magistrate on the 4th of January the appellant admitted having made the confession to the Magistrate on the 18th December and again admitted that he had struck his brother with a *balua* on his head. He added that he was drunk. Before the Judicial Commissioner on the 7th of February when questioned he stated that he did not know if he had beaten Tikua as he had taken *handia* (country liquor). He admitted that he had made the statement before mentioned to the Magistrate but added that he made it because he had been beaten by a constable. He said he had no quarrel with his brother about land and explained the evidence given by Khurloo and another witness, Dasain, by saying that they had deposed against him because there was a dispute between himself and them. He also stated that he was on bad terms with Rup Singh, the *chowkidar*, who had threatened to kill him. He further stated that he had enmity with Sukhu Mahto who had given evidence as to the quarrel between the two brothers.

At the trial, Khurloo stated that on the evening of the occurrence he took food at the appellant's house and afterwards was given tobacco. He and Gansa and Tikua sat on the veranda facing south, that Gansa struck Tikua but it was a dark night and he did not know what he struck him with. He further stated that nothing was said between Gansa and Tikua, that Gansa struck him silently on the head and Tikua remained sitting. Gansa then went outside and he did not know what happened to the weapon with which he struck him. He said that *Mussammât* Bhudni was not with them but in the north facing room. This evidence given by an obviously unwilling witness varied in some material respects from the statements which he had made earlier before the Committing Magistrate and the learned Judicial Commissioner allowed his deposition made on the former occasion to be put in evidence.

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under the provisions of section 288 of the Criminal Procedure Code. His attention was drawn to his previous statement which was to the following effect:—

That he went to the accused's house in the evening and was smoking there sitting on the verandah facing east. The accused's wife, *Musammāt* Budhni, and Tikua were there. Tikua and the accused began to quarrel and he took up his *balua* and hit Tikua on the head with it and then ran away out of the house. Tikua stood up and then sat down again. He could not say why the accused struck Tikua but added that the latter had cut paddy of 2 annas on their joint land whilst the accused had cut only 1½ annas. He admitted that he had said before the Magistrate that the brothers began quarrelling and that the accused took up his *balua* and hit Tikua on the head with it and added that what he said in the lower Court was true but that it was not true that they quarrelled.

Budhni, the appellant's wife, was also called and stated that she did not know how Tikua met his death. She had gone to sleep after her evening meal and only saw Tikua next morning when he was unconscious. He had a wound on his head but she did not see how the injury was caused. This witness also had made a statement before the Magistrate which was at variance with her statement given before the learned Judicial Commissioner and her previous statement was allowed to be put in evidence under the provisions of section 288, Criminal Procedure Code. On that occasion she had stated that her husband and Tikua and Khurioo were on the south verandah watching the fire when her husband and Tikua began to quarrel over the division of the paddy. Her husband told Tikua that he would divide the land after Tikua's marriage and that her husband took the *balua* which was on the verandah and struck Tikua on the head with it once. She identified the *balua* which was in Court. She admitted making the statement but alleged that she made it because the constable said if she did not the Magistrate would abuse and beat her. It was proved by the Sub-Inspector that Budhni produced the *balua* when he first went to the house on the night of the 16th.

This was the principal evidence against the appellant. Another witness, Dasain Oraon, who knew the parties and belonged to the same village, stated that last year Tikua called a *panchayat* for the division of their land but Gansa would not allow any division until Tikua got married so the *panchayat* dissolved. On the night of the occurrence Gansa came to his, Dasain's house and stated that he had done wrong. When asked what wrong he had done, he merely repeated that he had done wrong, and, as he had nothing on the upper part of his body and it was cold he asked for a covering, which he was given, and he went away.

The medical evidence showed that there was an incised wound 7 inches long by 1 inch deep on the top of the deceased man's head and that the brain substance was coming out when he was admitted into the hospital. The *post mortem* examination showed that the parietal and frontal bones of the skull were clean cut as if by a sharp instrument.

The learned Judicial Commissioner was satisfied beyond any reasonable doubt that the appellant was guilty of the charge preferred, although the opinion of the Assessors was inconclusive and unsatisfactory. One of the Assessors thought it was established that the accused did strike the deceased but that it has not been proved what was the weapon used and he did not think that the accused intended to kill his brother; he thought that he should be sent to jail and not hanged. The other thought it was improbable that a brother would kill his brother, but it might be that the accused was drunk and struck his brother and that the circumstance did not warrant more than imprisonment. It would seem probable, as the learned Judicial Commissioner thought, that the dislike of inflicting a capital sentence was the primary cause of such halting opinions.

It was argued before us in appeal that the written statement made to the Sub-Inspector by the appellant's wife on the evening of the 16th ought not to have been admitted in evidence as a First Information Report. It was pointed out that information having been already given at the Police Station earlier by the *chowkidar*, any statements afterwards taken by the Police were taken

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in the course of an investigation and were inadmissible as evidence under section 162 of the Criminal Procedure Code. I have no doubt that the statement made at the Police Station by the *chowkidar* was information relating to the commission of a cognizable offence within the meaning of section 154 of the Code. It ought to have been taken down in the book kept for that purpose as provided in the section, and whether this was done or not, in the particular circumstances of this case, I think all further statements taken from the witnesses were taken in the course of a Police investigation and that the written statements so taken were inadmissible as evidence under section 162 of the Code. Circumstances may arise in which information is given to the Police of such a vague and indefinite character that it cannot be treated as coming under section 154 so as to make it incumbent upon the officer in charge of the Police Station to start an investigation, and he may reasonably require more direct information before doing so; and such further information given to him in such circumstances might not come under the provisions of section 162. The information referred to in section 154 appears to me to be something in the nature of a complaint or accusation, or at least information of a crime given with the object of putting the Police in motion in order to investigate, as distinguished from information obtained by the Police when actively investigating a crime. I can also conceive that the information referred to in section 154 may come from more than one source, and more than one such information may be recorded at or about the same time, but once the Police have taken active steps to investigate, any written statements taken by them cannot be admissible as evidence as they would come within section 162. The Sub-Inspector in the present case stated that as the *chowkidar* did not give him any idea of the seriousness of the wound he thought the case to be non-cognizable. I have no doubt that he acted honestly in coming to this belief but at the same time there can be no doubt that the information disclosed by the *chowkidar* in the first instance was such as to show that something more than a common assault had been committed. I, therefore, consider that the so-called First information taken from

Budhni, the wife of the appellant, ought not to have been placed on the record, as it was not admissible in evidence. I observe that the learned Judicial Commissioner does not refer to this statement as evidence in the case and his judgment does not appear to have been in any way influenced by it. I also think that it should be rejected. Had I considered that it in any way influenced the learned Judicial Commissioner in arriving at the conclusion of the appellant's guilt, I should have considered whether it was necessary to order a new trial. But after considering the other evidence in the case, coupled with the appellant's own confession, I feel no reasonable doubt, in my mind, that the appellant was guilty of murder. It is noticeable that the appellant, when examined in the Sessions Court, did not deny that he had confessed before the Magistrate; nor did he deny that he had beaten Tikua. He pleaded that he did not know whether he had or had not, because he had taken *handia*. This was also his defence before the Committing Magistrate in which he admitted the assault upon his brother but said he was drunk. The main witnesses of his guilt were the appellant's wife and a near relation and they were no doubt confronted with a very difficult and trying situation. It is only natural that they should try as far as possible to do what they could for one so nearly related, and the evidence given by both of them before the Committing Magistrate, as well as the evidence of Khurloo given at the trial, abundantly corroborate the confession made by the appellant and leave no doubt in my mind as to his guilt.

It was contended that the statements made before the Committing Magistrate were not admissible as substantive evidence in the case and that conviction could not be based solely upon such evidence. For this proposition the case of *Queen-Empress v. Jeochi* (1) was relied upon. In that case there was no evidence before the Court to prove the guilt of the accused except the statements made by some of the witnesses when before the Committing Magistrate, and Mr. Justice Bannerji, as the witnesses had given a diametrically opposite version

(1) 21 A. 111; A. W. N. (1898) 196; 9 Ind. Dec. (N. S.) 780.

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before the Sessions Judge, refused to convict upon such evidence. In the later case of *Emperor v. Dwarka Kurmi* (2) the same learned Judge, when sitting with Mr. Justice Aikman, explained that in the earlier case he did not intend to hold that such depositions were wholly inadmissible, and having regard to the clear language of section 288 it could not be held that statements made before the Committing Magistrate could not be admitted in evidence under the section. Again, the Madras High Court in *Queen-Empress v. Dorasami Ayyar* (3) held that under section 288 of the Code the Court is not restricted to admitting the evidence of a witness duly taken before the Committing Magistrate merely for the purpose of contradicting that witness when giving evidence in the Sessions Court, but that the section was intended to enable the Court to read the previous evidence as substantive evidence at the trial where, for the purposes of justice, the adoption of such a course was found necessary by the Judge. A similar view was also expressed by the Bombay High Court in the case of *Maruti Joti Shinde v. Emperor* (4) and in my opinion the section clearly intends that the evidence taken before the Committing Magistrate where the witnesses produced are examined at the subsequent trial may be treated as substantive evidence in the case. No doubt, it is a matter for the discretion of the Judge whether he thinks that such evidence should be used in the interests of justice. At the same time, I consider that many cases may arise in which it would be extremely dangerous to rely upon such evidence where witnesses have proved themselves before the Sessions Judge altogether unworthy of credit. In my opinion the learned Judicial Commissioner rightly admitted the evidence in this case. It must also be observed that it was not the only evidence which corroborated the appellant's confession. That of Khurloo as given in the Sessions Court was strong corroboration of the fact that the appellant struck his brother with some sort of weapon.

The only other point argued before us was that the appellant might not have been aware that the blow which he struck his brother was one likely to cause his death, or that he might have inflicted the blow under a grave and sudden provocation which deprived him of his self-control. From first to last in this case, there is no suggestion of any grave or sudden provocation; indeed the evidence shows that the quarrel between the brothers was not violent or heated or that anything in the nature of a fight arose between them before the act was committed; nor is it possible to believe that any one using a weapon such as that which was used in this case in inflicting the wound which the deceased man received, could fail to realise that his act was so imminently dangerous that it must in all probability cause death or at least such bodily injury as was likely to cause death; and I can find no circumstances which should lead us to interfere either with the verdict or the sentence. The appeal is accordingly dismissed and the sentence confirmed.

Mullick, J.—I have no doubt that the accused committed culpable homicide by causing the death of his brother, Tikua.

From the evidence of the accused's cousin, Khurloo Oraon, in the Sessions Court it appears that on Friday the 15th December last he was on a visit to the accused's house and took his evening meal with the accused. The deceased Tikua did not share in the meal but sat afterwards with the witness and Gansa in the verandah of one of the huts. Khurloo says that suddenly, Gansa struck Tikua on the head with something which he did not see and that Gansa then went away. But in the Court of the Committing Magistrate on the 3rd January 1923 this witness said that Gansa and the deceased began quarrelling, that Gansa then took up his *balua*, struck the deceased on the head with it and ran out of the house; he also admitted that the accused's wife, *Musammatt Budhni*, was sitting in the verandah at that time. In the Sessions Court the witness denies that there was any quarrel; at the same time he asserts that what he said before the Committing Magistrate was true, though he cannot explain why the statement that Gansa and the deceased

(2) 28 A. 683; 3 A. L. J. 852; 4 Cr. L. J. 61; A. W. N. (1906) 187.

(3) 24 M. 414 at p. 416; 2 Weir 377.

(4) 63 Ind. Cas. 3321, 23 Bom. L. R. 820; 22 Cr. L. J. 636; 46 B. 97; (1922) A. I. R. (B) 108.

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began quarrelling appears in the Magistrate's record. As to his denial that *Musammāt* Budhni was in the verandah, he, when confronted with his statement before the Committing Magistrate, explains that Budhni was sitting in the verandah of another room.

The Investigating Officer Ghulam Haider who took the statement of Khurloo on the evening of the 16th December states that Khurloo corroborated the statement made to him by *Musammāt* Budhni which clearly speaks of a quarrel between Gansa and Tikua with regard to the division of the paddy crop. Again, at 9 A. M. on the 18th December the accused made a confession before Mr. Sharling, First Class Magistrate, in the sub-jail at Gumla, the record of which runs as follows:-

"Warnings—I am a Magistrate. I warn you that if you have anything to say, think over, consider and then say. Don't speak false or don't speak anything tutored by any man."

"Q. What do you wish to say?"

A. There was a division between my brother Tikua and myself. I struck him with a *balua* on his head. We are 8 members including my children and Tikua is along with his mother. He picked up a quarrel for his share. I have no motive in saying this. No body has tutored me. He took two annas while I have 1½ annas of land."

On the 4th January the accused was examined by the Committing Magistrate and the record of his statement runs thus:—

"Q. Did you assault your brother Tikua with *balua* on his head?"

A. Yes, I was drunk.

Q. Did you make this statement (confession, Exhibit 6, and read over to the accused before me).

A. Yes."

In these circumstances, I do not think that there can be any doubt that the statement made by Khurloo to the Sub-Inspector and to the Committing Magistrate are more correct than those made by him before the Sessions Judge. That he was present and saw the assault is common to both sets of statements, and his denial in the Sessions Court, that there was any quarrel is clearly false and fail to explain the cause of the assault.

It is curious, however, that nothing was asked from the witnesses to what he did after the assault. If he had been questioned on the point he might perhaps have given valuable information as to the conduct of the accused, but, in my opinion his evidence sufficiently proves that there was a quarrel between the accused and the deceased in consequence of which the accused inflicted the injury which caused the death of Tikua.

The learned Vakil for the accused contends that Khurloo's statement before the Committing Magistrate is not admissible in evidence because the accused did not cross-examine him. The record does not show why the witness was not cross-examined in the Committing Magistrate's Court, but there is no reason for supposing that the accused was deprived of the opportunity of cross-examining the witness. There is nothing to show that he was in any way prevented by the Court from exercising his right of cross-examination.

The only other eye-witness is the accused's own wife, *Musammāt* Budhni. She, too, has given evidence in the Sessions Court which is at variance with her evidence before the Committing Magistrate.

She states in the Sessions Court that Tikua and the accused took their meal together and that her husband went to bed and that she does not know what happened to Tikua, but that next morning she found Tikua unconscious in the verandah with a wound on his head.

Before the Committing Magistrate on the 3rd January 1923 she admitted that the two brothers began to quarrel about the division of the paddy crop and that her husband struck the deceased on the head with a *balua* which was in the verandah and that the witness Khurloo was then present.

She was the first person examined by the Sub-Inspector Ghulam Haider on the 16th December and she then gave a slightly fuller account of the occurrence adding that when she questioned her husband he replied that he had assaulted his brother with the *balua* thinking it to be a *latht*.

Ghulam Haider deposes in the Sessions Court that he handed a *balua* to him saying that it was the weapon with which the assault has been committed.

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The learned Vakil for the accused objects to the admissibility of Budhni's statement to the Sub-Inspector on the ground that it is a statement made in the course of an investigation and, therefore, inadmissible by reason of section 162, Criminal Procedure Code. On the other hand, the learned Assistant Government-Advocate contends that it is an entry in an official book prescribed by section 154 of the Code and that section 35 of the Indian Evidence Act applies. To this the learned Vakil rejoins that the real First Information in the case, *i. e.*, the information upon which the Sub-Inspector took cognizance of the offence and commenced investigation, was the statement of the *chaukidar* Rup Singh which was given at the *thana* at 4 P. M. on the 16th December and which ran as follows:—

"Rup Singh *chaukidar* of Bangoliya came and reported that this day morning while he was returning from Harakh Ahir's house of Bagaucha with Harak, Tikua Oraon's mother of Bangoliya said to him that her elder son, Gansà Oraon, assaulted his younger brother, Tikua, last evening while they were under the influence of *handia* with a *tangi*; he went there along with Harak and saw Tikua Oraon who has got a blood stained wound on his head and asked Tikua as to who assaulted him, but he gave no reply."

The Sub-Inspector explains that he did not trust this information and that he did not commence the investigation till he had visited the locality and taken the statement of *Musammât* Budhni.

In my opinion the investigation had already commenced when the statement of *Musammât* Budhni was recorded; and the learned Vakil's contention must be accepted.

The word "information" is not defined but the definition of "complaint" throws some light upon its meaning. "Complaint" is defined in section 4 (h) as an allegation made to a Magistrate with a view to his taking action that some person whether known or unknown has committed an offence. In my opinion an information is a corresponding allegation made to a Police Officer and this view seems to me to be supported by the language used in section 112 of the Code of 1872 (Act X of 1872) which provides for the entry in the official register not of informations but of complaints.

I think then if the allegations made are in the nature of a complaint the Police officer must record them as an information under section 154, Criminal Procedure Code, and the writing will attract the provisions of section 35 of the Evidence Act; and if, as he seems to be entitled to do, the Police Officer should record more than one information relating to a cognizable offence they will all share the privilege of being exempt from the disability imposed by section 162 of the Criminal Procedure Code. In every case it is for the Court to decide whether the communication is an information in this technical sense and whether and when the Police investigation had in fact begun.

The question then is, whether in the present case the investigation had begun before Budhni's statement was recorded by the Sub-Inspector. In my opinion it had, for the reason that Budhni's statement was not made to the Sub-Inspector with a view to taking action; on the contrary, from Rup Singh's evidence it is clear that no one in accused's house was willing to come forward as the accuser and I am satisfied from the facts of this case that Budhni's statement was certainly not that of a voluntary informant. It is then clear that, although the *chaukidar's* information was hearsay, the Sub-Inspector did in fact take it as an information under section 154, Criminal Procedure Code, and that he had already commenced his investigation when he recorded the statement of Budhni.

Therefore, the writing (Exhibit 1) is not legal evidence.

But the exclusion of the document does not affect the decision in this case; for Budhni's deposition before the Committing Magistrate clearly shows that the assault took place on account of a quarrel about land and that she witnessed it. The Sub-Inspector has given evidence under section 157 of the Indian Evidence Act which corroborates that deposition and her explanation in the Sessions Court that the statement and the deposition were made under the influence of fear cannot in the circumstances be accepted.

It is again to be regretted, that no attempt was made, either in the Committing Magistrate's Court or in that of the Sessions Judge to elicit from this witness any information as

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to the accused's movements during the remainder of the night. Rūp Singh, however, deposes that when, on the morning of the 16th, he went to the accused's house the accused would not allow Tikua to be taken to the Police nor would he go there himself. The only other inmate of the house on the night of the occurrence was *Musammāt Budhni*, the mother of the accused, but she states that she came home late and was taken straight away to bed and that it was not till the following morning that she saw the wound on Tikua's head.

Realizing the prime importance of reducing the value of the accused's confessions the learned Vakil contends that, having been retracted in the Sessions Court they themselves require corroboration. Now, in the Sessions Court the accused while admitting the two previous statements made to the Magistrate said that he had been beaten by the Police and that having been under the influence of liquor he knew nothing about the assault. In my opinion the statement made by the accused to the Committing Magistrate on the 4th January 1923 was not tainted by any coercion or undue influence and it is conclusive corroboration of the confession of the 18th December 1922, it proves satisfactorily that the accused did assault his brother.

In this later statement he added the plea of drunkenness but it is clear there is no substance in it. The only direct evidence on this point is that of Budhni and she states that Gansa and the deceased had drunk *handia* in the morning but not with their evening meal. The *chowkidar* also states in his information to the Police that the deceased's mother had informed him that the assault had been committed under the influence of drink. Giving the fullest weight to this evidence it goes only to show that the accused had taken alcohol in the course of the day, but the onus of proving that he did not commit the act with the intention of causing death or injuries sufficient to cause death is upon him and he has declined to give any explanation or evidence in the Sessions Court. There is no evidence whatsoever that the accused was not in a position to formulate the intention to kill or to cause injuries sufficient to cause death. As to the

quarrel there is no evidence of its suddenness and no provocation has been proved which would reduce the offence to one less than murder.

The result is that, in my opinion, the accused is guilty of murder.

As for the motive, the evidence of Dasain and Sukhan shows clearly that a dispute had been going on between the deceased and the accused and that the deceased wanted a division of the family lands because he wished to marry.

Finally, a plea has been made for mitigation of sentence, but having regard to the callous manner in which the accused behaved after the occurrence, it is impossible to allow the plea. The evidence of Dasain shows that after the assault the accused came to him and said that he had done wrong and complained that he was feeling cold. He did not explain what he had done but he borrowed a covering from Dasain which was recovered the next day from the accused's house. Nothing is known as to what he did during the remainder of the night, but it does not appear that he made any attempt to assist Tikua or that he showed any contrition. On the following morning the accused declined to allow the deceased to be taken to the *thana* and it was not till the Police arrived that the deceased was despatched to the hospital at Gumla.

In my opinion the sentence of death should be confirmed.

Z. K.

Sentence confirmed.

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PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 8 OF 1923.

AND

CRIMINAL APPEAL NO. 25 OF 1923.

March 16, 1923.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

THIBU BHOGTA AND ANOTHER—
ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 164 (3)—Confession, mode of recording—Magistrate, duty of, to put questions.

All that section 164 (3) of the Criminal Procedure Code requires is that a Magistrate recording a confession on questioning the person making the confession must have reason to believe that it is being made voluntarily. No express form of questions is prescribed, and the extent to which the Magistrate should question the person making the confession must largely depend upon the particular facts of each case. Whilst it is clearly desirable that he should always put such questions as may be necessary to enable him to determine whether the confession is voluntary, no particular form of questioning can be laid down as necessary. [p. 574, cols. 1 & 2.]

Where the circumstances under which a confession is made are not such as to create any suspicion in the mind of the Magistrate and he is satisfied from the demeanour of the person making the statement as well as the questions put and the manner in which the statement is made that it is voluntary, the statement cannot be objected to on the ground that the provisions of section 164 of the Criminal Procedure Code were not complied with. [p. 575, col. 1.]

A Court which is called upon to accept a confession must in each case satisfy itself that the Magistrate recording the confession honestly believed, and took steps to ascertain, that the confession was a voluntary one. [p. 575, col. 1.]

Criminal appeal from the judgment of Mr. Williams, Judicial Commissioner, Chota Nagpur, dated the 17th February 1923.

Mr. Steswar Dayal, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—In this case Phasur Bhogta was tried before the Judicial Commissioner of Chota Nagpur assisted by two Assessors in February last on a charge of murdering Sukru Bhogta and Musammatt Pandari his wife by poisoning on the 22nd of October last year. Thibu Bhogta was tried at the same time on a charge of abetment of the murder of Sukru Bhogta who

was his elder brother. The learned Judicial Commissioner, as well as the Assessors, found both the accused guilty and they were sentenced to death.

The proceedings have been submitted to this Court for confirmation of sentence under section 374 of the Code of Criminal Procedure and the convicted men have appealed.

The appellants and the deceased persons belonged to the same village, Aidega, in the Simdega sub-division of the Ranchi District in Chota Nagpur. The date upon which the alleged crime took place was the Sohrai Basi, that is, the day after the Sohrai festival, which is observed as a holiday in that part of the Province and is devoted to feasting and drinking throughout the village, the residents going from house to house for that purpose. Put shortly, the case for the prosecution is that the appellant, Thibu Bhogta, was on bad terms with his brother, a blind man with whom he had quarrelled as to the division of their land. The quarrel was one of long standing and Thibu had on a previous occasion purchased poison for the purpose of poisoning his brother. On the 22nd of October last he procured some poison which he made over to Phasur Bhogta promising him a reward of Rs. 10 and two bullocks if he would administer it to his brother Sukru. The same evening Phasur invited Sukru to his house where he went accompanied by his little daughter Jamni. As Sukru was blind, either Jamni or one of his other children usually accompanied him when he went out. At Phasur's house he partook of *handia*, a spirit distilled from rice, and *konhara chakna*, a preparation of pumpkin and chillies used as a sort of relish apparently to induce thirst. This was offered to him by Phasur. Shortly afterwards, Sukru's wife, Pandari, also accompanied by their small daughter Gangi, a twin of Jamni's, arrived and she also was offered and partook of the same food and drink. The time was in the evening about sunset. Shortly after they returned home, both Sukru and his wife were attacked with symptoms of poisoning from which they died, Sukru the same night and Pandari in the early hours of the next morning.

The principal evidence against the appel-

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ants consists of confessions made by each of them on the 2nd of November, before Mr. Walze, Magistrate of the First Class, at Simdega. The confessions so made were repeated with slight additions, but substantially to the same effect, before the Committing Magistrate on the 8th of December. At the trial before the Judicial Commissioner on the 3rd of February they withdrew their confessions, stating that they had been asked to confess by the *Daroga*, and pleaded not guilty.

Apart from the confessions of the appellants themselves, the evidence is purely circumstantial, and although it might be sufficient to raise great suspicion against the accused, we should not be prepared to convict them upon that evidence alone.

The main question for determination is whether we can rely upon the confessions. This involves a consideration of whether the evidence in the case affords corroboration of the matters alleged by the accused themselves before the Magistrate in their confessions.

According to the evidence called on behalf of the prosecution, it would appear to be clearly established that the two brothers were on bad terms. The quarrel was one of long standing and arose out of a dispute between them as to their land. They held a joint *parcha* from their landlord, but they lived in separate houses with their respective wives and families and cultivated separate plots. According to the landlord of the village, Chandrabhan Singh, who has a house there in which he occasionally resides, the quarrel between these two brothers had been going on for some ten years; and in the early part of Sukru 1920 the deceased man complained to him that Thibu had purchased poison from one Gobind Das Gosain for the purpose of poisoning him and said that he would lodge a complaint at the Police Station. The Sub-Inspector afterwards came to the village and investigated the matter but nothing came of it. After that Thibu lodged a complaint before the Magistrate charging his brother, Sukru, with calling Thibu's wife a witch and accusing him, the landlord, of trying to beat him. Again nothing came of it; the case being withdrawn. The story as to Sukru complaining about his brother's plot to poison him

finds corroboration from the evidence of Hamid-ud-din, the Writer Head Constable at Ranchi, who in 1920 was stationed at Kalebira, the nearest Police Station to Aidega, where the parties in this case lived. He states that in 1920 he was stationed at Kalebira and on the 7th of March of that year Sukan Bhogta came and complained that Thibu had given Rs. 2 to Gobind Das Gosain for the purpose of getting poison which he suspected was to poison him. Sukru said he had questioned Thibu who denied it. He also stated that they had some dispute about their land. The complaint was entered in the Station Diary of that date. This document was produced and bears out the statement given by the Writer Head Constable. It is obvious, therefore, that for some time the two brothers were on anything but friendly terms and Sukru was apprehensive of being poisoned.

To return to the evidence of Chandrabhan, the landlord. This witness further stated that at the time when the occurrence just mentioned took place in March 1920, Thibu asked him to grant separate rent-receipts to himself and Sukru and offered him Rs. 10 *salami* for this purpose. Before that a joint receipt for the whole *parcha* used to be given to Sukru. A petition for this purpose was written there, and then on behalf of Thibu by a witness who has been called stating that Sukru had threatened to take Thibu's *tanr* land and praying for a separate receipt on payment of separate rent. A separate receipt was in fact given to Thibu two days later for half the rent. This document was produced from Thibu's house during the investigation by the Police which took place before the present prosecution. It also appears from the evidence of Dibru Bhogta, the 16 years old son of Sukru, that in *Jeth* last year Sukru had sown Gondli on *tanara's* *tanr* land claimed by Thibu, and Thibu had sown Gondli on some *baree* land claimed by Sukru and the quarrel was still continuing. The fact that there was a quarrel between them about these *tanr* lands is also proved by other witnesses including Brindabatti the wife of Thibu who, when before the Committing Magistrate, had stated that there was a dispute about Gondli *tanr* between Sukru and her

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husband although at the trial she refused to admit it. There is no evidence of any quarrel between Phasur the other appellant and Sukru; in fact it is stated by at least one of the witnesses that they were not on bad terms. I have referred in some detail to the evidence as to the quarrel between the two brothers as it is a matter alleged in both the confessions as the motive for the poisoning.

I now come to the evidence of the actual occurrence which took place on the 22nd of October. There is evidence to show that both Sukru and his wife had been at the house of Phasur eating and drinking about noon or a little earlier on the same day. Other persons were also present on that occasion and it would seem clear that if poison was in fact administered by Phasur it was not on that occasion. It was urged on behalf of the appellants that there was in fact no reliable evidence that the deceased couple were at the house of Phasur on the later occasion in the afternoon, that I am satisfied from the evidence, which I shall refer to, that it has been proved that they were there shortly before sundown.

The first witness who speaks to what took place when Sukru and his wife returned home in the evening, is Dibru Bhogta, the son of Sukru already referred to, a boy of 16 years of age. He had been out in the fields at work most of the day. He returned home for his midday meal, went out again, and came back in the evening. His father and mother had both returned home by that time. His mother was ill and vomitted; his father said he wanted to make water and asked Dibru to take him out which he accordingly did taking him to a place not far from the house. His father made water and was purged and on getting up found he could not walk and had to be helped home by his son. He vomitted a great deal on his way back to the house and on arriving lay down on a *charpoy*. He told Dibru that he and Pandari were going to die and asked him to call the landlord and the *chowkidar* of the village and to go to the Police Station. He said that Phasur had given him poison and that Thibu had instigated him to do so. Thibu had by this time arrived at the house and other neighbours were coming in as

the news spread, and Thibu, when he heard the accusation against him, said nothing. Thibu helped to assist his brother on to the *charpoy* but Sukru said "why you are showing me this affection when it is you who have given me poison. The fields will now be yours." Two other men, Nagru and Bipat Bhogta, who have also given evidence had arrived at the house when Sukru made these accusations against his brother. These two witnesses have also been called and affirm that they heard Sukru accusing Thibu. The words used by both vary slightly from those used by Dibru. The words heard by Bipat are said to have been "This is all your work, why are you showing me any affection. You have got all my lands now." Nagru's account of it is that Sukru said "You and Phasur have given both of us *dawa*, why have you come to show affection for me." Although Dibru maintained in cross-examination that these two witnesses were present when his father accused Thibu, it appears that, when, before the Committing Magistrate, he had stated that no conversation took place between his father and Bipat and Nagru and that his father was unconscious when they arrived. Whether Bipat and Nagru actually heard these words or not would appear to be doubtful from what Dibru had stated before the Magistrate but it seems clear that they were said in the presence of Dibru himself as he reported the matter early next morning to Chandrabhan, the landlord, when he went to him and stated what had occurred. The words reported to him according to Chandrabhan were "why do you try to assist me when you had me poisoned by Phasur."

Samitri, a daughter of Sukru, about 15 years of age, who was at a neighbour's house when her parents returned home that night, arrived a little later on being sent for. She deposes that her father said that he and her mother had been poisoned by Phasur and Thibu, the poison being given in *honhara chakna* at the house of Phasur. She says that her brother Dibru was present when her father said this. It would appear, however, from her evidence in cross-examination that she was merely speaking of what Dibru had told her. Dibru and several of the other witnesses describe the symptoms

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from which Sukru and his wife were suffering. They were both vomiting and felt restless and uneasy; they had tingling sensation over the body described as *jhin-jhin*. They had difficulty in standing up or walking as if they were losing the use of their limbs. The two children Jamni and Gangi who went respectively with their father and mother to Phasur's house were also called and gave evidence. They stated that their father and mother drank *handia* and ate *konhara chakna* at Phasur's house and they both say that it was in the evening. They themselves did not eat or drink anything. Jamni states that it was her parents who told her about that poison. It would further appear from their evidence that Phasur's wife was at the time inside the house and not on the verandah, where the eating and drinking was going on, and did not see what took place. The fact that the two deceased persons were at Phasur's house on the evening of the 22nd of October is also deposed to by Mohit Ram Lohar who had been to a neighbouring village and was returning in the evening at sunset. As he was passing Phasur's house he says he saw Sukru and his wife and their two little girls in the court-yard of Phasur's house. He in fact entered to hear what was going on and he was given a drink of *handia* and just at that time Sukru and his wife and the children went away. He also mentions the name of another man called Bhaunra Patras as being present but he has not been called as a witness. Early the following morning, when Dibru and the others went to report the matter to Chandrabhan, the latter advised them to go to the Police Station and report. Dibru, accompanied by Nagru and Bipat, went later to Kolebira, about 12 miles distant, where the Police Station is. According to Nagru when Chandrabhan told them to accompany Dibru to the Police Station, Thibu who was present said "why go to the Police Station, better bury the dead bodies as there will only be trouble in going to the Police Station." The *chowkidar* was not at that time in the village but as the three proceeded to Kolebira they met him on his way back from that place and informed him of what had taken place. He accordingly accompanied them to the *thana* at Kolebira

and he himself lodged the First Information Report, the others being present at the time. This report states that the *chowkidar* met the others coming to the *thana* and how they told him that a double murder had been committed and that Phasur Bhogta of Aidega had administered poison both to Sukru Bhogta and his wife in the afternoon at the time of drinking *handia*. that they returned home and vomitted. He also states certain words of Sukru as reported to him to the effect that some one should "go and call Phasur, what harm did we do him that he administered poison to us both. None of us will survive. Phasur has placed earth in the mouths of my children, that is, deprived them of the means of subsistence." No mention is made in the First Information Report about Thibu and this is relied upon by the defence as an important omission. It appears, however, from the Sub-Inspector's evidence, that he also questioned Dibru and the other witnesses when the First Information was taken down and Dibru told him that when Thibu wanted to assist his father the latter said "don't lift me, don't touch me, you and the villagers in conjunction have done this".

A *post mortem* examination was made on the bodies but no poison was found in viscera and unfortunately none of the matter vomitted was preserved for chemical analyses. The bodies were those of healthy persons with no signs of injury, and it would appear that the actual cause of death was asphyxiation. The internal organs were much congested. According to Colonel Murray, the Civil Surgeon of Ranchi, who gave evidence at the trial and who had received the *post mortem* examination report, it could not definitely be said from the indications appearing from the report that death was due to poisoning but that a suspicion of poisoning arose from the absence of any injury or organic disease. He stated that poison could be entirely evacuated by vomiting and that the condition of congestion of the internal organs brain, lungs, etc., may appear in the case of persons who had taken poisons such as aconite, *dhatura*, or yellow oleander. He also stated that vomiting might lead to asphyxia by particles of vomitted matter being drawn into the respiratory passages. The *post mortem* examination, therefore, is of a negative character which shows symp-

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toms consistent with poisoning or other causes. It is well-known, however, as reference to books on Medical Jurisprudence will show, that certain poisons, such as aconite, do produce the symptoms which were observed in the present case. In Lyon's Medical Jurisprudence, 7th Edition, 691, the action and symptoms of aconite poisoning are described. It first produces tingling and then paralysis, the sensory nerve-terminals causing numbness. It produces similar effects on the motor nerves and centers of the medulla and cord. The motor ganglia of the heart are paralysed, the respiratory centre is slowed, death being usually due to arrest of respiration. Among the other symptoms it is there stated that the tingling is followed by numbness and great muscular weakness, the patient staggers if he attempts to walk, respiration becomes slow and weak, and death may occur from shock or syncope but usually occurs from asphyxia due to paralysis of the respiration. Most of these symptoms were observed in the present case. At page 696 the importance of examining the vomitted matter as well as the viscera in fatal cases is insisted on, and several instances are given of this kind of poisoning where no poison was found in the stomach or its contents or the liver or other organs but was found in the vomitted matter.

I now turn to the confessions of the appellants on which the conviction was mainly based. It would appear that they were both arrested on the 30th of October and sent to Simdega where they arrived on the following day. The Magistrate, understanding that they wished to make confessions, gave them time for reflection and committed them to the local jail until the 2nd of November, so that they might have time for reflection freed from Police influence. The Magistrate informed them that he was a *Hakim* and asked Phasur Bhogta "do you like to make any statement before me of your own free will". He answered "yes," and on being asked, "What do you want to state" replied that there was a quarrel between Sukru and Thibu in the month of *Jeth* and both brothers were ready to fight armed with arrows and *baluas*; that Sukru Bhogta had ploughed the land and that there was enmity between the brothers. In *Assar* last Thibu one evening had asked him to do

away with Sukru but he refused, that on Sunday, about 12 days ago, Thibu called him to his house and gave him *handia* to drink and some poison like *maida* flour on a leaf of a green clour and asked him to administer it to Sukru. He first declined and Thibu said that he would pay him Rs. 10 and give him a pair of bullocks and any other thing he would demand. This took place at noon. He then describes how the same day he met Sukru returning after drinking and took him to his house and having mixed the poison given by Thibu with *chakna* made him eat it and also gave him *handia* to drink, that Sukru's wife Pandari also came and ate the *chakna* into which poison was mixed and also took *handia*. They then went away and he adds that Sukru died at 10 P. M. and his wife at cock crow. He also adds that Thibu did not tell him that the medicine was *zahur* (poison) but told him that it was *bish* (poison) and that if it was taken by any man he would emicate and die within two or three months.

In the case of Thibu the Magistrate stated to him "I am a *Hakim*, you may make your statement if you so wish." He states in effect that he had a quarrel with his brother in *Asar* last over their land and there was an altercation between them. He told the landlord Chandrabhan who said that he too had enmity with Sukru because he did not pay his rent and advised Thibu to kill him but he refused. Later, in the month of *Bhado*, he again complained to the landlord that Sukru was cutting his *Gondil* and asked him to expostulate and again the landlord advised him to kill his brother and offered to give him poison for the purpose, suggesting that if Thibu could not administer it he should get Phasur Bhogta to do so. He got the poison on Friday and gave it to Phasur Bhogta on the following Sunday, the day after the *Sohrai* and told him that Chandrabhan had given him the poison to kill Sukru; that as he, his brother, could not administer it to him Phasur had better do it. The same day in the evening Phasur called Sukru to his house and gave him the poison mixed with *chakna*. When doing so his wife Pandari also came to the house and took the *chakna* with her husband and they both died. The Magistrate recorded that he believed the confessions to be voluntarily made.

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It was strongly urged before us that the confessions ought not to have been recorded by the Magistrate at all because he did not comply with the provisions of section 164 of the Criminal Procedure Code, the third clause of which provides "that no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily." It was contended that the question put to Phasur was not sufficient to enable the Magistrate to arrive at the conclusion that the confession was made voluntarily, and that in the case of Thibu no question in fact was put but he was merely told that he might make a statement if he so wished. I may say at once that with regard to the last contention, I can see no material difference between asking a person if he wishes to make a voluntary statement and stating to him that he may make a statement if he so wishes. It is contended, however, that even if a general question of this sort should be put, that is not enough within the provisions of the section to entitle the Magistrate to record the confession.

Certain cases were relied upon in support of this contention: *Ragho Laya v. Emperor* (1), *Jogjiban Ghose v. Emperor* (2), *Farid v. Emperor* (3), *Queen-Empress v. Narayan* (4) and *Jibodhan Bhuiyan v. Emperor* (5) (decided by this Court in 1917). In the last-mentioned case the Court found that the confessions were improperly induced by the Police and recorded in the presence of a Police Officer and they refused to accept them. One of the learned Judges, Chapman, J., did not deal with the question of Magistrate's jurisdiction; The other learned Judge, Roe, J., who agreed with him added: "As I understand section 164, clause (3), a Magistrate is bound to question the accused closely as to his motives in making a confession, and if he fails to do so he has no jurisdiction to say that he is satisfied that the confession is voluntarily made. He has,

therefore, no jurisdiction to record it as a Magistrate." In the case of *Ragho Laya v. Emperor* (1) the same learned Judge refers with disapproval to the invariable practice of Deputy Magistrates in this Province of ignoring entirely the provisions of section 164 (3), and expresses the view that it is not sufficient for a Magistrate merely to inform the accused person that he is a Magistrate and tell him that he may make a statement of his own accord if he so chooses but not to make any statement which he had been tutored, by others to make, and adds that what is meant by the Code is that the Magistrate should ask the accused some questions as "why are you confessing, are you sorry for your crime, or is it that some one has told you that you will gain something by a confession," and that he should refuse to proceed with the recording of the confession until he has a satisfactory answer to his question.

In a more recent case, *Emperor v. Dewan Kahar* (6) decided in 1922 the dictum of Rao, J., was criticised and dissented from if it was meant to lay down a proposition of law, but if it was merely a rule of prudence it was unobjectionable. All that the section requires is that the Magistrate on questioning the person making the confession shall have reason to believe that it was made voluntarily. No express forms of questions is prescribed, and, in my opinion, the extent to which a Magistrate should question the person making the confession must largely depend upon the particular facts of each case. As pointed out by Mr. Justice Das in the case last mentioned, there are cases which on the face of them attract the suspicion of a Magistrate and there are others which do not attract suspicion at all, and it is quite impossible to lay down any hard and fast rule on the subject. The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one. I think it would be a very dangerous rule to lay down that any particular form of questioning is necessary. Whilst it is clearly desirable that a Magistrate should always

(1) 40 Ind. Cas. 721; 18 Cr. L. J. 721.

(2) 2 Ind. Cas. 681; 9 C. L. J. 663; 13 C. W. N. 861; 10 Cr. L. J. 425.

(3) 65 Ind. Cas. 613; 2 L. 325; 5 P. W. R. 1922 Cr. J. 23 Cr. L. J. 149; 4 U. P. L. R. (L.) 33; (1922) A. I. R. (L.) 237.

(4) 25 B. 543; 3 Bom. L. R. 122.

(5) 39 Ind. Cas. 991; 1 P. L. W. 388; (1917) Pat. 149; 18 Cr. L. J. 623.

(6) 72 Ind. Cas. 961; 4 P. L. T. 145; (1923) A. I. R. (Pat.) 13.

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put such questions as may be necessary to enable him to determine whether the confession is voluntary. I can see no reason why a comprehensive question such as that objected to by Rao, J., in the case of *Ragho Laya v. Emperor* (1) should not be sufficient in certain cases. In the present case the persons confessing had not been in Police custody for more than 24 hours. They were then given two days for reflection freed from Police influence and came again voluntarily to make their statements. There was primarily no reason why the Magistrate should expect any undue pressure although he was bound to satisfy himself by a proper enquiry that the statements were voluntary, and I can see no reason why the confession as taken down by the Magistrate should be inadmissible under the section. The question is not whether, having regard to all the circumstances and the other evidence in the case, we should accept the confessions as true, but whether the Magistrate, in the circumstances shown, exceeded his jurisdiction in recording them at all. Even if they were properly recorded, there always remains the further question of whether the Court should accept them as statements of the truth. In the present case, although the questioning was meager, the circumstances were not such as to create any suspicion in the mind of the Magistrate and he may well have been satisfied from the demeanour of the persons making the statement as well as the questions put and the manner in which the statements were made, that they were voluntary. In my opinion the confessions recorded are not objectionable on the ground that the provisions of section 164 of the Criminal Procedure Code were not complied with. The real question is whether, on the rest of the evidence in the case, there is sufficient corroboration of the facts mentioned in the confessions to enable us to judge of their truth. The evidence, as already stated, clearly shows that there was a feud between these two brothers of long standing and that their quarrel was cropping up from time to time. It is suggested that the motive was totally inadequate to induce Thibu and certainly Phasur to commit a crime of this magnitude. It must be remembered, however, that all the parties in this case are Mundas descended from aboriginal tribes and one cannot

apply to them the same tests of conduct as one would in the case of more cultured people, and what might well appear to be no adequate inducement to commit a crime in the case of people of a higher standard of intelligence and morals, might appear to them to be more than adequate. There seems to be no reason why these confessions should have been made if they were not in the main true. One feature which is frequently observable in confessions amongst people of a low standard of intelligence is present in this instance. It will be observed that in both cases, whilst confessing their crime, they introduced circumstances which probably appeared to them to show a certain amount of extenuation. In the case of Thibu he seeks to excuse his action on the ground that he was influenced and urged thereto by the landlord. In the case of Phasur he alleged, which was no doubt true, that Thibu was the prime instigator and further that he told him that the poison was such that the man would not die immediately but would emaciate and die later, and in his examination before the Committing Magistrate he puts the extenuating circumstance even higher by saying that Thibu told him that Sukru would not die if he took the poison but would only be emaciated. It is impossible, however, to accept this part of his statement as it was clearly an afterthought.

After considering the whole of the evidence it seems to me ample to support the truth of the confessions made and I have no reasonable doubt that they were true in so far as they disclosed the guilt of the appellants. In my opinion this appeal should be dismissed and the sentences confirmed.

Mullick, J.—I agree.

Z. K.

Appeal dismissed.

CHANDER SEN V. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 563 OF 1922.

December 20, 1922.

Present.—Mr. Justice Walsh.

CHANDER SEN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190 (1) (c), 191—Cognizance of offence by Magistrate—Omission to inform accused of his right to have case transferred—Illegality.

When a Magistrate takes cognizance himself of an offence under section 190 (1) (c) of the Criminal Procedure Code, the accused has a right under section 191 to have the case tried by another Magistrate and to be told by the Magistrate that he has such a right. An omission to inform the accused and the Magistrate's refusal to transfer the case when asked to do so are fatal to the legality of the trial. The accused, in order to save time and trouble of a further hearing may waive his right. But he can do so only when he is distinctly told by the Magistrate in accordance with the provisions of the Criminal Procedure Code that he has the right to decline to be tried by him.

Criminal revision from an order of the Sessions Judge, Muradabad, dated the 17th October 1922.

Mr. Durga Prasad, for the Applicant.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case a *punkha* coolie had stolen a brooch worth Rs. 20 which he sold to the present applicant Chander Sen for one anna. Chander Sen was examined as a prosecution witness and admitted that he had given the boy one anna and that he handed the brooch on to a caste-follower who was a *sonar*. He represented himself as a philanthropist which, of course, is nonsense. The next time he wants to do an act of philanthropy and give a boy one anna when he is hungry, I should advise him not to take a stolen brooch in exchange. The notion that he handed on this ill-gotten gain as a present to his friend the *sonar* is nonsense. The brooch would only be worth to a *sonar* what it would fetch, and it is, therefore, reasonable to suppose, in fact quite certain, that Chandra Sen intended to divide the proceeds with his friend. It was clearly a dishonest act which deserved punishment though no more than a petty theft to which, no doubt, he was by chance subjected to a sudden temptation. The punishment seems to me to have been

adequate, and the fine, unless he is a man of some position, rather severe. All this, however, is really irrelevant to the question which I have to determine, and is only relevant upon the question whether the authorities in the Magistrate's Court now think it worthwhile to proceed further with this matter, if a further trial is lawful upon which question I express no opinion. But it is quite clear that his revision must be allowed. The trial and conviction were unlawful. The Magistrate quite rightly took cognizance himself of the offence on the evidence of the witness. Section 191 provides that the accused in such a case shall be informed by the Magistrate, before any evidence is taken, that he is entitled to have the case tried by another Court. The meaning of that is obvious. The accused has a right to have the case tried by another Court and he has a right to be told by the Magistrate he has such a right. This was not done. Indeed, the Magistrate himself refused to transfer the case when asked to do so. This omission was fatal to the legality of the trial. It is idle in such a case to talk about acquiescence or waiver. A man has no option but to acquiesce when the decision has already been given against him. No doubt, an accused person in order to save time and trouble of a further hearing may waive his right. He can only waive it when he is distinctly told in accordance with the provisions of the Act that he has the right to decline to be tried by that Court. When he has been so told he can decide whether he waives the right. Nothing of that kind has happened here. The conviction and sentence must be set aside and the fine, if paid, refunded.

Having regard to the state of work in the Criminal Courts, I should not myself consider it necessary to proceed further with a re-trial.

Let the brooch be returned to the Magistrate to enable him to return it at once to Miss Cruddas.

N. K. Revision allowed.

SAFDAR KHAN V. MUHAMMAD ZAMAN KHAN.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 79-44 OF 1921.

February 22, 1923.

Present.—Mr. Pison, J. C.

SAFDAR KHAN—PLAINTIFF—

APPELLANT

VERSUS

MUHAMMAD ZAMAN KHAN AND AN-

OTHER—DEFENDANTS—RESPONDENTS.

Custom—Proof—Opinion of tribe, value of—Tribal and family custom—Special custom—Burden of proof—Succession—Pagwand—Presumption—Whole blood, whether excludes half blood—Gagiani tribe of Peshawar District.

Custom is a mere crystallisation of public opinion in matters affecting the social and economic life of a community, and it is not an unsound criterion of the existence of a custom whether or not it is to any extent in harmony with general opinion. [p. 579, col. 1.]

It is dangerous to hold that a custom, which is categorically repudiated and condemned by the majority of a tribe, is actually the custom by which they are bound. [p. 579, col. 1.]

There is an overwhelming presumption that a particular family follows the general custom of its tribe, and, in particular cases, definitely established instances of a mode of succession in a family belonging to a particular tribe are of enormous value in arriving at a general custom, which is simply the aggregate of the customs of particular families. [p. 580, col. 1.]

Courts have the widest latitude in discovering and establishing any particular custom applicable to any particular community, and it is for this reason that case-law has been particular in distinguishing the customs of various tribes. But Courts are bound to recognise some limit to the distinctions which can be drawn among different members of the same community, and they are obliged to take certain tribes as the lowest units regarding which case-law can be established as binding. [p. 582, col. 1.]

Courts must, in the interests of justice and the discouragement of litigation and uncertainty of tenure, lay down the normal rule of succession applicable by custom to the tribe as a whole. In such cases it may be possible for special families to prove a special custom, but the *onus* will lie heavily on him who asserts a departure from the general rule. [p. 582, col. 2.]

The statement of a custom prevailing among Muhammadans as being in conformity with Muhammadan Law, is no bar whatever to its being a valid and a genuine tribal custom. This is particularly the case where there is any confusion or variety in the details of the custom, and where it has been, in any way, in a state of flux. In such a case it is natural and legitimate that members of the tribe concerned should refer their custom to the test of Muhammadan Law, and although this test may not be the ultimate *ratio decidendi*, it is not one which in any way invalidates a statement of custom. [p. 582, col. 1.] Where it is found that the parties to a suit follow the *pagwand* rule of succession the *onus*

of proving that the whole blood excludes the half lies on the party alleging it. [p. 578, col. 1.]

Gholam Muhammad v. Muhammad Bahshsh, 4 P. R. 1891 (F. B.), relied on.

The rule prevailing in the *Gagiani* tribe of the Peshawar District is that in succession to a brother's estate the whole blood excludes the half. [p. 582, col. 2.]

Second appeal from a decree and judgment of the Additional Divisional Judge, Peshawar, dated the 1st June 1921, setting aside a decree and judgment of the Sub-Judge, Charsadda, dated the 12th January 1920.

JUDGMENT.—(May 4th, 1922).—The parties in this case are Gagianis of Matta Moghalkhel in the Peshawar District, and are sons of Kabut Khan. Kabut Khan had two sons Safdar Khan and Nasarullah Khan by one wife, and Muhammad Zaman and Rustam Khan by another. The land now in suit is the estate of Nasarullah Khan, deceased. His own brother Safdar Khan claims to succeed alone to the whole estate of his own brother, to the exclusion of Muhammad Zaman and Rustam Khan, who are half brothers of the plaintiff and of the deceased. The sole question to be decided in this case is, whether, by the custom prevailing among the parties, the whole blood excludes the half-blood in succession to a brother's estate. The Sub-Judge who tried the case, Mr. Wylie, Assistant Commissioner of Charsadda, found for the plaintiff. The Divisional Court on appeal found for the defendants.

It can be said at once that there is not the least doubt that the parties follow the "*pagwand*" system in succeeding to a father's estate, *i.e.*, they inherit from their father *per capita* and not *per stirpes*. As there were two surviving sons by each wife on Kabut Khan's death, the mode of succession was actually the same whether they inherited *per capita* or *per stirpes*. I do not attach very much importance to the entry in the Revenue papers, that the two groups of sons succeeded half and half; but, apart from this, the "*pagwand*" succession is almost conclusively proved by the fact that Kabut Khan, the father of the parties, was one of the persons who declared before Mr. Lorimer, when the Code of Customary Law of the Peshawar District was prepared at the Settlement

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of 1895-96, that in the Gigiani tribe succession was "*pagwand*."

But this finding does not conclusively prove that, when brothers succeed to the estate of a deceased brother, whole blood does not exclude the half. There is a presumption that it does not so exclude and *Gholam Muhammad v. Muhammad Bakhsh* (1) is an authority for holding that, when parties follow the "*pagwand*" rule, the *onus* of proving that the whole blood excludes the half lies upon the party alleging it. But it must be clearly recognized that this *onus* can be, and has on some occasions been, discharged, and that there are well-established cases of the whole blood excluding the half in succession to a brother's estate although all brothers succeed equally to their father's estate. This point is noticed very clearly by the learned Revenue Commissioner in his order of the 30th of July 1920, dealing with the present case. But I think that the distinction has been partly missed by the learned Divisional Judge. The distinction is very clearly dealt with by Mr. Bunbury in his ruling published as J. R. 21 of 1904, which relates to the neighbouring Daudzai tract. Mr. Bunbury held, that the Daudzai tribe followed the "*pagwand*" rule of succession, but, that, nevertheless, in succession to a brother's estate the whole blood excluded the half. I quote the following passage from that judgment: "The view of the first Court that, because the "*pagwand*" rule obtained in the family of the parties, therefore, the whole and the half blood succeed equally, is not to my mind logically sound. All the sons of one individual by different wives are related "*inter se*" in the half blood; but the sons by the same mother are related "*inter se*" in the whole blood: and it does not at all follow that a rule which governs the distribution of the father's property among these sons would subsequently govern the distribution of the share of one of the latter among his full and half brothers." A further point of importance in that ruling is that it established the principle that the whole blood excluded the half practically entirely upon oral evidence produced by the parties, and there can be no doubt, that

(1) 4 P. R. 1891 (F. B.).

in the present case also, the evidence of witnesses and the results of local inquiries are extremely important and cover a very wide field. In the revenue proceedings, the first local inquiry was made by the Naib-Tahsildar who, although he found against the present plaintiff in view of judicial precedents, seems to have considered that the custom as shown by his inquiry and the evidence of the leading men of the tribe, was in plaintiff's favour. The Revenue Assistant, K. B. Mian Ghulam Samdani, on appeal found definitely in plaintiffs' favour and gave a very complete resume of his reasons for doing so. Mr. Wylie, the Assistant Commissioner, recorded the evidence of very important representatives of the Gigiani tribe including that of K. B. Abdúl Jabbar Khan, *Zaildar*, and Ghulam Haidar Khan, Honorary Magistrate, and he further referred to his experience with a representative *jirga* of the Gigiani tribe held in 1920, and in which the opinion was absolutely unanimous that the whole blood excluded the half. He remarked in his judgment, probably with justice, that there was no other question on which such a *jirga* could have produced a unanimous opinion. Again, we find this very question in 1919 referred under section 8, Frontier Crimes Regulation, to a local *jirga* and a finding given that the whole blood excluded the half. As against this there is not the least doubt that the oral evidence produced by the defendants was of the most unsatisfactory character. Most of their witnesses were not Gigiani and those that were, were persons of no position. The above to my mind is fully sufficient in itself at least to neutralize the presumption which arises from the "*pagwand*" system of succession to a father's estate especially in view of the fact that we have in a neighbouring tract an established instance where the presumption has been similarly rebutted.

The case for the defendants, therefore, rests upon two supports, (a) the custom as recorded in answer No. 63 of Lorimer's Customary Law, and (b) the weight of judicial decisions. To take first (a) alone I am inclined to think that the authority of Lorimer's Customary Law is less im-

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portant than would appear at first sight. It has been argued by the learned Counsel for the respondents in this case, that the evidence now produced in Court and the local inquiries made by K. B. Ghulam Samadani and Mr. Wylie represent rather the view of the tribe as to what the custom ought to be than what it actually is. It is pointed out, that Mian Ghulam Samadani was certainly influenced, partly by sentimental considerations and possibly by his own view on the question of equity. He alludes, for instance, to the habitual frictions between half brothers and to the assistance which is often given in time of adversity by one own brother to another. It may be admitted that what we are endeavouring to ascertain is certainly not what the custom ought to be, but what it is. But we must, at the same time, take into full consideration the fact that, as noted in a well-known ruling of Mr. Barton in this Court, "custom is a mere crystallization of public opinion in matters affecting the social and economic life of a community and it is not an unsound criterion of the existence of a custom whether or not it is to any extent in harmony with general opinion." It is, therefore, dangerous to hold that a custom, which is categorically repudiated and condemned by the majority of a tribe, is actually the custom by which they are bound. Now I think, that the objections taken to statements made by leading members of the tribe as to their own customs in the present case may equally well be brought against Mr. Lorimer's record itself. He was doing precisely what a series of Revenue and Executive Officers have been doing in the present case. He was depending entirely upon opinions expressed before him at the moment. He was in no better position to ascertain the truth of those statements than were the officers who have made local inquiries in the present case. In fact, I am inclined to think, that the latter were in the better position of the two. Mr. Wylie's judgment shows, that he had considered the question for a very extended period. It was not only the evidence which he recorded in the present case, but his experience of the representative *Jirga* the year previously. Few persons could have been in a stronger position than he was to get

to the bottom of the custom and practice of the Charsadda Sub-Division. I attach, again, the greatest weight to the finding passed under section 8, Frontier Crimes Regulation. A tribal *Jirga* is exactly the tribunal most competent to decide a question of tribal custom and a finding under section 8, Frontier Crimes Regulation, is a legal finding, and when it deals with questions of this kind, has all the weight of an important judicial decision. These considerations show that even where Lorimer's Customary Law is most definite it is not a document upon which reliance can be placed for all time. It has indeed been exposed to a series of criticism in the recorded rulings of this Court. We have a very clear precedent also in the case of Dardzi tribe for the discovery of cases, where sons succeed to a father's estate by "*pagwand*", but inherit *inter se* with reference to uterine descent only against the custom as recorded by Mr. Lorimer.

I now turn to (b), the question of recorded judicial authority. The judicial precedents in favour of each side are set out in Mr. Bolton's order of the 30th July 1920, and, at first sight, their weight is, as he considered, in favour of the defendants. But a closer examination of these rulings shows to my mind an extremely small balance, if any, on the defendants' side. Three judgments are alluded to by Mr. Bolton as favouring the defendants. Of these, two, *viz.*, Mr. Bolton's own finding in the Divisional Court, Case No. 2 of 1909, and the Revenue Commissioner's finding in Case No. 129 of 1910-11, do not relate at all to the exclusion of the half blood by the whole in succession to a brother's estate. They allude solely to the question of "*pagwand*" or "*chundwana*" inheritance to a father's estate. This point seems to have been lost sight of inasmuch as the question for consideration was not whether the present parties inherited "*pagwand*" (this had already been decided), but, whether, notwithstanding that system of inheritance, brothers succeeded *inter se* on a different principle. The only important ruling, therefore, on the actual question of whole blood not excluding half among brothers is the Judicial Com-

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missioner's ruling in Case No. 42 of 1904. Now, an examination of that ruling shows that it was passed on revision proceedings and at a preliminary hearing only. It is a very short order and it cannot be said to deal at all exhaustively with the general customs, I have not yet seen the Divisional Court's order against which revision was then lodged and possibly, it may disclose a complete case. But as regards the revisional order, I cannot, though with all respect to the high authority which passed it, regard it, as having quite the same binding force as other rulings which have been passed after a lengthy discussion on full appeals. Now, this order is the *only* judicial precedent which I have seen for the view that the whole blood does not exclude the half among Gigianis. As against this, there are two recorded rulings in which the opposite view was taken. Case No. 186 of 1899 is extremely important as it was there held among certain Gigianis of Matta Moghalkhel, where the bulk of the land now in suit is situated, the whole blood did exclude the half. It has been remarked that that decision was passed on precedents found in a particular family, but I do not think that this affects its importance. There is an overwhelming presumption that a particular family follows the general custom of its tribe, and in any case, definitely established instances of a mode of succession in a Gigiani family are enormously important in arriving at a general custom which is simply the aggregate of the customs of particular families. There is another Case No. 107 of 1896 in which it was held, that whole blood excluded the half by Muhammadan Law. I do not entirely agree with the view taken by the Revenue Commissioner that it is irrelevant simply because none of the present parties follow Muhammadan Law. It may be admitted that its force is weakened, but I think it is going too far to say that it is irrelevant. The tendency of Pathans who follow tribal customs in preference to Muhammadan Law to attempt nevertheless to adjust and reconcile those customs with the principles of "*shariyat*" has been frequently noticed, and has coloured their pronouncements on questions of

custom both in Lorimer's Code and on subsequent occasions. The mere fact that parties assigned the reason for a particular practice to Muhammadan Law, rather than to Pathan custom does not necessarily imply that that practice was not in accordance with their custom.

From the above, it will be clear that the defendants benefit very little, if at all, from recorded judicial precedents, and I have already alluded to the overwhelming nature of the plaintiff's oral evidence and of the results of extended local inquiries.

I now turn to a very important part of the evidence, the actual instance of successions recorded in mutation proceedings. In the Revenue inquiries 115 mutations were discovered, of which it is said that 59 are in favour of the defendants and 56 in favour of the plaintiff. Unfortunately, I cannot determine by an examination of those mutations, whether all of them or which of them relate to the Gigiani tribe, nor are the learned Counsel on either side able to enlighten me on this point. It appears to me probable that those produced refer to the Doaba tract as a whole and not necessarily to the Gigiani tribe in particular. I think it is extremely important that all possible mutations should be compared which relate exclusively to the Gigiani tribe and to no other. The Gazetteer of the Peshawar District would seem to show that the Gigiani tribe has always held a very peculiar position and I do not think that a parallel can necessarily be drawn between its customs and those prevailing in such portions of the Doaba tract as are held by other tribes. I am, therefore, obliged to remand this case for this point to be cleared up. Under O. XLI, r. 25, I remand this case to the Divisional Court with the request, that the learned Divisional Judge will direct the Assistant Commissioner of Charsadda to make an inquiry upon all recorded mutations of the succession of brothers to a brother's estate relating exclusively to the Gigiani tribe, and will submit the result of this inquiry with his opinion to this Court. I may remark that another case that of *Muhammad Rafiq v. Sher and others* in which the same issue of custom is involved, has been heard by

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me today and I have made a remand under O. XLI, r. 25 in that case also. It is not on all fours with the present case. It was decided not by the Assistant Commissioner, Charsadda, but by Arbab Wali Muhammad Khan, Munsif, First Class, who merely followed the decision of the Assistant Commissioner in the more important case. There are, however, in that case certain preliminary points to be cleared up with regard to the parties' position, and I think it is important that on remand both cases should be heard by the Assistant Commissioner.

Return by 10th October 1922. Objections and hearing on 11th October 1922.

Mr. Hukim Chand, for the Respondents.

JUDGMENT.—My order of the 4th of May 1922 is to be read as part of the final order on this appeal. The return made to the order of remand shows that 65 of the relevant mutations in the Doaba tract relate to succession among Gigianis, and that in 39 of these whole and half blood have succeeded equally and in 26 the whole has excluded the half blood. The Tahsildar who conducted this investigation, notes in his report of the 31st of July 1922, that the opinion generally expressed was, that the whole blood excluded the half. The same view is strongly enunciated by Major Reilly, the present Assistant Commissioner of Charsadda, to whose Court the remand was made. He also convened a *jirga* of all the leading men of the tribe and again referred to them this issue. Their written finding is attached to the record of Civil Revision No. 135 of 1921 (*Muhammad Rafiq v. Sher*) in which a remand was made simultaneously.

I have already reviewed at length the original evidence produced in this case and have discussed in detail the record of custom and the judicial precedents. With reference to the remarks in my former order regarding Civil Revision No. 42 of 1904, I have now examined the judgment of the Divisional Court also in that case. The examination tends to confirm the view that the ruling is of little value as a precedent. The question of the possibility of whole blood excluding half by virtue

of a custom co-existing with the *pagwand* distribution was not really discussed. It was found that the succession in that particular family had been irregular in the past and that neither *pagwand* or *chundawand* custom had been completely followed, and that, in consequence, "the ordinary rule of inheritance must come in." As I have already said, the order passed by the Judicial Commissioner was of a summary nature rejecting a petition for revision *in limine*, and involved no serious review of the question of custom. I have already pointed out that this judicial precedent stands alone among several others of far more importance to the opposite effect.

It remains to consider whether the inquiry now made on this remand has materially added to our knowledge of custom. So far as regards the recorded mutations of succession, the balance in favour of equal inheritance by whole or half blood does not appear to me seriously to shake the weight of other evidence to the exclusion of half blood by whole. The learned Counsel for the respondents argues that the finding of the *jirga* convened by Major Reilly, if examined carefully, tends rather to confirm than to rebut the conclusion arrived at by the Divisional Court. He contends that it is clear from the wording of the finding itself that the *jirga* wanted to introduce an innovation because that innovation would be in accordance with Muhammadan Law. This, of course, is another form of the argument that we are dealing with, a record not of what custom is, but of what people think, it ought to be. I do not consider, however, that the opinion of the *jirga* bears this construction. It is true that at the beginning it states that the signatories wish that full blood should inherit a brother's estate to the exclusion of half blood. At the same time, it concludes by saying, that "generally full blood succeeds to a brother's estate, and we, all the Khans, are also of opinion that this is the best and just mode of inheritance in a brother's estate, as is always done and as Muhammadan Law orders us to do. We abide by Muhammadan Law in this respect." I do not think that this can be twisted into an admission that the signatories contemplate an inno-

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vation or, that they are trying to revise an existing custom. It is clear, indeed, from the rest of their finding that the custom has actually varied in different villages and is, to some extent, in a state of confusion. Again, I consider that Courts are apt unduly to press that aspect of the case which treats Pathans of the Peshawar District as bound by custom to the exclusion of Muhammadan Law. There appears to be a prevalent idea that not only are such tribes bound by their own custom, as opposed to Muhammadan Law, but that such custom can never be in accordance with Muhammadan Law. I can see no justification whatever for this extreme view. There is nothing in the least impossible in certain features of tribal custom approximating to the tenets of Muhammadan Law, and indeed one would naturally expect to find this feature among any class of Muhammadans. The statement of a custom as being in conformity with Muhammadan Law is, to my mind, no bar whatever to its being a valid and a genuine tribal custom. This is particularly the case where there is any confusion or variety in the details of the custom and where it has been, in any way, in a state of flux. In such a case it is natural and legitimate that members of the tribe concerned should refer their custom to the test of Muhammadan Law and, although this test may not be the ultimate *ratio decidendi*, it is not one which in any way invalidates a statement of custom. It is argued, again, by Counsel that we have, in this recorded opinion, an admission that every village has a separate custom, and that, in these circumstances, it is for Courts to decide what special custom obtains in each particular village. I am unable to subscribe to this view. Courts undoubtedly have the widest latitude in discovering and establishing any particular custom applicable to any particular community, and it is for this reason that case-law has been particular in distinguishing the customs of various tribes. But it appears to me, that Courts are bound to recognize some limit to the distinctions which can be drawn among different members of the same community; and that they are obliged to take certain tribes as the lowest unit regarding which case-law can be established as binding. It

would seem to me impossible to leave the Courts of this Province in a position of having to discover and lay down a special rule of succession in every particular village of a small tract, such as the Gigiani tract, and of determining its applicability to practically every distinct family of the tribe. It is impossible to escape from the view that Courts must, in the interests of justice and the discouragement of litigation and uncertainty of tenure, lay down the normal rule of succession applicable by custom to the tribe as a whole. In such cases it may be possible for special families to prove a special custom, but the onus will lie heavily on one who asserts a departure from the general rule. I can only regard the opinion recorded by the *jirga* in this case as a statement of the custom accepted unanimously by all the leaders of the Gigiani tribe as the custom which governs their mode of succession, and which, in spite of individual variations, is regarded by the tribe as a whole as the normal and established mode of succession. I have already, in my previous order, enumerated the other reasons which have led me to the same view. It is one which is supported by the trend of judicial decisions, by an overwhelming consensus of oral evidence and by all the local inquiries, which have been made in the present case starting from the first investigation made on the question of mutation. It is also, as I have already shown, not in conflict with precedents which have been laid down in an adjoining tract. I must hold, therefore, that the rule prevailing in the Gigiani tribe is that, in succession to a brother's estate, the whole blood excludes the half.

On the above finding the present appeal must succeed. I, therefore, set aside the order of the Divisional Court dismissing the suit and grant the plaintiff a declaratory decree to the effect that he succeeds solely to the estate of his deceased brother Nasarullah Khan. The defendants will pay the plaintiff's costs throughout.

Z. K. & N. H.

*Appeal allowed.
Order set aside.*

MAWAZ KHAN v. ZOHRA JAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 390 OF 1920.

February 19, 1923.

Present:—Mr. Justice LeRossignol

Mr. Justice Martineau.

MAWAZ KHAN AND OTHERS—DEFENDANTS—APPELLANTS
versusMusammat ZOHRA JAN AND
OTHERS—PLAINTIFFS AND BEGAM JI—
DEFENDANT—RESPONDENTS.*Custom—Alienation by limited owner—Female reversioner, whether can object.*

Where a female is in possession of certain property with a limited interest, her alienations can be controlled by another female who is entitled to succeed to the estate on the death of the alienor.

Maqsud-un-nisa v. Kaniz Zohra, 135 P. R. 1908; 194 P. W. R. 1908, followed.

Second appeal from a decree of the District Judge, Attock, at Cambellpore, dated the 12th December 1919, reversing that of the Subordinate Judge, First Class, Cambellpore, dated the 2nd August 1919.

Mr. Jai Gopal Sethi, for the Appellants.

Mr. Sagar Chand, for Mr. B. D. Qureshi, for the Respondents.

JUDGMENT.—One Fateh Ahmad by Will devised his property to his widows and daughters. On his death his reversioners contested the validity of the Will with the result that this Court in its decision—*Mowaz v. Gulab Jan* (1) held that the Will should have no effect upon the ordinary rule of devolution of property in this family. Subsequently, *Musammat Begam Ji*, one of the widows of Fateh Ahmad, gifted her share in her late husband's estate to his reversioners, the plaintiffs in the earlier case, and the present suit was by the daughters for a declaration that the gift by *Musammat Begam Ji* was not binding upon them and for possession of Begam Ji's share of the estate which she had forfeited by re-marriage.

The Trial Court dismissed the suit on the ground that the plaintiffs had not established any right to contest the alienation by *Musammat Begam Ji* because they had not been able to show the nature of the right under which they claimed. The plaintiffs are women and were represented

(1) 24 Ind. Cas. 920; 97 P. R. 1914; 220 P. L. R. 1914; 121 P. W. R. 1914.

ed by Counsel who had no clear idea apparently as to the nature of the widow's title. In reply to the plea of the defendants he first stated that they succeeded on the re-marriage of *Musammat Begam Ji* by right of survivorship, then he opined that it was by right of succession, and finally elected for the right of survivorship. The learned District Judge on appeal went into the status of widows and unmarried daughters and found that, according to the custom obtaining among the parties, who are *Khattars* of Tahsil Attock, widows and unmarried daughters succeeded in equal shares and, on the death of a widow or daughter, the survivor or survivors succeeded to her share. The term 'survivor' appears to have caused confusion. It does not mean that the survivor succeeds under the technical rule of survivorship; it means simply that the survivors succeed under custom to the estate of the deceased. In second appeal we are asked to interfere on the ground that the claim to succeed was based on the rule of survivorship and the Appellate Court had decided according to custom, but, in our opinion, there has been no confusion in the minds of the parties as to the question in issue between them. It is noteworthy that in their earlier suit, reported as *Mowaz v. Gulab Jan* (1), the reversioners admitted the right of the widows and daughters to possession up to the time of death or marriage or re-marriage in the case of the widows, and this admission confirms the finding of the lower Appellate Court that till death or marriage widows and daughters succeed in equal shares to the estate of the deceased. The real question in dispute between the parties was, whether the daughters were competent to contest an alienation by a widow. This question had been answered in the affirmative by the lower Appellate Court, following *Maqsud-un-nisa v. Kaniz Zohra* (2), which provides that when a female is entitled to succeed on the death of the alienor and when the alienor holds only a limited interest in the estate, such female is competent to control the alienations of the alienor. This rule is based upon common sense and general principles of equity and we accept it without hesitation.

(2) 135 P. R. 1908; 194 P. W. R. 1908.

NANJADIK RAI v. RAM JATAN RAI. SUBRAYA SAMPIGETHAYA v. KRISHNA RAIPADITHAYA.

For these reasons we find the decree of the Court below worthy of affirmation and dismiss the appeal with costs.

Z. K.

Appeal dismissed.

ruling in *Kalyan Mal v. Samad* (1) in which it has been held that a question of proprietary right is involved. Following that ruling, I reject the plea of the appellant and dismiss the appeal with costs.

M. A. A.

Appeal dismissed.

(1) 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1587 OF 1921.

April 10, 1923.

Present:—Mr. Justice Daniels.

NANJADIK RAI—PLAINTIFF—APPELLANT
versus

RAM JATAN RAI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 34, 177 (e)—*Question of proprietary title—Appeal.*

In a suit for ejectment under section 34 of the *Agra Tenancy Act*, if the defendant pleads that he is not a tenant but a mortgagee of proprietary rights, a question of proprietary title is raised within the meaning of section 177 (e) of the *Act*, and an appeal lies to the Civil Court.

Kalyan Mal v. Samad, 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118, followed.

Second appeal against a decree of the District Judge, Ghazipur, dated the 10th August 1921.

Messrs. U. S. Bajpai and S. D. Sinha, for the Appellants.

Dr. M. L. Agarwala, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment in the Revenue Court. The only plea which has been argued is that no appeal lay to the Court below, no question of proprietary title having been raised within the meaning of clause (e) of section 177 of the *Tenancy Act*. The plaintiff brought the suit under section 34 alleging that the defendant was occupying the land without his permission. The contesting defendant, Ram Jatan Rai, pleaded that he was a mortgagee of the proprietary right. The plaintiff's proprietary right was not in dispute. If the matter were one of first impression there might, I think, be room for controversy whether the issue whether the defendant was a tenant or a mortgagee from the proprietor does really raise a question of proprietary right; but the question is concluded by the

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 498 OF 1921.

March 12, 1923.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts-Trotter.

SUBRAYA SAMPIGETHAYA AND
OTHERS—DEFENDANTS NOS. 1, 3, 4—
APPELLANTS

versus

KRISHNA RAIPADITHAYA—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6 (d) —*Right to future maintenance—Alienability—Test.*

The right under a contract to a defined amount in cash or kind for future maintenance is "property" under section 6 of the *Transfer of Property Act*. But whether it is an interest in property restricted in its enjoyment to the owner personally so as to render it inalienable under clause (d) must depend on the facts of each case and must be ascertained by the ordinary rules of interpretation of the contract, the question being whether the intention of the parties was that the right should be personal and, therefore, inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution, considered as a contract to come into operation at once without reference to what has in fact since happened. [p. 587, col. 2; p. 588, col. 1.]

A widow by a deed surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and maintain her during her lifetime and the document also provided in the alternative that if it was not convenient for her to live jointly with him, she should remain in the building in which she resided and be then entitled for separate provision for food, clothing and a certain quantity of rice, which were charged upon certain immoveable properties:

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Held, that the intention of the parties to be derived from the document was that the rights of the widow under the contract should be personal and inalienable under section 6 (d) of the Transfer of Property Act. [p. 588, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 122 of 1920, preferred against a decree of the Court of the District Munsif, Karkal, in Original Suit No. 148 of 1919.

This second appeal coming on for hearing on the 6th and 7th of April 1922, upon perusing the grounds of appeal, the judgments and decrees of the lower Courts and the material papers in the suit, and upon hearing the arguments of Mr. C. V. Anantakrishna Ayyar, for the 1st Appellant, and Mr. K. Srinavasa Rao, for the Appellants, and of Mr. B. Sitarama Rao, for the Respondent, and the case having stood over for consideration till the 19th of April 1922, the Court, (Oldfield and Spencer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Oldfield, J.—I agree to a reference to a Full Bench in the terms, which my learned brother is about to state. In doing so, I commit myself to no opinion as to whether section 6, Transfer of Property Act, is to be interpreted with reference to public policy. For it is not clear that the considerations which arise correspond with any of the heads of public policy which authority has hitherto recognised and which it is undesirable to multiply, or that the refusal of the law to treat certain things and rights, of which a widow's right to future maintenance may be one, as property susceptible of transfer, may not be a sufficient justification for interpreting the section in the manner proposed.

Spencer, J.—In this second appeal a question has arisen whether the sale of a right to maintenance which a Hindu widow executed in favour of the plaintiff was valid. The widow, who is named Lakshmi Hengsu, in 1904 surrendered by Exhibit B her husband's estate to the nearest reversioner subject to a condition by which she became entitled to food and clothing for life and a right of residence, the food to consist of 45 *muras* of rice of two descriptions charged on the liability of the sur-

rendered properties; and nearly ten years later she conveyed under Exhibit A her right to collect future maintenance in the form of 45 *muras* of rice annually to the plaintiff in consideration of a sum of Rs. 1,000. The description of property in the document refers to another conveyance of the widow's right to collect arrears of maintenance which she executed on the same day.

Mr. Anantakrishna Ayyar who appears for the appellants concedes that the transfer of arrears of maintenance already accrued at the time of transfer is valid. But he argues that Exhibit B is invalid so far as it purports to transfer future maintenance. In the lower Appellate Court in dealing with this point of law, the Subordinate Judge relied on an observation in *Annapurni Nachiar v. Swaminathan Chetty* (1), of Sir Arnold White, Chief Justice, and Munro, J. They state: "It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The Legislature has not thought fit to prohibit them. We are not prepared to say that, at any rate where as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate is inalienable." With due deference, I feel some difficulty in accepting that dictum as a correct statement of the law on the subject. So far as it makes an agreement to pay maintenance to a widow transferable, it seems to be opposed to section 6, clause (d) of the Transfer of Property Act which declares that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. On this section and clause there is a note in the Commentary by Shephard and Brown on the Transfer of Property Act, which is so well accepted an authority that I do not hesitate to quote it. It says: "The right to future maintenance cannot be attached in execution of a decree and it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer by her since the right exists for her personal benefit only." It may be doubted

(1) 6 Ind. Cas. 439; 34 M. 7; 8 M. L. T. 108. (1910) M. W. N. 505; 20 M. L. J. 785.

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whether she could effectually transfer her interest in property allotted to her for her maintenance. As regards attachment of the right to future maintenance reference is made to *Diwali v. Apaji Ganesh* (2), and section 60 of the Code of Civil Procedure. *Diwali v. Apaji Ganesh* (2), the decision proceeded upon the proviso against alienation contained in the deed of assignment. But section 60, clause (n) is quite clear. The Courts have consistently held that a right to future maintenance cannot be attached in execution. In *Nanammal v. Collector of Trichinopoly* (3) the fact that the right to maintenance has ripened into a decree did not, in the opinion of Abdur Rahim, J., and Munro, J., who was also a party, to *Annapurni Nachiar v. Swaminathan Chetty* (1), make the right to maintenance any more attachable. In *Palikandy Mammad v. Chingoran Kelth Valia Appa* (4), Sadasiva Aiyar and Moore, J., had no hesitation in holding that there could be no attachment of a right to future maintenance. As pointed out by Sadasiva Aiyar, J., in that case, the public policy of prohibiting transfers found in section 6 of the Transfer of Property Act and the prohibition against attachment under Civil Procedure Code, both rest upon the same foundation. In England it was held in *Watkins v. Watkins* (5), that alimony granted to a separated wife was not alienable by her. Lindley, L. J., indicates the reasons for this. He says the Court which orders it never loses its control over it and the doctrine of inalienability is based on the old ecclesiastical law. The learned Judges who decided *Annapurni Nachiar v. Swaminathan Chetty* (1) evaded the application of the Transfer of Property Act by saying that the right to future maintenance was not in their opinion "property." Seshagiri Ayyar, J., in *Seshappa Heggade v. Chandayya Heggade* (6) also expressed an opinion that a right to maintenance would not be covered by clause (d) of section 6 as it could not be described as an interest in property restricted in its enjoyment to the owner personally. But my learned brother, Oldfield,

J., who sat with him pronounced an opinion only on the other question which arose as to the maintainability of the suit in a Small Cause Court. In *Annada Mohan Roy v. Gour Mohan Mallik* (7), Mookerji, Acting Chief Justice, in deciding that the chance of Hindu reversioners succeeding to the estate of the last full owner was not alienable property under clause (a) of section 6, discussed a definition of "property," a definition which could cover a widow's right to maintenance. He pointed out that when non-existent property is made the subject of a contract, the party who takes the agreement is in no better position when he attempts to defeat the application of the statutory provision by this means, as no Court of Equity will assist him in his endeavour to accomplish his purpose which is opposed to public policy. In 12 Calcutta Law Journal there are two instructive cases, *Asad Ali Molla v. Haider Ali* (8) and *Tara Sundari Debi v. Sarada Charan* (9). Mookerjee, J., observed in the earlier case, at page 133,* that if a person is entitled to a monthly allowance under a deed, the allowance can be attached by an execution-creditor only after it has become due, so that an assignee of a decree for arrears of maintenance can execute it against the judgment-debtor in the same manner as the original decree-holder; and, at page 154,* where land has been granted in lieu of a right to maintenance the interest of the grantee is liable to be sold in execution of a personal decree. He quotes the decision in *Harris v. Brown* (10) by the Privy Council where a monthly allowance of Rs. 50 devised by Will for the maintenance of a daughter was transferred and the Privy Council treated the assignments operative. In that case, no question as to the illegality of the assignment by the legatee, Flora Williams, of this allowance was raised with reference to section 6 of the Transfer of Property Act. The two cases *Enact*

(2) 10 B. 342; 5 Ind. Dec. (N. S.) 615.

(3) 5 Ind. Cas. 879; 20 M. L. J. 97.

(4) 34 Ind. Cas. 381; 40 M. 302; 30 M. L. J. 361.

(5) (1896) P. 222; 65 L. J. P. 75; 74 L. T. 636;

44 W. R. 677.

(6) 53 Ind. Cas. 665; 37 M. L. J. 402.

(7) 65 Ind. Cas. 27; 48 C. 536; 25 C. W. N. 496; 33 C. L. J. 457.

(8) 6 Ind. Cas. 826; 12 C. L. J. 130; 14 C. W. N. 918; 38 C. 13.

(9) 7 Ind. Cas. 80; 12 C. L. J. 146.

(10) 28 C. 621; 28 I. A. 159; 5 C. W. N. 729; 3 Bom. L. R. 808; 8 Sar. P. C. J. 92 (P. C.).

*Pages of 12 C. L. J.—[Ed.]

SUFRAYA SAMPIGETHAYA V. FRISUNA BAIPADITHAYA.

Hossein v. Nujeeboonissa Begum (11) and *Maharajah Dheraj Mahtab Chand Bahadur v. Sreemuttee Dhun Coomaree Bibee* (12), the latter relating to an annuity charged on an estate in favour of a brother which was held to be attachable in execution, are not very material to the question before us, as they were decisions prior to the passing of the Transfer of Property Act in which the provisions of the Civil Procedure Code alone were considered. In the present case the provisions for residence and clothing under Exhibit A. appear to be undoubtedly interests restricted in enjoyment to the widow Lakshmi Hengsu. As the allowance of rice was intended to be for support after she had parted with her interest in the land and as it would come to an end at her death, this also appears to be an interest restricted to her personally and a transfer of such an interest is, in my opinion, prohibited on grounds of public policy by section 6, clause (d). Whether after a decree has been obtained for arrears of past maintenance the decree-holder can assign the decree for execution is a matter which does not require to be decided on the facts of this case. As the decision in *Annapurni Nachiar v. Swaminathan Chetty* (1) appears to be at variance with section 6 of the Transfer of Property Act and other decisions already referred to, we refer the question to a Full Bench: "Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her lifetime even if charged upon specified immovable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due."

This second appeal came on for hearing in pursuance of the Order of Reference to a Full Bench, dated the 19th of April 1922, on the 29th and 30th of January 1923.

Messrs. C. V. Anantakrishna Ayyar and K. Srinavasa Rao, for the Appellants.

Mr. B. Sitarama Rao, for the Respondent.

OPINION.

Schwabe, C. J.—The question referred

to the Full Bench is, "Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her lifetime even if charged upon specified immovable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due." I do not think that it is possible to give a general answer to this question, and I will confine myself to considering whether the assignment in this case is valid. By a document, called a general power-of-attorney, the widow surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and to maintain her during her lifetime. The document then continues (according to a corrected translation) "Besides maintaining me by giving me food and clothing, etc., until my lifetime you should also perform my obsequies, etc., after my death. Henceforward, you should also perform the *Sradha* of my husband, father-in-law and mother-in-law, making the necessary expenses therefor... If it is not convenient for me to live jointly with you. I should remain in the building where I now reside. In that event, except that for my food and clothing you should pay yearly 33 *muras* of *kuchlu* rice and 12 *muras* of *belige* rice charged on the following properties, I have no right to contract any debts as a charge on the said properties or have any claim to the return of the property."

Whether the right to future maintenance, apart from the contract, or under a contract to provide clothing, board, and residence in the house of the other contracting party is property at all, within the meaning of section 6 of the Transfer of Property Act, is a matter upon which there has been considerable divergence of opinion, but it is unnecessary to consider that here as in my judgment, it is a purely personal right and is clearly inalienable.

The right under a contract to a defined amount in cash or kind for future maintenance is, in my judgment, property under the enabling words of section 6 of the Transfer of Property Act of 1882. But the

(11) 11 W. R. 138.

(12) 17 W. R. 254.

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question remains whether it is an interest in property restricted in its enjoyment to the owner personally, such an interest under clause (d) of that section being inalienable. This must depend on the facts of each particular case and must be ascertained by the ordinary rules of the interpretation of the contract; the question being, whether the intention of the parties was that the right should be personal and, therefore, inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution. It must be considered as a contract to come into operation at once, and in the light of the surrounding circumstances as they then stood. What has in fact happened since is not a relevant consideration, except perhaps as an illustration of what may possibly have been in the contemplation of the parties at the time of this contract. The widow was surrendering her life-interest in the property in exchange for the agreement for maintenance, and it seems to have been quite clearly in the contemplation of the parties that the reversioner should continue in possession of the property and of the family house, and the fact that he has since sold the property does not help us to arrive at the true interpretation of the contract.

Examining the contract itself, we find that the first alternative form of maintenance provided was by residence in the house and by sharing the meals of the family. The second alternative was that, if she chose to live apart, she should receive definite amounts of paddy secured by a charge on the land. There is no provision for an election once and for all, and I see no reason why she should not at her will at one time live in the house, and at another live away and receive the paddy. This leads me to the conclusion that the intention of the parties to be derived from the document was that the rights under the contract should be personal and inalienable; for, she could not give to another the right of living and feeding with the reversioner's family.

I think that the view expressed above that this question must turn on the intention of the parties reconciles most, if not

all, of the apparently conflicting decisions on this question.

The right to future maintenance properly so-called, by which I mean the right to be maintained by the supply of clothing, board and lodging, is inalienable, and so I understand the statements in the Text-Books, Trevelyan's Hindu Law, II Edition, page 80, West and Bhuler's Hindu Law, page 283 and Shepherd and Brown, Transfer of Property Act, page 209, and so, I think, may be explained the decision in *Rajat Kamini Debi v. Raja Satya Niranjan Chakrabarty* (13), where, on facts somewhat similar to these, it was held that a widow who released her life-interest in return for an agreement to pay her Rs. 100 per annum and supply her with 39 maunds of rice per annum could alienate her interest under the agreement; for, in that case, it was no part of the agreement that she should be clothed, fed or housed and, therefore, there was nothing personal about the contract at all. This, too, was, I think, the view of Mookerjee, J., who in two cases decided in the same month held that the widow's right to maintenance under one contract could be taken in execution and under another it could not. *Asad Ali Molla v. Haider Ali* (8) and *Tara Sundari Debi v. Sarada Charan* (9). The right to attach is governed by the Code of Civil Procedure, but in his judgments he discussed fully the inalienability of such right. In *Tara Sundari Debi v. Sarada Charan* (9) in which he held the right inalienable and, therefore, not attachable, the payments were not to be made until the donee lived separately from the family, and he distinguishes between cases where the provision of land, money or goods is taken in lieu of maintenance without any restraint upon alienation where the land, money or goods are alienable, and cases where the right is purely personal. If the latter, he considers that, even when the right is merged in a decree, it is not alienable. *Bhyrhub Chunder Ghose v. Nubo Chunder Goocho* (14), *Enact Hossein v. Nujeeboonissa Begum* (11) and *Maharajah Dheraj Mahtab Chand Bahadur v. Sreemuttee Dhun Coomaree Bibee* (12), I think, may be reconciled on the same

(13) 53 Ind. Cas. 587; 23 C. W. N. 824.

(4) 5 W. R. 111.

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ground. *Annapurni Nachiar v. Swaminathan Chetty* (1) and the explanation of it in *Palikandy Mammad v. Chingoran Keloth Vahu Appa* (4) by Sadasiva Aiyar, J., do not assist me in arriving at the principle to be applied. The remarks of Seshagir Ayyar, J., in *Seshappa Heggade v. Chandayya Heggade* (6) on this point were purely *obiter* but can properly be explained by limiting their application to cases of maintenance properly so called. I do not think that any useful purpose will be served by going in further detail into any of these cases or others to which our attention was drawn.

I answer the question referred by saying that this widow's right to future maintenance was inalienable.

Oldfield, J.—The question referred is stated in general terms, which, as the referring order of Spencer, J., and argument before us show, are liable to be applied to interests of different kinds and subject to different legal incidents. Some confusion has again been introduced by reliance on the exemption under section 60, Civil Procedure Code, of a right to maintenance from attachment. But that exemption is inconclusive, when, as here, a transfer by act of parties is in question and when some of the descriptions of property enumerated in the section certainly are not, and it is not to be assumed that a maintenance right is exempted from attachment. Authorities relating to attachment are accordingly irrelevant, except in so far as they deal with the only provision of law at present material; section 6 (a), Transfer of Property Act, under which property cannot be transferred, if it is "restricted in its enjoyment personally to the owner." And on this account *Palikandy Mammad v. Chingoran Keloth Vahu Appa* (4), one of the decisions of this Court, regarded as conflicting in the reference, is not of assistance, the prohibition against attachment having been relied on directly. The other *Annapurni Nachiar v. Swaminathan Chetty* (1) proceeds on the view that a right to future maintenance is not property within the enabling words of an interest in property contemplated by paragraph (d) of section 6. But, with all respect, we have not been shown that this view has been taken elsewhere; it is inconsistent with

the statutory exclusion of such a right from property liable to attachment; and, if it were acceptable, explanation would still be necessary as to the law, by which the validity of a transfer of what is not property is recognized or can be tested at all.

Authority need not be cited to show that section 6 (d) requires more than the termination of the interest in question with the life of its owner. But in the present case that requirement is complied with. For it is not conceivable that Exhibit B was meant to enable the widow to have some other person clothed or to introduce any stranger she might nominate to the family meals. The rights conferred on her are clearly personal; and it is, therefore, unnecessary to follow Mookerjee, J., in his exhaustive discussion in *Tara Sundari Devi v. Sarada Charan* (9), of the questions (1) whether an interest created in lieu of and in discharge of a right to maintenance is assignable, and (2) whether it is material that the right is enforceable by a charge on immoveable property. For, as regards the first, I agree that there is no question of a discharge in Exhibit B, the widow's option to return at any time to actual maintenance instead of a periodical allowance having been preserved, and as regards the second, the only substantive right under transfer is the right to future maintenance already considered and no question of an impersonal interest in land available for the enforcement of that right can arise, except incidentally and in case a default takes place.

I concur in the opinion expressed by my Lord.

Coutts-Trotter, J.—I am of the same opinion and have nothing to add.

V. N. V.

Answered accordingly.

JHANDU V. HUSAIN BIBI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 575 OF 1920.

February 22, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

JHANDU—PLAINTIFF—APPELLANT

versus

Musammal HUSAIN BIBI AND OTHERS—
DEFENDANTS—RESPONDENTS.*Muhammadan Law—Marriage—Iddat on death—Pregnancy, effect of—Marriage during iddat, validity of.*

The period prescribed by the Muhammadan Law for the *Iddat* of a widow, on the death of a regularly married husband, if not pregnant, is four months and ten days, and if pregnant, four months and ten days or until delivery, whichever is longest.

The marriage of a Muhammadan woman before the expiry of the period of *Iddat* is illegal.

Ilahia v. Imam Din, 1 Ind. Cas. 894; 29 P. R. 1909; 34 P. W. R. 1909; 47 P. L. R. 1909, followed.

Second appeal from a decree of the District Judge, Amritsar, dated the 7th February 1920, affirming that of the Subordinate Judge, Second Class, Amritsar, dated the 30th October 1919.

Sheikh Niaz Muhammad, for the Appellant.

Lala Kahan Chand, for the Respondents.

JUDGMENT.—One Jhandu, son of Umar, a Gazar, instituted a suit against Musammal Husain Bibi, alleging that she had been lawfully married to him and claiming restitution of conjugal rights. It appears that Musammal Husain Bibi was a widow when Jhandu married her and the defence set up was that the marriage, if any, was illegal and not binding as it had been solemnized within the period of *Iddat*, namely, four months and ten days from the death of her former husband. It was found as a fact that the marriage in question took place within two months of the death of Musammal Husain Bibi's former husband, and the Courts below, following *Ilahia v. Imam Din* (1), dismissed the plaintiff's suit holding that the marriage in question was illegal and, therefore, not binding on Musammal Husain Bibi. Jhandu has now come up to this Court in second appeal through

Mr. Niaz Muhammad, and it has been contended that the decision in *Ilahia v. Imam Din* (1) was bad and opposed to Muhammadan Law.

Our attention has been drawn to various treatises on Muhammadan Law, such as Muhammad Usaf's Muhammadan Law, Vol. III, page 63, Hamilton's Hedaya, page 130, Abdur Rahman's Muhammadan Law, pages, 316, 317, Muhammad Ali's translation of the Quran, page 1086, verse 4, Fateh-ul-Qadir, page 141, and Bailie's Digest, page 355. We have carefully examined these, (with the exception of Fateh-ul-Qadir, which has not been actually placed before us) and in addition we have consulted Wilson's Digest of Anglo-Muhammadan Law and Tayabjee's Principles of Muhammadan Law. The reference to Muhammad Ali's translation of the holy Quran affords no assistance as that obviously deals only with a case of a divorced woman. In Tayabjee's treatise at page 133 a table is shown giving the duration of the period of the *Iddat* and, according to this table, the period prescribed for the *Iddat* of a widow on the death of a regularly married husband, if not pregnant, is four months and ten days, and if pregnant four months and ten days or until delivery, whichever is longest. In the present case it appears that Musammal Husain Bibi was pregnant at the time of her former husband's death and was delivered of her child before the expiry of the four months and ten days' period.

It has been contended that the Muhammadan Law requires only that a widow should maintain the period of *Iddat* for such period as is laid down, namely, four months and ten days, or, if she be pregnant, until such time as she is delivered of the child, the period fixed being curtailed if the delivery takes place before the expiry of the period of four months and ten days. We are unable to find any authority to support this contention and none has been laid before us. In Hamilton's Hedaya at page 130 the following passage occurs:—"Now the *Iddat* of a widow is not designed for the purpose of ascertaining the state of her womb: for if it were so, it would not be determined by the lapse of time (supposing her to be one who is subject to the menstrual discharge) but by three terms of her courses; whereas

(1) 1 Ind. Cas. 894; 29 P. R. 1909; 34 P. W. R. 1909; 47 P. L. R. 1909.

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we see that the law fixes it at four months and ten days, although she be a woman of that description; but it is made incumbent merely as a fulfilment of one of the rights of marriage." See also pages 132 and 145.

According to the view taken by Wilson the period of *Iddat* for a woman, who has been lawfully married, is four months and ten days, and if she happens to be pregnant it continues until delivery, *vide* pages 112 and 113 and Appendix D. page 519. This is the view that was adopted in *Ilahia v. Imam Din* (1), a view with which we are in accord.

We, therefore, dismiss this appeal with costs.

Z. K.

Appeal dismissed.

UDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 31
AND 32 OF 1922.

August 1, 1922.

Present:—Mr. Justice Ashworth.

Shaiikh FARZAND ALI—PLAINTIFF—

APPELLANT

versus

EKADASHI—DEFENDANT—RESPONDENT.

Ex parte decree—Appeal—Appellate Court, power of—Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLI, rr. 23, 24, 25—Remand, when permitted—S. 151, object of—Appeal, when may be treated as revision.

When a suit is decided *ex parte* the Appellate Court to which an appeal from the decree is preferred, has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing. [p. 592, col. 1.]

Sadhu Krishna Ayyar v. Kuppan Ayyangar, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F. B.), relied on.

The Code of Civil Procedure permits a remand by an Appellate Court not only in the particular case set forth in O. XLI, r. 23, but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision

of the case, provided that the procedure under O. XLI, rr. 24 and 25 does not meet the cases. [p. 593, col. 1.]

An order of remand cannot be made under r. 23 of O. XLI of the Code, unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end. [p. 593, col. 2.]

Section 151 of the Code of Civil Procedure can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give a Court jurisdiction, if it does not possess it otherwise. [p. 593, col. 2.]

Where no appeal lies, an appeal to the High Court may be treated as an application for revision [p. 593, col. 2; p. 594, col. 1.]

Ramji Das v. v. Bhagwan Das, 43 Ind. Cas. 180, not followed.

Section 115 of the Civil Procedure Code is intended merely to rule out revision of interlocutory orders. An order of remand is not an interlocutory order. [p. 594, col. 1.]

Miscellaneous Appeals against an order of the Third Additional District Judge, Lucknow, dated the 10th April 1922, setting aside a decree of the Munsif, North Lucknow, dated the 9th July 1921.

Mr. Nazir-ud-din, for the Appellant.

Mr. H. K. Ghose, for the Respondent.

JUDGMENT.—These two miscellaneous appeals arise from the following facts. The plaintiff-appellant brought two suits for possession of certain plots of land and damages. Notice was duly served on the defendant-respondent for his appearance on the 25th April 1921. The defendant did not appear and the Munsif ordered that both cases were to proceed *ex parte*. Owing to the necessity, however, of a plan being prepared no *ex parte* decree was given on that date and the cases were adjourned to the 30th May and further adjourned on that date to the 28th of June. On that date the defendant appeared and asked to be heard in answer to the suit under O. IX, r. 7. Evidence was taken as to whether he had good cause for his previous non-appearance and his application was rejected on the 4th July. On the 9th July the Court decreed both suits *ex parte* in favour of the plaintiff. Against these decrees the defendant-respondent brought an appeal before the third Additional District Judge of Lucknow. He was of the opinion, that the defendant had absolutely failed to assign good cause for his previous non-appearance when he applied to the Munsif under O. IX, r. 7, but he held, on

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the authority of the ruling *Bhagwati Prasad Tewari v. Muhammad Shibli* (1), reported in Volume 20 of the Allahabad Law Journal, page 270, that whenever a defendant applied to be heard in a suit the hearing of which had been adjourned *ex parte* his application was bound to be allowed irrespective of whether he showed good cause for his previous non-appearance or not. The Additional Judge has expressed the opinion that the ruling ignored the provisions of O. IX, r. 7, but must nevertheless be followed. He was in error in his interpretation of the ruling. The facts in the ruling as reported in the Allahabad Law Journal are, as usual in that Journal, not fully set forth, but it is clear from the judgment of the Allahabad High Court that the Judges held in that case the defendant to have shown good cause. They say "his application to be heard ought to have been granted." This does not mean that it ought to have been granted merely because he made it, but implies that it ought to have been granted on the merits. Apparently, in that case the lower Court had rejected his application in ignorance of the fact that he had a right to make it under O. IX, r. 7. It is clear, therefore, that the decision appealed against was incorrect.

Another ground on which the remand order is impugned is that the lower Appellate Court could not entertain any objection to the decree of the First Court on the mere ground that it was heard *ex parte*. There is, however, strong authority to the contrary. In the Full Bench case *Sadhu Krishna Ayyar v. Kuppan Ayyangar* (2) it was held, after full discussion of the previous rulings of the Calcutta and other High Courts, that when a suit is decided *ex parte* and the Appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing. The only ground on which it appears to me that the contrary view could be based would be on the principle that a section dealing with a particular

case should override one dealing with a general case—*generalibus specialia derogant*. There is, however, no authority for the application of this maxim to the interpretation of statutes unless the two sections are repugnant. The general rule is that, where an Act adds a remedy in respect of anything it is to be construed as cumulative provided that there is nothing else in the Act to suggest the contrary.

It has also been urged that the lower Appellate Court in any case had no right to remand the case as the only power of remand is one given under O. XII, r. 23. There appears to be some authority for holding that a District Judge has no power of remand except under this provision of law or under section 151, Civil Procedure Code, by exercise of his inherent power. I refer to cases *Gokul Prasad-Har Prasad v. Ram Kumar* (3) and *Kulsoomunissa v. Ram Prashad* (4). These rulings, however, appear to have ignored certain provisions of the Code and not to have considered the previous Full Bench case already mentioned by me. The two rulings relied upon were not by a Full Bench and one of the two Judges in each case was the same. Section 107 of the Code confers on every Appellate Court a general power of remand subject to conditions and limitations imposed. It is clear that section 100, sub-section (2), of the Code of Civil Procedure by allowing an appeal against an *ex parte* decree must, if interpreted as I have shown it ought to be interpreted, to allow an appeal from such a decree merely on the ground that it has been passed *ex parte*, be deemed to show an intention on the part of the Legislature that there should be an order of remand as no other procedure would meet the case. Again, section 105, sub-section (2), of the Code speaks of an order of remand from which an appeal lies. The Code must, therefore, have contemplated an order of remand from which an appeal does not lie. As an appeal lies from an order of remand under O. XII, r. 23, the Code clearly contemplates an order of remand passed under

(3) 64 Ind. Cas. 878; 19 A. L. J. 971; 44 A. 176; (1922) A. I. R. (A) 254.

(1) 66 Ind. Cas. 892; 20 A. L. J. 270; (1922) A. I. R. (A) 110.
(2) 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F. B.).

(4) 67 Ind. Cas. 713; 20 A. L. J. 321; (1922) A. I. R. (A) 226; 44 A. 492; 4 U. P. L. R. (A) 168.

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Some other section. Again, the same section 105, in sub-section (1) allows any error, defect or irregularity in an order affecting the decision of a case to be set forth as a ground of objection in the memorandum of appeal. Now, it is obvious that there may be an error, defect or irregularity at the very commencement of the trial by the Court of hearing which would affect the whole decision of the case and that it may be necessary in order to secure proper re-hearing of the case to remand it. The Code of Civil Procedure must, therefore, be held to permit a remand by an Appellate Court not only in the particular case set forth in O. XLI, r. 23 but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision of the case, provided that procedure under O. XLI, rr. 24 and 25 does not meet the case. In the present case, therefore, I do not hold that the order of remand by the lower Appellate Court was without jurisdiction, but I hold that it was wrong on its merits owing to a wrong view being taken by the lower Appellate Court of the law.

It is urged, however, by the respondent's Counsel that in these appeals the appellant is not appealing from the judgment of the lower Appellate Court but only against its order of remand and it is maintained that under O. XLIII, r. 1 (m), of the Code no appeal will lie against an order of remand unless that order of remand be passed under O. XLI, r. 23. On the other hand, it is urged by the appellant's Counsel the order of remand of the lower Appellate Court should be regarded as an order passed under O. XLI, r. 23. He has relied on the ruling *Gokul Prasad-Har Prasad v. Ram Kumar* (3), as well as the other ruling referred to above reported as *Kulsoonnunmissa v. Ram Prashad* (4). In the former of these rulings it is stated that the policy of the Allahabad High Court has always been to allow as wide a meaning as is reasonably possible to O. XLI, r. 23. In the second ruling one of the Judges has gone so far as to state that "in the case of an order of remand it must be presumed, unless the contrary is shown at the time when it is made, to be made under O. XLI, r. 23." Now, the former ruling as reported in the Allahabad Law Journal does not

give the facts of the case. They are, however, known to me. The real facts of the case were that the Court of hearing had, after fixing issues, sent the whole case to be decided by a Commissioner appointed to examine accounts and not merely referred to the Commissioner certain facts to be discovered from the accounts. An order of remand in such a case can hardly be deemed to be an order of remand under O. XLI, r. 23. In my view, it is undesirable to give a wider meaning to the provisions of O. XLI, r. 23 than the language of the section will reasonably justify merely in order to get over real or imaginary difficulties in the Code. If the section is approached without bias its meaning must be clear. An order of remand cannot be made under this rule unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end.

There can, in my opinion, be no question that the order of remand impugned in the present case was not passed by the lower Appellate Court under O. XLI, r. 23. It may be argued, however, that, under section 151 of the Code, this Court has inherent power to allow the appeal against the order of remand notwithstanding that no right of appeal is given by the Code, if this is necessary in the interests of justice or to prevent abuse of the process of the Court; section 151 provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is, therefore, urged that section 105 (1) of the Code, read with O. XLIII, r. 1 (m), can be ignored by this Court under section 151. But section 151 of the Code can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give the Court jurisdiction, if it does not possess it otherwise. It would not appear necessary to cite any authority in support of this proposition. It is not, however, necessary to invoke section 151 as I am of the opinion that, under section 115, Civil Procedure Code, this Court has power to deal with the case in revision. There is abundant authority for holding that where no appeal lies an appeal to the High Court

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may be treated as an application for revision. It is true that in *Ramji Das v. Bhagwan Das* (5) it was held by two Judges of the Allahabad High Court that it cannot do so in a case like this, as a Court is not entitled indirectly to allow an appeal which is not given by the Court by treating the matter as one in revision. But neither anything in the Code nor any authority was cited in support of such a view and I am not prepared to follow it. It may be argued that section 115 only refers to a case which has been decided and this will not include a suit the hearing of which has been remanded on appeal. But section 115 is intended merely to rule out revision of interlocutory orders. An order of remand is not an interlocutory order as it entirely disposes of the case, so far as the Court passes it, for the time being. The case can only come up again on a further appeal. It is true that the rulings of the Allahabad High Court reported as *Gokul Prasad-Har Prasad v. Ram Kumar* (3) and *Kulsoomunnissa v. Ram Prashad* (4), which I have criticised above, ignore the use of section 115 in such a case but they do not appear to have considered the question of the applicability of that section.

Consequently, holding that the order of remand by the lower Appellate Court was not justified, I set aside that order of remand in revision and direct the lower Appellate Court to hear the appeal on its merits. That appeal raises two points first, whether the Court of first hearing was justified in hearing the case *ex parte*, and, secondly, whether, if so, there was evidence on the record to prove the plaintiff's claim. The costs of this appeal will abide the result.

W. C. A.

Order set aside.

(5) 43 Ind. Cas. 180.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL NO. 54 OF 1922.

April 20, 1923.

Present:—Mr. Pipon, J. C.

HABIB GUL—DEFENDANT—APPELLANT
versus

SHAHDAD KHAN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 12 (a), as amended by N.-W. F. P. Regulation (II of 1906) — "By right of blood relationship," "in order of succession," meaning of—Persons entitled to pre-empt — Admissions—Admission of Counsel on point of law, whether binding on party.

The law of pre-emption obtaining in the North-West Frontier Province is one which deprives a person claiming to succeed by Will or other form of artificially regulated succession from putting forward pre-emption rights under section 12 (a) of the Punjab Pre-emption Act as amended by the North-West Frontier Province Regulation, II of 1906, but it includes all cases where the pre-emptor would be entitled to succeed to the property sold by right of blood relationship, whether such relationship is with the vendor himself, or with the natural heirs of the vendor. [p. 598, cols. 1 & 2.]

Clause (a) of section 12 of the Punjab Pre-emption Act assumes by its concluding words "in order of succession", that any person who would be entitled ultimately to inherit, however remote such inheritance might be, and however many preferential heirs might be in existence, has a right of pre-emption under the clause. [p. 598, col. 1.]

A Counsel cannot bind his client by an admission made purely on a point of law. [p. 596, col. 1.]

Further appeal from the judgment and decree passed by the Divisional Judge, Peshawar, dated the 25th March 1922, whereby a decree passed by the Sub-Judge, Mardan, dated the 15th December 1921 was reversed.

Mr. Saaduddin Khan, K. S., for the Appellant.

Mr. Diwan Chand, R. S., for the Respondents.

JUDGMENT.—The facts of this case are these. The plaintiff Shahdad Khan sued to pre-empt an area of 196 *kanals* 2 *marlas* situated in the village of Kurogh in the Mardan Tahsil which had been sold on the 4th of January 1920 by Shamshad Khan and his wife, Musammat Shamso Jan, to Habibgul. Shamshad Khan was described as the owner of 1 *kanal* 2 *marlas* and Musammat Shamso Jan as the owner of 19 *kanals* 15 *marlas* which formed the subject of the sale. The title of Musammat Shamso

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Jan had been acquired by gift from her husband Shamshad Khan. The suit was instituted on the 4th of January 1921. On the 27th of January 1921 the vendee Habibgul executed a sale-deed re-transferring the land to Firdaus Khan, the son of the vendors, Shamshad Khan and *Musammat* Shamso Jan. Shahdad Khan claimed to pre-empt under section 12 (a) of Act II of 1905 as being a person who, but for the sale, would be entitled to inherit the property. The suit was resisted on the ground that the re-sale to Firdaus Khan extinguished the right of the plaintiff to pre-empt, Firdaus Khan being a pre-emptor with a superior right. The Trial Court accepted this plea and dismissed the suit. On appeal by the plaintiff the Divisional Judge held that the sale to Firdaus Khan had been made subsequent to the institution of the suit, that it was not a genuine sale for real consideration, and that possession of the subject-matter had not been delivered, and that, therefore, it could not adversely affect the rights of the plaintiff to pre-empt. He accordingly decreed the suit. The appeal was resisted principally by Firdaus Khan alleging that his sale extinguished the plaintiff's right to pre-empt, and he was represented by Counsel. The first vendee, Habibgul, however, also made an appearance, though he was not represented by Counsel. During the hearing of the appeal a further plea was set up by Firdaus Khan which had not been taken in the Trial Court, viz., that, as regards the bulk of the land in suit, the plaintiff was not a person who but for the sale would have been entitled to inherit within the meaning of section 12 (a) of Act II of 1905 (as amended for the North-West Frontier Province), the principal vendor being *Musammat* Shamso Jan with whom the plaintiff was not connected by blood relationship. The plaintiff, before the Divisional Judge, resisted this plea partly on the ground that *Musammat* Shamso Jan had only acquired her title as owner by a purely *benami* transaction and that her husband Shamshad was the real vendor. The Divisional Judge overruled this contention on the ground that there was nothing on the record to establish the allegation that the gift by Shamshad to *Musammat* Shamso Jan was *benami*. He found, how-

ever, that Shamshad was, nevertheless, a person entitled to inherit from *Musammat* Shamso Jan as her next heir would be Firdaus Khan, and that plaintiff would succeed by blood relationship to Firdaus in the event of his decease. He remarked "constructively, therefore, the plaintiff is entitled to succeed to *Musammat* Shamso Jan by right of blood relationship through the woman's son." A further appeal has been lodged in this Court by the original vendee, Habibgul, and the sole contention set up by him on this appeal is that the plaintiff has no right to pre-empt the sale by *Musammat* Shamso Jan, as he is not an heir to *Musammat* Shamso Jan by blood relationship within the meaning of section 12 (a) of Act II of 1905 as amended for the North-West Frontier Province.

The present appeal is resisted by the plaintiff-respondent mainly on three grounds:—

1. That the contention now raised by the appellant is not one which was ever set up in the Trial Court, and that it cannot be set up at the present stage of the proceedings.

2. That the gift by Shamshad Khan to *Musammat* Shamso Jan was a *benami* transaction, and that the plaintiff-respondent is entitled to allege, and to prove this on the present appeal in view of the fact that he was given no opportunity of doing so in the First Court when the vendee did not make the ownership of *Musammat* Shamso Jan a ground for attacking his rights of pre-emption.

3. That in any case the finding of the Divisional Judge is correct that the plaintiff is a person who would ultimately inherit from *Musammat* Shamso Jan but for the sale and in the event of her decease.

As regards the first of these three points, it is contended by the learned Counsel for the appellant that the suit was resisted from the outset on the ground that the plaintiff had no right to pre-empt on the ground of being a collateral. It is admitted that this plea was not specifically raised by the vendee, Habibgul, in his written statement, but it is urged that this ground was actually taken by Shamshad Khan and *Musammat* Shamso Jan, and that the vendee, as a defendant, was entitled to use a plea set up by his co-defendants. I do not regard this argument very seriously, as the plea

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set up by Shamshad and *Musammat* Shamso Jan did not really relate to this question at all. It is true that they stated in their pleas that the plaintiff was not their collateral, but this amounted to nothing more than a demand that plaintiff should prove his relationship, and it is perfectly clear that what they contested was his relationship with Shamshad. They cannot be considered as having, in any way, implied that, if the plaintiff succeeded in proving that he was a collateral of Shamshad, he was nevertheless not entitled to pre-empt because he was not a collateral by blood relationship with Shamshad's wife. I can only regard the contention now set up by the appellant as one which was never taken in the Trial Court. It has, further, been noticed by the Divisional Judge, and this point is emphasized by the learned Counsel for the respondent, that the present appellant's Counsel in the Trial Court admitted in his written arguments that, unless the validity of the re-sale to Firdaus could be established, the suit for pre-emption must succeed. I am not prepared, however, to rule that this point cannot be taken as a ground for further appeal. There would be no legal bar to such a point of law being raised either on first or on second appeal, especially when it is one which goes to the whole root of the plaintiff's right to sue. Again, there is ample authority for the view that a Counsel cannot bind his client by an admission made purely on a point of law. I consider, therefore, that I have to deal with the contention now set up on its merits.

There is some force in the objection made on behalf of the plaintiff-respondent that he was never called upon in the First Court to meet a ground of attack based upon the absence of blood relationship between the plaintiff and *Musammat* Shamso Jan and that, therefore, he was precluded from raising the plea, which he otherwise would have raised, that *Musammat* Shamso Jan was a *benami* donee and that Shamshad must be regarded as the sole vendor. This question, however, does not seem to me very material to the decision of the case. In the first place, it would be difficult, if not impossible, for the plaintiff to prove that the transaction was *benami*. The plaintiff itself fully admits the ownership

of *Musammat* Shamso Jan, and recites in detail the extent of her ownership as compared with that of her husband, and alludes to her as one of the actual vendors. Apart from this, the case really turns upon the far more important question of the interpretation of section 12 (a) of Act II of 1905 and its applicability to the present facts and, as I shall show below, I consider that the appeal must, in any case, fail upon this point alone.

I now turn to the really important point for decision in this case, the question as to whether, when a woman has acquired a title in land by gift from her husband and has sold her right to an outsider, a collateral of her husband can pre-empt on the ground that he is a person who would be entitled to inherit the property but for the sale, by right of blood relationship. The learned Counsel for the appellant argues that the wording of section 12 (a), as amended for the North-West Frontier Province by Regulation II of 1906, is perfectly clear, and he would interpret it as meaning that the only person who can claim to pre-empt under this clause is one who would inherit the property by right of his blood relationship with the vendor. He contends indeed that the addition of the words "by right of blood relationship", by Regulation II of 1906 was made with the specific purpose of excluding a pre-emption claim, such as that now in question, and of leaving no doubt that the pre-emptor in the case of land owned by a female must be collaterals of the female herself and not of her husband. He further, supports his argument by a consideration of Explanation (2) to section 12 of Act II of 1905 and of the Explanation to section 15 of Act I of 1913 which, in the Punjab, has replaced section 12 of Act II of 1905. He challenges the admissibility of the Divisional Judge's ruling that plaintiff is "constructively" entitled to succeed to *Musammat* Shamso Jan by right of blood relationship. To consider first the bearing of Explanation (2) to section 12 upon the present case, it is argued by the learned Counsel for the respondent that the word "succeeded" in that Explanation covers also the acquisition of title by gift. The Explanation runs that "in the case of sale by a female of property to which she has succeeded through her

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husband, son, brother or father, the word 'agnates' in this section shall mean the agnates of the person through whom she has so succeeded." The commentary upon this Explanation in Shadi Lal's Pre-emption Act states that "the explanation applies only if the female has got the property by inheritance and has no application to the case of a female getting the property in any other way." I am somewhat doubtful of the correctness of this portion of the Commentary in view of the remarks made in Ellis's Commentary on Act I of 1013. By the latter Act Explanation (2) to section 12 of Act II of 1905 was amended and now runs as follows: "In the case of sale by a female of land or property to which she has succeeded on a life-tenure through her husband, son, brother, or father, the word 'agnates' in this section shall mean the agnates of the person through whom she has so succeeded." Mr. Ellis remarks that where a female has obtained a full estate from her husband or son, the persons entitled to pre-empt are not their agnates, as was the case under the Act of 1905, but those of her father and brother who are her own agnates as well if on her death they would be entitled to succeed. In alluding to a woman obtaining a full estate from her husband or son, the learned Commentator would appear to be referring to the case where she acquired the full estate by gift or sale as well as by inheritance, and his view appears to be that, under Act II of 1905, it would, in all cases where she had obtained an estate of any kind, be the agnates of her husband, son, brother or father who would have been entitled to pre-empt and not her own agnates. It appears to me, however, that it is not absolutely material to the decision of the present case which of these two conflicting views is correct. It think it has been overlooked that the explanations in both cases refer to pre-emptive rights under clause (b) of section 12 and clause (b) of section 15, and not to the rights derived from clause (a). Clause (a) does not contain the word "agnates" at all. I consider that it is necessary to interpret clause (a) quite independently of the explanations and to construe it strictly both by its own wording and by the intention of the Legislature in using the words which are actually used. The

contention of the appellant that the object of Regulation II of 1906 in adding the words "by right of blood relationship" was to exclude pre-emption suits such as that with which we are now dealing, is certainly an incorrect one. I have examined the correspondence which led to the introduction of this amendment. I find that the sole ground on which this amendment was introduced was to avoid the possibility of Courts having, in pre-emption suits, to adjudicate upon the validity of Wills. It was thought that if section 12 (a) of Act II of 1905 were introduced into the North-West Frontier Province without amendment, there might be innumerable cases in which persons would set up the claim that they were entitled under a Will to inherit the property and would base suits for pre-emption upon contested Wills: As against this the learned Counsel for the appellant points out that a person to whom a bequest has been made under a Will, cannot claim, during the testator's lifetime, to be a person entitled to inherit. This view may be perfectly correct, but the fact remains that it was the possibility of persons setting up titles under a Will and that possibility alone which led to the introduction of Regulation II of 1906 and the addition of the words "by right of blood relationship." Now, the argument of the learned Counsel for the appellant appears to me to contain one unwarranted assumption. It proceeds on the supposition that we must read the section as if it contained the words "by right of blood relationship to the vendor." The words "to the vendor" do not appear in the section and their omission appears to me to be vital. It must be remembered, as I have already pointed out, that we are dealing with section 12 (a) alone and not with any question of the interpretation of the word "agnates" as used in section 12 (b). What we have to consider is (1) whether the pre-emptor would be entitled to inherit at all, and (2) whether his title to inherit would be derived from blood relationship and not from any extraneous cause, such as a legacy or other form of artificially acquired right. A collateral of the husband of Musammât Shamsó Jan would certainly be entitled ultimately to inherit. The section says nothing about immediate in-

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heritance. On the contrary, it assumes by the concluding words "in order of succession," that any person who would be entitled ultimately to inherit, however remote such inheritance might be and however many preferential heirs might be in existence, has a right of pre-emption under this clause. It is clear that the immediate heir of *Musammatt Shamso Jan* is her son, *Firdaus Khan*, and it is also clear that *Shahdad Khan* is an ultimate heir of *Firdaus Khan*. The only question, therefore, is whether *Shahdad Khan* fulfils the second condition, viz., that he is entitled to inherit the property by right of blood relationship. I fail to see how it can be argued that his title to succeed rests upon anything except blood relationship. *Firdaus Khan* would succeed to *Musammatt Shamso Jan* solely by right of blood relationship to her. *Shahdad Khan* would succeed again to *Firdaus Khan* solely by right of his blood relationship to him. In other words, it is blood relationship and that consideration alone which governs the right of *Shahdad Khan* to succeed ultimately to the estate. It seems to me unnecessary to consider the position which would arise if *Firdaus Khan* were not in existence, or if he pre-deceased *Musammatt Shamso Jan*. I see no reason to deal with a hypothetical case, but it may be remarked that there is a consensus of authority for the view that if *Musammatt Shamso Jan* died without direct heirs, the estate would revert to the collaterals of her husband and not those of herself. However this may be, as the parties stand at present, *Shahdad* is clearly an heir entitled ultimately to succeed and an heir who derives his title from blood relationship. I have already said that I can see nothing in the wording of the section to warrant the assumption that we must add the words "to the vendor" after the words "by right of blood relationship." If the Legislature had intended to add those words, it would have added them. To make the position clear, I consider that the law obtaining in the North-West Frontier Province is one which deprives a person claiming to succeed by Will or other form of artificially regulated succession from putting forward pre-emption rights under section 12 (a) of Act II of 1905, but that it includes all cases where the pre-emptor would be entitled

to succeed to the property by right of blood relationship, whether such relationship is with the vendor herself or with the natural heirs of the vendor.

On the above view, I maintain the finding of the Divisional Judge that the plaintiff in the present case has a right of pre-emption and is entitled to a decree. I, therefore, dismiss this appeal with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 127 OF 1922.

May 31, 1923.

Present.—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Kulwant Sahay.

JAGANNATH SAO AND OTHERS—
APPELLANTS

versus

DEBI PRASAD DHANDHANIA AND
OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 30—Decree directing sale of property on failure of payment—Attachment, whether necessary before sale.

The procedure laid down in O. XXI, r. 30 of the Civil Procedure Code is only applicable in the case of a decree for the payment of money, that is to say, where there is no decree which affects any specific immoveable property. In such a case before any specific immoveable property belonging to the judgment-debtor can be the subject of sale in satisfaction of the decree, it is necessary that the property should first be attached. [p. 599, col. 2.]

Where, however, a decree itself gives effect to a charge on specific immoveable property and directs the property to be sold in the event of the decretal amount not being paid, the decree is in fact something more than a decree for the payment of money and it is altogether unnecessary that the procedure laid down in O. XXI, r. 30, of the Civil Procedure Code should be carried out before the property is sold. [p. 599, col. 2.]

Appeal from an order of the Subordinate Judge, Bhagalpur, dated the 7th April 1922.

Mr. Narendranath Sen, for the Appellants.

JAGANNATH SAO v. DESI PRASAD.

Messrs. *Rai Guru Saran Prasad* and *Jadubans Sahai*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the judgment-debtors from an order of the Subordinate Judge passed in execution dismissing the objection of the judgment-debtors and ordering execution to proceed.

It appears that the decree-holders obtained against the judgment-debtors a decree for the sum of Rs. 29,925. That decree which was passed on the 14th June 1919 was the result of a compromise between the parties to the suit. The suit was decreed in terms of the compromise. It provided that a decree should be passed in favour of the plaintiff for the sum of Rs. 25,925 and that the defendants should pay that sum together with interest and costs by certain instalments which were set out at the end of the decree. If the defendants should fail to pay the whole or portion of any of the instalments then the plaintiff should have the right to realise the entire decretal amount of principal and costs together with interest at 8 annas per cent. per month until realization. Certain properties were also given as security for the due fulfilment of the terms of the decree, and by clause (c) of the decree it was provided that should these defendants fail to pay the decretal amount payable by instalments, the plaintiffs shall have the right to take out execution of the decree, to get the charged property sold by auction, and realise the decretal amount principal with interest and costs to which these defendants shall have no objection. Those are the principal terms of the compromise as embodied in the decree. Now default was made in the payment of the instalments and thereupon the decree-holders applied for execution of the decree on the 21st September 1921 claiming the balance still due, one instalment only having been paid, and a sale of the property charged by the terms of the decree as security for the fulfilment of those terms. The judgment-debtors filed an objection to execution and contended that the properties charged under the decree could not be sold in execution unless they were first attached as provided in O. XXI, r. 30. That rule provides that "Every decree for the payment

of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property or by both." The learned Subordinate Judge who heard the objection came to the conclusion that there was no necessity in the present case, having regard to the terms of the decree which provided specifically for the sale of these properties in the event of default in payment of the instalments to attach the properties before sale but that the decree would be executed by a sale of the properties as provided therein. From that decision this appeal has been preferred.

It seems to me that in a case of this sort where the decree gives effect to a charge on the property and orders the property to be sold in the event of the instalments not being paid, it is altogether unnecessary that the procedure mentioned in O. XXI, r. 30, should be carried out. That procedure is only applicable in the case of a decree for the payment of money, that is to say, cases in which there is no decree which affects any specific immoveable property. In such cases, before any specific immoveable property belonging to the judgment-debtor can be the subject of sale in satisfaction of the decree, it is necessary that the property should first be attached. In the present case, however, the decree itself provides for the sale of this very property in the event of the instalments not being paid and the decree is in fact something more than a decree for the payment of money. It is not only a decree directing the payment of money but it is a decree directing that in the event on non-payment certain property belonging to the judgment-debtor shall be sold. The form of the decree is very similar to that in a mortgage-decree. It is clear that in mortgage-decrees it is not necessary to attach the property and the reason for that is that the form of the decree in a mortgage-suit itself directs that the property shall be sold. So here the form of this decree which created a charge upon the property directed that the property in question should be sold in a certain event which has happened. In my opinion O. XXI, r. 30, has no application to a suit like the present, and the decision of the learned

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Subordinate Judge was right.

The appeal is dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No.

188 OF 1923.

May 16, 1923.

Present:—Mr. Justice Moti Sagar.

DHUMI AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

Nawab MUHAMMAD SAJJAD ALI

KHAN AND OTHERS—DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Declaratory suit—Receiver, appointment of—Agricultural land—Appointment of Receiver to collect rent—Jurisdiction of Civil Court.

The question that a Court has to consider in dealing with an application for the appointment of a Receiver is whether, in the circumstances of the case, the appointment of a Receiver is just and convenient, the object merely being to preserve the property. [p. 601, col. 1.]

A Court is not debarred from appointing a Receiver of property forming the subject-matter of a declaratory suit in which possession of the property is not to be awarded to one party or the other. [p. 601, col. 1.]

Dan Prasad v. Gopi Kishen, 22 Ind. Cas. 59; 36 A. 19; 11 A. L. J. 973, *Amarnath v. Tehal Kaur*, 67 Ind. Cas. 383; 4 U. P. L. R. (L) 73; (1922) A. I. R. (L) 444, relied on.

A Civil Court has jurisdiction to appoint a Receiver to collect the rents of agricultural land. [p. 601, col. 2.]

Raghubir Singh-Jaswant Singh v. Narinjan Singh, 72 Ind. Cas. 569; (1923) A. I. R. (L) 48, distinguished.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Delhi, dated the 4th January 1923, appointing the Collector of Delhi an *ad interim* Receiver for the collection of the rents of the property in suit.

Bakhshi Tek Chand, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This is an appeal from an order passed by Bhagat Jagannath, M. A., Subordinate Judge of Delhi, on the 4th of January 1923, holding

that the Collector of Delhi be appointed an *ad interim* Receiver for the collection of rents of the property which is the subject-matter of controversy between the parties in this case. The suit out of which this appeal has arisen was instituted by 199 persons, all residents of village Khor Punjab in the Delhi Province, and was one for a declaration that they and defendants Nos. 15, 18 and 19 were owners in possession of the land in the village and that defendants Nos. 1 to 4 had no rights therein. It appears that in the Mutiny of 1857 the whole of this village was confiscated by Government on account of the rebellious conduct of the then proprietors and subsequently released in favour of one Nawab Ahmad Ali Khan Mandal of Karnal, ancestor of defendants Nos. 1 to 4, as its sole proprietor. Since then the plaintiffs have continued to be recorded in the Revenue paper as tenants-at-will and the predecessors-in-title of defendants Nos. 1 to 4 as proprietors. Rent was fixed at Rs. 14,000 per annum and it is alleged that it regularly used to be realised from the plaintiffs till about three years before the institution of the suit. The defendants have put in a large number of documents showing that during the last 66 years they have brought several suits for rent and ejectment and that they have always been decreed. No objection has ever been taken by the plaintiffs to the proprietary rights of the defendants, and it has always been taken for granted that they have been holding the land merely as tenants under the defendants-proprietors. After the institution of this suit the defendants-proprietors made an application to the Court below that as there was no likelihood of the case being decided at an early date and that as the rents were running into arrears, it was not only just and convenient but necessary that a Receiver should be appointed for their collection so that in the event of the defendants ultimately succeeding in the case they may not be put to any unnecessary loss on account of the action of the plaintiffs. It was pointed out that a sum of about Rs. 36,000 was already due and that if the case dragged on for another three years, which in all probability it would, a further sum of about Rs. 40,000 would become due

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which would be impossible to realise from the plaintiffs who were not possessed of any independent property of their own. The learned Subordinate Judge gave effect to this prayer and appointed the Collector of Delhi an *ad interim* Receiver to realise rents and to deposit them in the Government Treasury pending the order of a competent Court as to payment thereof. Against this order the plaintiffs have preferred an appeal to this Court through Bakhshi Tek Chand, and I have heard Mr. Shamair Chand on behalf of the respondents.

Three contentions have been raised by Bakhshi Tek Chand in this appeal, firstly, it is contended that as the suit brought by his clients was one for a mere declaration, the Court should not have appointed a Receiver of the property, the possession of which could not be awarded to one party or the other by the Court in which the suit was pending. It should, however, be remembered that by appointing a Receiver the Court did not intend to determine any legal rights in the property but merely intended to preserve the rents of the property in *custodia legis* until the legal title thereto could be established by one party or the other. No authority has been cited in support of the proposition that the powers of a Court to appoint a Receiver are limited to suits of a possessory nature only, and having regard to the fact that the object of the appointment of a Receiver is to protect the property and to maintain its *status quo ante*. I do not think that there is any force in the objection that the appointment is invalid merely because the suit in which the appointment was made was one for a mere declaration. In the case of *Dan Prasad v. Gopi Kishen* (1) it was laid down that a Court had a right to appoint a Receiver where it appeared to it to be just and convenient to do so, and that the Court could make such an order *suo motu*. The same rule was laid down in a recent case decided by a Bench of this Court, *Amarnath v. Tehal Kaur* (2) where it was held that a Court was not debarred from appointing a Receiver of property forming the subject matter of a declaratory suit, in which possession of the property was not to be awarded to one

party or the other, and that the object of the appointment of a Receiver was to preserve the property in its actual condition pending the disposal of the suit between the parties. I do not see any force in this contention and I consequently overrule it.

Next, it is contended that the institution of the suit should not be allowed to result in improving the position of the defendants. It is pointed out that if the suit had not been instituted the defendants would have had to bring suits against the plaintiffs for the recovery of the rents due and to execute the decrees for the realisation of their decretal amounts, and it is urged with some show of reason that they should not be relieved from the necessity of instituting suits and of proving their claims merely because the plaintiffs have instituted a suit against them for the determination of their legal rights in the property. The argument is plausible enough, but it entirely loses sight of the fact that by the institution of this suit the position of the defendants, instead of being in any way bettered as contended by the plaintiffs, has been made much worse. If they were now to bring suits for the recovery of the rents due they would be met with an objection that their rights in the property itself, of which the rent was being claimed, had not yet been adjudicated upon and that they were consequently not entitled to have their claims decreed. The suits would in all probability be stayed and by the time that the main suit instituted by the plaintiffs against the defendants was decided, a large amount of rent would become overdue which it would be very difficult to recover. By the appointment of a Receiver the Court has tried to avoid all these difficulties and has, in my opinion, exercised its discretion in a most sound and judicial manner.

Lastly, it is contended that a Civil Court has no jurisdiction to appoint a Receiver over agricultural lands, the control of which rests entirely in the hands of a Revenue Court. I do not see any force in this objection. If this objection were to prevail, the result would be that a Civil Court would be debarred from exercising all jurisdiction in the matter of appointment of a Receiver even in cases where the *corpus* of the property in dispute consists of house property and agricultural lands. The

(1) 22 Ind. Cas. 59; 36 A. 19; 11 A. L. J. 973.

(2) 67 Ind. Cas. 383; 4 U. P. L. R. (L) 731 (1922)
A. I. R. (L) 444.

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question that the Courts have to consider in dealing with applications under O. XI, r. 1, is whether, in the circumstances of the case, the appointment of a Receiver is just and convenient, the object merely being to preserve the property, and it is nowhere provided that where both house and agricultural properties are in dispute, a Receiver with regard to the house property should be appointed by a Civil Court and with regard to the agricultural property by a Revenue Court. Moreover, it should be observed that in the present case a Receiver has not been appointed to take possession of the agricultural lands or to manage them but merely for the purpose of the collection of rents relating to that property. The case of *Raghubir Singh-Jaswant Singh v. Narinjan Singh* (3), cited by Bakhshi Tek Chand in support of his contention, is not exactly in point. In that case the lower Court appointed a Receiver in respect of the whole of the property in dispute without any sufficient grounds being disclosed for the appointment of a Receiver. It was held by the High Court that the Court should not appoint a Receiver except upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding and that the property in possession of the defendant was in danger of being wasted and destroyed. The defendant in that case was in possession as a manager of a joint Hindu family and the Court very rightly held that a manager should not be ousted from possession unless a very strong case for his ouster was made out. Incidentally, the question of the Court's jurisdiction over the apportionment of the produce of agricultural lands also came up and it was observed by the learned Judge in the course of his judgment that in cases where the Court has no jurisdiction over the apportionment of the produce, the appointment of a Receiver for the agricultural lands was still less justifiable than that regarding the other property. I do not think that the facts of the two cases are in any way similar and I overrule the objection.

Further, it should be observed that the lower Court, in the exercise of its discre-

tion after considering all the facts and evidence, has come to a conclusion that the appointment of a Receiver with regard to the collection of rents in this case was necessary. It is now for the appellants to show that the Court exercised its discretion improperly. It has been repeatedly held that a Court of Appeal will not, except in an extreme case, disturb an order as to the appointment of a Receiver by a Court below *vide Jibanessa Khatun v. Majid-unnessa Khatun* (4), *Raja Ram v. Sheorani Kuer* (5), *Sant Ram v. Ram Chana* (6), *Kadir Bakhsh v. Ghulam Mohammad* (7), *Bai Parvati v. Mansukh Jetha* (8) and *Amarnath v. Tehal Kaur* (2). In my opinion this was pre-eminently a fit case in which a Receiver ought to have been appointed and no sufficient ground has been made out to interfere with the discretion which has been exercised by the Court below.

I dismiss the appeal with costs.

Z. K. & N. H.

Appeal dismissed.

(4) 18 Ind. Cas. 398; 17 C. W. N. 581.

(5) 7 Ind. Cas. 344.

(6) 6 Ind. Cas. 659; 53 P. W. R. 1910; 36 P. R. 1910; 72 P. L. R. 1910.

(7) 55 Ind. Cas. 50; 2 U. P. L. R. (L.) 56; 30 P. W. R. 1920.

(8) 59 Ind. Cas. 361; 22 Bom. L. R. 1097; 44 B. 972.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 151
OF 1922.

April 5, 1923.

Present:—Mr. Justice Daniels,
Sheikh CHHUTTAN AND ANOTHER—
OBJECTORS—APPELLANTS
versus

JWALA PRASAD—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Property attached in execution—Suit by third party regarding title to property—Property handed to Receiver in second suit—Second suit, dismissal of—Application under s. 144 by decree-holder in first suit, whether maintainable.

(3) 72 Ind. Cas. 569; (1923) A. I. R. (L) 48.

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If a decree-holder in execution of his decree attaches certain property, but on a third party bringing a suit to establish his title to that property, the property is placed in charge of a Receiver in proceedings in the second suit; it is not competent to the decree-holder in the first suit, on failure of the second suit, to claim the recovery of the property from the Receiver, by an application under section 144, Civil Procedure Code, in the execution proceedings in the first suit.

Second appeal against a decree of the District Judge, Bareilly, dated the 13th of May, 1922.

Mr. U. S. Bajpai, for the Appellants.

Mr. N. P. Asihana, for the Respondent.

JUDGMENT.—This appeal is brought against an order which purports to be made under section 144, Civil Procedure Code, in Suit No. 789 of 1907 filed by the respondent, Jwala Prasad, against Sewa Singh and certain other defendants.

In that suit Jwala Prasad caused the produce of 37 plots to be attached. The present appellant, Sheikh Chhuttan, asked that the sale of the crops might be stayed on account of a declaratory suit which he was filing. He did file such a suit against Jwala Prasad and certain third parties on 13th April 1920 for a declaration that the crops in dispute were not liable to sale under Jwala Prasad's decree but were the property of tenants cultivating from him on a *batai* rent so that he, Sheikh Chhuttan, was entitled to half the crops. Sheikh Chhuttan's suit was decreed by the Court of first instance. While this suit was pending an application was made by him to have the crops made over to a *sipurdar* and they were made over to two persons, Khumani, who was a servant of Sheikh Chhuttan, and one Sewa Singh. In some way which is not explained the crops were subsequently entrusted to Sheikh Chhuttan's son, the second appellant, Kalim-ud-din. After Sheikh Chhuttan's suit was decreed Kalim-ud-din made over half the crops to his father and the other half to the tenants. This was about October 1920. On 28th July 1921 Sheikh Chhuttan's suit was dismissed in appeal.

Jwala Prasad's application for execution of his decree had remained pending from 28th February 1920. Thereupon on 2nd May 1921 the decree-holder, Jwala Prasad,

filed an application which is on the record asking that the grain might be brought to sale and stating that he would take separate proceedings for the loss caused to him by the wrongful suit of Sheikh Chhuttan. The Court then issued notice to the *sipurdar* to produce the property for sale. Notice seems to have been served on Kalim-ud-din, for the order-sheet contains an order of the Court dated 17th December 1921 stating that he objects that he was not *sipurdar* in this case but in the case instituted by his father. The Court overruled this objection on the ground that the property was attached in Jwala Prasad's suit and that the attachment became subject to the result of the suit subsequently filed by Sheikh Chhuttan. The Court held that Kalim-ud-din was bound to produce the property and that being unable to do so by reason of having given it to other persons without authority from the Court he was bound to deposit the price. Ultimately, on 1st September 1922, the order out of which the present appeal arises was passed against Sheikh Chhuttan and Kalim-ud-din directing them to pay Rs. 1,000 in respect of the attached crops wrongfully appropriated by them. An appeal was preferred to the District Judge. To this appeal a preliminary objection was taken that no appeal lay; the learned Judge held that section 144, Civil Procedure Code, applied but on the merits considered that the Munsif's order was correct and declined to interfere.

The appellant's case in this Court is that the Courts below had no jurisdiction to pass an order against the appellant in execution proceedings in Jwala Prasad's suit. It is urged that neither Kalim-ud-din nor Sheikh Chhuttan was a party to that suit and, further, that the proceedings by which a *sipurdar* was appointed and in which the alleged act of wrongful misappropriation was committed, took place in Sheikh Chhuttan's Suit No. 231 of 1920 and not in Jwala Prasad's suit. It is, therefore, contended that Jwala Prasad's only remedy against the appellants was to institute a regular suit against them, as in the case of Sheikh Chhuttan he originally declared his intention of doing.

On behalf of the respondent decree-holder it is contended that Kalim-ud-din was *sipurdar* in Jwala Prasad's case and as such is

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liable and it is further urged that as on the appellant's own contention the case is not covered by section 144, Civil Procedure Code, no appeal lies to this Court.

I have no hesitation in overruling the preliminary objection. One of the issues which the Judge of the Court below had to decide was whether the case was covered by section 144, Civil Procedure Code. He applied his mind to the question and he decided it and the appellant cannot be deprived of his right of appeal because one of his grounds for challenging the decree is that the decision on this issue was wrong.

On the merits it is difficult to see how any proceedings under section 144, Civil Procedure Code, could possibly be taken against the appellants in Jwala Prasad's case. Kalim-ud-Din, at any rate, was no party to that case either in the original Court or in the execution proceedings. The order appointing him *sipurdar* was made in the suit filed by Sheikh Chhuttan. His position being substantially that of a Receiver under Chapter XL of the Code the Court might in that suit have called on him to produce the crops or their value. It could not do so in a suit to which he was an entire stranger. Sheikh Chhuttan's only connection with Jwala Prasad's suit was the fact that he applied to have the sale of the crops stayed on the ground that he was going to file a separate suit in respect of them. Whatever further proceedings were taken by him were taken in his own suit. Moreover, section 144 only applies where a decree has been set aside in appeal or otherwise. The only decree which has been set aside is the decree in Sheikh Chhuttan's suit. Whatever remedy the respondents had against the appellants was either by application in Sheikh Chhuttan's suit to which the respondent was a party, or by a *separate* suit. The present proceedings on his part were entirely misconceived. I, therefore, allow the appeal and set aside the decree against the appellants. As the appeal is allowed on a technical point I award no costs. The parties will bear their own costs in all Courts.

M. D. J.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1776 OF 1917.

May 6, 1922.

Present.—Mr. Justice Broadway and Mr. Justice Harrison.

SARDARA AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

ALLAYAR AND OTHERS—DEFENDANTS—
RESPONDENTS.

Parties.—Suit for possession against joint holders, dismissal of—Appeal in presence of some only of respondents, whether competent—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Suit for possession against joint holders, dismissal of—Appeal, abatement of, against one respondent—Appeal, entire, whether abates.

An appeal against the dismissal of a suit for possession against several persons who hold the property jointly cannot proceed in the presence of some only of the respondents.

Bejoy Gopal Bose v. Umesh Chandra Bose, 6 C. W. N. 196, *Basir Sheikh v. Fazle Karim Biswas*, 28 Ind. Cas. 703; 19 C. W. N. 290 and *Azimuddin Mandal v. Tara Sankar Ghose*, 47 Ind. Cas. 638; 28 C. L. J. 201, relied on.

An appeal against the dismissal of a suit for possession against several persons who hold the property jointly abates in its entirety where one of the respondents dies and his legal representatives are not brought on the record within time.

Khuda Bakhsh v. Mathra Das, 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R. 1913; 89 P. W. R. 1913, *Hadu v. Lala*, 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914, *Inayat v. Ganga*, 32 Ind. Cas. 829; 3 P. R. 1916; 260 P. W. R. 1915, *Daya Singh v. Bula Singh*, 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916, *Fateh v. Bhanju Ram*, 41 Ind. Cas. 730; 96 P. R. 1917; 49 P. W. R. 1917, *Jamna v. Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919, *Sardari Lal v. Ram Lal*, 57 Ind. Cas. 199; 1 L. 225; 1 L. J. 225; 143 P. L. R. 1928 and *Fatta v. Sikandar*, 56 Ind. Cas. 927; 2 L. L. J. 442; 2 U. P. L. R. (L.) 112, relied on.

Gajo Singh v. Amrit Narain Singh, 60 Ind. Cas. 722; 2 P. L. T. 234, distinguished.

Appeal from a decree of the Senior Sub-Judge, Jhang, dated the 30th March 1917.

Lala *Fakir Chand*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The plaintiffs in this case brought a suit against 18 defendants for possession of an area of land which they said belonged to them and on which all the defendants had trespassed. The suit was dismissed by the Trial Court on the 30th March 1917. On the 16th February 1917, after the conclusion of the arguments one Amir, defendant, died;

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In spite of this fact his name was shown as one of the respondents in the appeal and it was not until the 12th of May 1920 that respondent's Counsel brought this fact to the notice of this Court. On the following day an affidavit of the appellants was put in and a month later on the 15th June 1920 Counsel applied for permission on their behalf to bring Amir's son on the record. It is admitted that the appellants live 10 miles from the respondents and no reason has been shown for holding that they were prevented by any sufficient cause from ascertaining the fact of Amir's death. The appeal automatically abated against him and his representative at the end of six months and in the absence of any good cause being shown we do not accede to the prayer of the appellants to set aside the abatement.

This being the position, Counsel has adopted two alternative lines of argument. He contends, in the first place, that in spite of the application put in by himself there has been no abatement against Amir, inasmuch as he died before the judgment was pronounced by the Trial Court. Under O. XXII, r. 6; the death of Amir between the conclusion of the hearing and the pronouncement of judgment is immaterial, and if there has been no abatement all the parties are not before the Court and as explained in *Bejoy Gopal Bose v. Umesh Chandra Bose* (1), *Basir Sheikh v. Fazl Karim Biswas* (2) and *Azimuddin Mandal v. Tara Sankar Ghose* (3), the appeal must fail.

It is, however, clear that the appeal has abated against Amir and all we are concerned with is the question of the consequence of such abatement *qua* the remaining respondents. Now, the position taken up by the plaintiffs-appellants is that the defendants are all trespassers and are all in occupation of the land in suit. It is contended that, because they own other land in well defined ancestral shares, it must be taken that they also hold this land in accordance with the same ancestral shares. This position is contradictory to the suit as

framed. The defendants hold the land jointly and there had been no specification of shares or separation of interests, and there is a mass of authorities to the effect that, under these circumstances, the abatement against the one individual respondent leads to and necessitates the abatement against them all. In this connection we may refer to the following authorities cited by Mr. Tek Chand:—

Khuda Bakhsh v. Mathra Das (4), *Hadu v. Lala* (5), *Inayat v. Ganga* (6), *Daya Singh v. Buta Singh* (7), *Fateh v. Bhanju Ram* (8), *Jamna v. Sarjit* (9), *Sardari Lal v. Ram Lal* (10) and *Fatta v. Sikandar* (11), with which we agree.

As against these rulings Counsel for the appellants has referred us to *Gajo Singh v. Amrit Narain Singh* (12) a case which is easily differentiated from the present, for the only question before the Court was the effect of the death of certain respondents in execution proceedings arising out of the final decision by the Privy Council. Whatever test be applied and more especially by that referred to in *Hadu v. Lala* (5), namely, the possibility of a suit proceeding in the absence of the one particular defendant, we find that the relief sought was joint and indivisible against all the defendants-respondents, and, therefore, the inevitable consequence of the abatement of the appeal against one of the respondents is the complete abatement against all.

We, therefore, dismiss the appeal with costs.

N. H.

Appeal dismissed.

(4) 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R. 1913; 89 P. W. R. 1913.

(5) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

(6) 32 Ind. Cas. 829; 3 P. R. 1916; 260 P. W. R. 1915.

(7) 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916.

(8) 41 Ind. Cas. 730; 96 P. R. 1917; 49 P. W. R. 1917.

(9) 52 Ind. Cas. 510; 67 P. R. 1919.

(10) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.

(11) 56 Ind. Cas. 927; 2 L. L. J. 442; 2 U. P. L. R. (L.) 112.

(12) 60 Ind. Cas. 722; 2 P. L. T. 234.

(1) 6 C. W. N. 196.

(2) 28 Ind. Cas. 703; 19 C. W. N. 290.

(3) 47 Ind. Cas. 638; 28 C. L. J. 201.

G. I. P. RAILWAY v. HIMATLAL JAGJIVANDAS.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

No. 232 OF 1922.

January 19, 1923.

Present :—Justice Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

G. I. P. RAILWAY—DEFENDANT—

APPLICANT

versus

HIMATLAL JAGJIVANDAS AND OTHERS

—PLAINTIFFS—OPPONENTS.

Railway Company—Goods consigned under Risk Note, Form B—Loss of goods—Wilful neglect or theft—Onus of proof.

In an action for the price of goods short delivered by a Railway Company to whom they were consigned for carriage under a Railway Risk Note, Form B, the onus lies upon the plaintiff to prove that loss was due to theft by, or to wilful neglect of, the Railway Company's servants. [p. 606, col. 2.]

Although in equity a Railway Company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent, under the law, upon them to do so. Still the Company should produce before the Court for examination those of its servants who are in a position to be acquainted with the facts relating to the disappearance of the goods. Where this is done, the absence of any explanation by the Company as to what had happened to the goods, is not evidence that the short delivery was due to wilful misconduct of the Company's servants. [p. 607, cols. 1 & 2.]

Smith, Ltd. v. Great Western Railway Co. (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, followed.

Civil extraordinary application against the decree passed by the First Class Subordinate Judge at Broach, in Small Cause Suit No. 810 of 1921.

Mr. O'Gorman, instructed by Messrs. Little & Co., for the Applicant.

Mr. N. K. Methu, for the Opponents.

JUDGMENT.—The plaintiffs sued the South Indian Railway Company and G. I. P. Railway Company for damages in respect of short delivery of certain tins of oil which were delivered to the South Indian Railway Company at Erode Railway Station for carriage to Baroda. When the train arrived at Kalyan, it was found that the waggon which contained the plaintiffs' goods was open and seventeen tins were missing. The plaintiffs signed the Risk Note B and in order to recover, the plaintiffs had to prove that the loss was due to theft by, or to the wilful

neglect of, the Company's servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: provided that the term "wilful neglect" could not be held to include fire, robbery from a running train or any other unforeseen event or accident.

The learned Judge came to the conclusion that the theft was not committed in a running train, although he does not deal in detail with the evidence given by the witnesses with regard to the arrival of the train at Kalyan. The theft was discovered when the waggons were examined within a few minutes of their arrival at Kalyan, and if the theft was not committed in the running train, it would appear it must have been committed within a few minutes of the train's arrival at Kalyan. That would be a conclusion which it would be rather difficult to arrive at. However that may be, the onus lies upon the plaintiffs to prove that loss was due to theft by, or to the wilful neglect of, the Company's servants, and they called no evidence to prove that; it is true that there is the evidence of the Company's servants, but, in our opinion, there is nothing in the evidence of the Company's servants which would entitle the Court to come to the conclusion that the loss was due to theft committed by one of them or to any wilful neglect on their part.

The liability of Railway Companies under Risk Notes of this character, and the question what it is incumbent on the plaintiffs to prove was considered recently in *Smith, Ltd. v. Great Western Railway Co.* (1). Lord Buckmaster said, after reading out the clause in the agreement which provided that the Company should not be liable for the loss of the goods except upon proof that the loss arose from the wilful misconduct of the Company's servants (pages 182, 183):—

"The first question to determine is, what is the true meaning of that condition? It has been suggested on the part of the appellant that it must be read as though it con

(1) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

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tained exceptions in favour of the Railway Company with a proviso reserving to the consignor rights in a certain event, and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts, and when that was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or, in other words, that the loss had arisen owing to the wilful misconduct of the Company's servants.

"I am unable so to regard this clause; it is, in my opinion, a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the Company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the Railway Company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the Railway Company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the Railway Company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the Railway Company. All he has been able to show is this: he has proved the delivery of the goods in the manner that I have mentioned to the Railway Company's servants, and he has put in evidence a correspondence between himself and the Railway Company, and their answers to certain interrogatories. I am bound to say that the correspondence does not reflect very creditably upon the attitude which the Railway Company adopted, and certainly does not show any anxiety on their part to satisfy one of their customers as to such of the circumstances as were within

their knowledge, associated with the loss of these goods."

It appears, therefore, that, although it may be said that in equity the Railway Company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent under the law upon them to do so and they are not obliged to go out of their way to assist a plaintiff in proving wilful neglect. But as there are rules of procedure enabling a party to administer interrogatories in a Small Cause Court suit, we still think that in this country a Railway Company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods. The G. I. P. Railway Company have done so in this case, and, in our opinion, very rightly, but the learned Judge considered that their long continued failure to give any explanation as to what had happened to the seventeen tins short delivered, coupled with the want of explanation to account for the delay, afforded evidence upon which it could be found that the short delivery was due to wilful misconduct of the Company's servants. That is a conclusion which can no longer be warranted under the decision to which we have just referred. Therefore, the Rule must be made absolute and the suit dismissed with costs.

W. C. A.

*Rule made absolute.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 1483 OF 1921.

April 12, 1923.

Present:—Mr. Justice Daniels.RAJA SINGH AND ANOTHER—DEFENDANTS
—APPELLANTS*versus*DURGA SINGH—PLAINTIFF—
RESPONDENT.*Hindu Law—Father's debt—Sons, pious duty of
—Death of father, effect of.*

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A debt by a Hindu father which is neither antecedent nor for legal necessity, is not binding on the sons on the plea of pious obligation merely because of the father being dead on the date of the institution of the suit.

Chet Ram v. Ram Singh, 67 Ind. Cas. 569; 44 A. 368; 49 I. A. 228; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), followed.

Gharib Ullah v. Khalak Singh, 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.), distinguished.

Second appeal from a decree of the District Judge, Ghazipur, dated the 26th July 1921.

Dr. M. L. Agarwala, for the Appellants.

Mr. Ram Nama Prasad, for the Respondent.

JUDGMENT.—These appeals by the defendants arise out of two suits to set aside two sale-deeds executed by two adult members of the joint family to which the plaintiffs belong and by their mother. The sole issue in the case which is now material was whether these deeds were executed for purposes binding on the joint family estate. The consideration of the sale-deeds is made up of various items but the only item which is in dispute in this appeal consists of Rs. 415 which was applied to pay off a mortgage executed by the father of the plaintiffs. Part of the consideration was set off against each sale-deed. Following the law as laid down in *Sahu Ram Chandra v. Bhup Singh* (1) the Courts below have gone on to consider how far this mortgage was executed for legal necessity. Some items have been allowed and the others disallowed. The appellants do not challenge the findings as to the separate items. Their argument is that, inasmuch as the father who executed the mortgage is dead, it is immaterial whether the mortgage was executed for legal necessity or not. They invoke the doctrine of pious obligation on the part of the sons and say that the debt is binding on the sons whatever the purpose for which the money

was borrowed so long as that purpose was neither illegal nor immoral. No direct authority was cited in support of this view for the case of *Gharib Ullah v. Khalak Singh* (2) on which the appellants rely is not really an authority on the point, and it appears to me impossible to accept the view contended for in view of the recent decision of the Privy Council in *Chet Ram v. Ram Singh* (3). There the father had executed a sale-deed in lieu of a previous usufructuary mortgage. The matter came before the Privy Council and their Lordships held that, under the rule laid down in *Sahu Ram Chandra v. Bhup Singh* (1), the usufructuary mortgage could not constitute antecedent debt. At the time when the suit was brought the father was dead but his sons and grandsons were alive. Their Lordships refused to accept the contention that the father's death made any difference or that the transaction which was otherwise invalid could be treated as valid by reason of the father having died prior to the suit. I, therefore, reject the argument put forward by the appellant. Both appeals clearly fail and they are accordingly dismissed with costs including in this Court fees on the higher scale.

M. A. A.

Appeals dismissed.

(2) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.).

(3) 67 Ind. Cas. 569; 44 A. 368; 49 I. A. 228; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).

(1) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.).

FATEH MUHAMMAD KHAN V. WAFI BEGUM.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 70 OF 1922.

April 21, 1923.

Present.—Mr. Pipan, J. C.

Shahzada FATEH MUHAMMAD KHAN

—DEFENDANT—APPELLANT

versus

Musammat WAFI BEGUM AND OTHERS
—RESPONDENTS.

Arbitration—Reference by agent—Authorisation, proof of—Arbitration in criminal proceeding, nature of—Custom v. personal law—Sadozai royal family, whether governed by custom or Muhammadan Law—Succession—Females, exclusion of.

No instrument in writing is necessary to establish a valid authorisation by a principal to his agent to make a reference to arbitration. [p. 611, col. 1.]

Ram Das v. Abbas Khan, 51 P. R. 1893 (F. B.), *Unniraman v. Chathan*, 9 M. 451; 3 Ind. Dec. (N. S.) 709, *Saturjit Persat Bahadoor Sahi v. Dulhin Gulab Koer*, 24 C. 469; 12 Ind. Dec. (N. S.) 980, relied on.

At the same time, proof is required, whether there has been an instrument in writing or not, that the agent was actually authorised to make a reference to arbitration. [p. 611, col. 1.]

Whenever there is a gap in the Customary Law which cannot be filled otherwise, it must be filled by a reference to the personal law of the litigating parties. [p. 612, col. 1.]

Daya Ram v. Sohail Singh, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.), relied on.

The Sadozai family, descended from Shah Shuja, follows Muhammadan Law in matters of succession and no custom obtains in the family whereby females are excluded from inheritance. [p. 612, col. 1.]

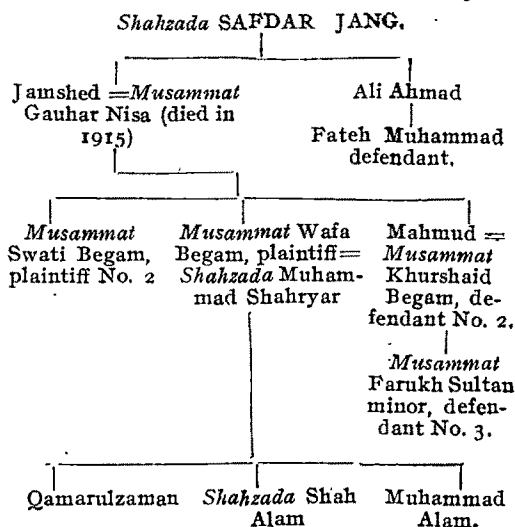
Second appeal from an order of the Divisional Judge, Peshawar, dated the 20th March 1922, reversing that of the District Judge, Peshawar, dated the 22nd June 1921.

Mr. Diwan Chand, R. S., for the Appellant.

Mr. Saaduddin Khan, K. S., for the Respondent No. 2.

JUDGMENT.—This suit is for possession of a *kothri* situated in Peshawar City which was originally purchased by Musammat Gauhar Nisa. Musammat Gauhar Nisa died in 1915 and the parties to the suit are her relatives. They belong to an Afghan family which has been for many years resident in the North-West Frontier Province and the Punjab. The family in question is a branch of that of Shah Shuja Sadozai, the Amir of Afghanistan, who lost his throne during the course

of the first Afghan War. It holds a high social position and many members of it are now in Government service. The sub-joined pedigree table shows the relationship of the parties to the present suit.



The suit is brought by Musammat Swati Begam and Musammat Wafa Begam, who are two married daughters of Musammat Gauhar Nisa. They claim to succeed to the *kothri* with the shares to which they would be entitled under Muhammadan Law. They calculate their joint share as 22/32nds of the property. The calculation depends on the assumption that they are entitled to 16/32nds as heirs to Musammat Gauhar Nisa the remaining 16/32nds having devolved upon their brother, Mahmud. Mahmud has died and, as shown by the pedigree table, left a widow and a daughter. The shares of the widow and daughter, who are defendants Nos. 2 and 3 in this case, would be 10/32nds of the whole estate, while the remaining 6/32nds would devolve upon the plaintiffs as heirs to Mahmud thus entitling them to 22/32nds in all. The suit is resisted by Shahzada Fateh Muhammad, first cousin of the plaintiffs, who is supported by the widow and daughter of Mahmud who have consented to receive only maintenance from the estate. The suit is resisted *inter alia* on the ground that the parties are not governed by Muhammadan Law, as alleged by the plaintiffs, but by a special custom which excludes

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females from inheriting immovable property. The Trial Court found that the parties were governed by this custom and on this finding dismissed the suit. The Divisional Judge, on appeal, remanded the case for further evidence upon the issue of whether Muhammadan Law or special custom applied to the parties, and, after considering a return made to the remand, held that the parties would succeed in the present case by Muhammadan Law, and granted the plaintiffs a decree for the relief sought by them. A further appeal has been lodged in this Court by the defendant Shahzada Fateh Muhammad.

One of the grounds on which the suit was resisted in the Trial Court was that *Musammât Gauhar Nisa* in purchasing the property in dispute, had used funds which belonged to the defendant Fateh Muhammad and that she had not a sole or unqualified title to the property. This contention is again set up in the grounds of the present appeal, but has not been pressed before me by Counsel. It is indeed clear, as pointed out by the learned Divisional Judge, that the contention is supported by no evidence and cannot possibly succeed. I need not, therefore, consider it further.

The appeal, as argued before me, proceeds on three main grounds:—

(1) that the present suit did not lie because the parties had made a valid reference to arbitration out of Court followed by a valid award which found that the plaintiffs were not entitled to possession of the property.

(2) That the parties are governed by a special custom excluding females from inheriting immovable property.

(3) That even if it be proved that the parties follow Muhammadan Law, the share to which the plaintiffs are entitled is not that which has been alleged in the plaint and which has been decreed to them.

I proceed to deal with these points in order.

(1) The arbitration proceedings referred to arose in the following manner. On the 5th of February 1920 Fateh Muhammad put in an application to the Deputy Commissioner of Peshawar under section 8, Frontier Crimes Regulation, asking for a settlement of his claims by Council of Elders. He alleged in the ap-

plication that his entire property has been in charge of Mahmud as his guardian, and that the latter had taken advantage of his guardianship to acquire property in his own name from the income of Fateh Muhammad's estate, and that a portion of the estate was in possession of the present plaintiffs, *Musammât Swati Begam* and *Musammât Wafi Begam*, who had no right to hold it as against him. This application was sent to the City Magistrate of Peshawar who forwarded it to K. S. Maulvi Ghulam Hassan for inquiry. The present plaintiffs on that occasion were represented by Shahzada Shah Alam, the son of *Musammât Wafi Begam*, who purported to be acting as agent for both. He and Fateh Muhammad agreed before K. S. Maulvi Ghulam Hassan to refer the dispute to two arbitrators and an umpire. The arbitrators and the umpire put in an award on the 8th of May 1920 which was forwarded to the Court of the City Magistrate by the Sub-Registrar. This award purported to make a final settlement of all disputes between the parties, awarding maintenance only to *Musammât Khurshid Begam* and *Musammât Fairukh Sultan* and prescribing that the present plaintiffs should give up possession of the property now in suit, *Musammât Swati Begam* receiving Rs. 500 from Fateh Muhammad. The arbitrators stated in the award that it had been agreed to by Fateh Muhammad and by the agent of the present plaintiffs. The agent, however, objected before the Court to the award and stated that the plaintiffs would seek their relief in a Civil Court. No further proceedings were, therefore, taken under section 8, Frontier Crimes Regulation. It would appear that the Trial Court, rightly or wrongly, considered that the objection set up by Fateh Muhammad against the present suit was one which contended that there had been proceedings under section 8, Frontier Crimes Regulation which would operate as *res judicata* in a subsequent suit. This objection was, of course, unsustainable as no decree between the parties had ever been passed under section 8, Frontier Crimes Regulation. The objection, as urged in the Divisional Court, was that there had been a valid reference to arbitration out of Court by which parties were bound and which would

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bar a subsequent suit. The ruling of the Judicial Commissioner of this Province in Civil Revision No. 86 of 1915 is quoted as authority for the view that arbitration proceedings taken in a Criminal Court are to be regarded as arbitration proceedings taken out of Court. This view is undoubtedly correct, and it cannot be denied that if there were valid arbitration proceedings between the parties and a valid award drawn up in those proceedings, the present suit would be barred. The validity of the proceedings, however, and of the award is contested by the respondents on the ground that Shahzada Shah Alam who purported to be acting as the agent of the present plaintiffs had no valid authority to act for them and no valid authority to make a reference to arbitration. It is argued, indeed, that the Counsel for the defendants in the Trial Court was so conscious of this obvious defect in the arbitration proceedings that he abandoned the position and fell back upon the allegation of *res judicata*. As against this, it is contended by the appellant that Shahzada Shah Alam, who is the son of *Musammal Wafi Begam*, was clearly an agent authorized by her and by her sister and that no instrument in writing was necessary to establish a valid authorization. In support of this proposition *Ram Das v. Abbas Khan* (1), *Unniraman v. Chathan* (2) and *Saturjit Pertap Bahadoor Sahi v. Dulhin Gulab Koer* (3) are quoted as authorities. It may be conceded that this view is correct. At the same time, proof is required, whether there has been an instrument in writing or not, that the agent was actually authorized to make a reference to arbitration. I am unable to see in the present case any presumption that such an authority existed. The women themselves never appeared in the proceedings at all and, even admitting that the procedure in a trial under section 8, Frontier Crimes Regulation is necessarily irregular and to some extent extrajudicial, it would be unusual for a dispute of this nature to be referred to a regular arbitration without either the express consent of the parties concerned, or some

appearance or the execution of some document by them which would authorize the conduct of their case by an agent. I cannot agree with the argument put forward by the respondents' Counsel that the initial words of the arbitrator's award imply in any case that the present plaintiffs consented to, or ratified, the reference to arbitration. The arbitrators simply use a phrase almost invariable in the compilation of an award when they allude to themselves as "*maqbulah farigain*." It is noticeable also that when they allude to the parties' acceptance of their finding, they specifically refer to acceptance by Fateh Muhammad himself and by the agent of the other side. To my mind, it is perfectly clear that the Divisional Judge is correct in holding that the reference to arbitration was an invalid one so far as the present plaintiffs are concerned, and that they neither consented to or ratified the reference. On this finding it must naturally follow that the present suit is not barred by any valid award drawn up upon a valid reference to arbitration.

2. The question as to whether the parties are governed by Muhammadan Law or by a special custom, has been dealt with at length by the learned Divisional Judge and we now have a very complete body of evidence upon the record upon both sides of the question. It is important to remember that, as pointed out by the Divisional Judge, the defendant is not alleging that the parties follow the ordinary agricultural custom of the Peshawar District, but is pleading that a special custom exists in this particular family by which females are excluded from inheriting immoveable property. I agree also with the *dictum* of the Divisional Judge that the onus of proving such a special custom lies very heavily upon the defendant. I further agree that this onus has not been discharged. I do not think it necessary on this further appeal to review at length the evidence which has been recorded. It is sufficient to say that instances have been shown where females have inherited immoveable property, and that there has been at least one judicial decision to the effect that the Shahzada family in the matter of succession is governed by Muhammadan Law. The judgment in one of these

(1) 51 P. R. 1893 (F. B.).

(2) 9 M. 451; 3 Ind. Dec. (N. S.) 709.

(3) 24 C. 469; 12 Ind. Dec. (N. S.) 980.

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cases is upon the record and relates to a case between certain members of the Shahzada family who are resident in the Ludhiana District. There was a very clear finding in that case to the effect that the family was governed by Muhammadan Law. As against this, one of the chief pieces of evidence adduced by the defendant was a mutation proceeding taken between certain other members of the family in the Gujranwala District. The final order on that mutation which is dated the 9th of March 1914 was to the effect that daughters had no rights to succeed to the property of their father. The order in question, however, when closely examined, carries little or no weight. It disposes of one instance which would militate against the view taken by the Revenue Officer in a manner which is distinctly unconvincing. The Revenue Officer finally disposed of the judicial authority for holding that the family was governed by Muhammadan Law by the somewhat surprising argument that Pathan agriculturists of the Sharakpur Tahsil of the Gujranwala District were governed by their own custom embodied in the *riwaj-i-am*. Now, this argument was obviously beside the point, as the Shahzada family could not, by any stretch of imagination, be regarded as members of the Pathan agricultural community of the Gujranwala District. There would not be the least presumption that they followed the custom of the district in which they happened to be settled purely in virtue of lands granted to them by Government as Afghan refugees. Nor, again, can I see any force in the contention that, as this Sadozai royal family were originally residents of Afghanistan, they are thereby to be presumed to follow a custom which excludes females from inheritance. This contention has been disposed of rightly by the Divisional Judge by a consideration of the very exceptional position which was held in Afghanistan by the family in question. I need not review the evidence of various members of the family who have been produced on either side. It is sufficient to say that, even where instances have been adduced to show that females have been excluded from inheritance there is no necessary presumption that an inviolable custom exists so excluding them, and that where the practice adopted by the family has been in a state of uncertainty and flux,

the parties have definitely ceased to be governed by their personal law. The case seems somewhat parallel to that which was dealt with by the Privy Council in *Abdul Hussein Khan v. Bibi Sona Dero* (4) where, although 68 instances had been quoted where females had failed to succeed to immoveable property, their Lordships of the Privy Council held that this fact was insufficient to exclude them. It was remarked that the evidence fell short of the standard to which it must attain in order to succeed in altering the devolution of property according to Muhammadan Law to a devolution determined by a family custom. The standard there set up, therefore, was a very high one and I see no reason why it should not be considered as equally high in the present case. I have already indeed pointed out that the onus of proving his contention lay very heavily upon the defendant. I may, further, refer to *Daya Ram v. Sohel Singh* (5) which lays down a proposition highly important to questions of this nature in this Province. In that judgment Mr. Justice Chatterjee made the very apposite remark that, "the principle to be borne in mind is that whenever there is a gap in the Customary Law which cannot be filled otherwise, it must be filled by a reference to the personal law of the litigating parties. This rule underlies all application of Customary Law to the concrete facts of a case." Certain other minor points which have been brought up by the respondents, such as the remark in a sale-deed executed by *Musammal Wafi Begam* that daughters do not succeed to the estate, seem to me to have little or no bearing upon the case. She and her sister actually did succeed, did secure possession at one time of the property in suit, and the arbitration proceedings admit their possession. The arbitration proceedings themselves are quoted in support of the contention that females are excluded from inheritance, but the award, on close examination, hardly bears this interpretation. Indeed, it may be said that it definitely admits the title of the two

(4) 43 Ind. Cas. 306; 45 C. 453; 16 A. L. J. 17; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 J. A. 10; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353 (P. C.)

(5) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.).

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women to the property now in suit when it describes that they shall receive Rs. 500 compensation and that they shall give up the property on receipt of this compensation. It may be argued that unless compensation had been prescribed, they would have been entitled to succeed to the property itself. Nor, again, do I attach much weight to the report made by K.S. Maulvi Ghulam Hassan as a local Commissioner during the hearing of the present case. His report, dated the 16th of June 1921, is extremely meagre and is in no way convincing. He appears to have thought that as Afghans in general are bound by custom in the Peshawar District, it, therefore, lay upon the plaintiffs to show that they were governed by Muhammadan Law. As a matter of fact, no such presumption was warranted as the parties were not Afghans (or as they are ordinarily called, Pathans) of the Peshawar District, but immigrants from Afghanistan resident in Peshawar City, and the recorded custom of Peshawar City is actually that its inhabitants normally follow Muhammadan Law. I consider on the evidence that the learned Divisional Judge was fully justified in his conclusion that Muhammadan Law must be followed in the present case and that the plaintiffs are entitled to inherit the property in suit according to the shares to which they would be entitled under Muhammadan Law.

3. I have already referred to the calculation made by the plaintiffs of the shares claimed by them. It is argued for the appellant that there is an obvious flaw in this calculation, inasmuch as *Musammal* Gauhar Nisa, during her lifetime, on the 26th of October 1913 gifted the whole of the property by a *tamliknana* to her son Mahmud. If this is the case, it is clear that the plaintiffs could only succeed to the property as heirs of Mahmud and not as heirs of their mother, *Musammal* Gauhar Nisa. It has been contended by the respondents that this deed of gift is not shown to have been acted upon. At the same time, there is every thing to show that it was, and its validity appears to have been accepted by the learned Divisional Judge and the existence of this deed was one of the reasons given for finding that *Musammal* Gauhar Nisa was full and

unqualified owner and that she had not been provided funds out of Fateh Mohammad's estate. It would seem that the learned Divisional Judge overlooked the result of his own view of the deed. Its validity having been once accepted, the estate must have passed to Mahmud, and the plaintiffs could only succeed as his heirs. I have been shown nothing by Counsel for the respondents to upset the view that it is necessary on this appeal to correct the shares decreed to the plaintiffs and to grant them a decree only for such shares as they would be entitled as heirs to Mahmud. The estate of Mahmud, according to Muhammadan Law, would devolve in the following manner:—his daughter would receive one-half or 16/32nds, his widow 1/8th or 4/32nds and his two sisters the balance remaining, i.e., 12/32nds. To the latter share, therefore, the plaintiffs must be entitled. I, therefore, accept this appeal to the extent that the decree of the Divisional Court be varied so as to give the plaintiff a decree for possession to 12/32nds of the property in suit.

Costs:—The appeal has succeeded only on a minor point and has failed on the more important contention set up. I, therefore, direct that half the costs of the respondents on this appeal be borne by the appellant. The appellant will pay his own costs.

Z. K.

Appeal partly accepted.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 75

OF 1922.

January 18, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

ALI MAHOMED KHAN—PLAINTIFF—
APPELLANT

versus

ALI AKBAR KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Muhammadan Law—Waki—Dedication, proof of—Burial of saintly person, whether renders land trust property—Sajjada nashin, appointment of, effect of.

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In the absence of proof of a dedication, express or implied, of a plot of land to public religious uses, the mere burial in it of a saintly person cannot have the effect of converting the land into trust property.

In the absence of a *wakf* the appointment of a person as a *sajjada nashin* must be regarded as a courtesy title only.

Zinat Bibi v. Emma, 40 Ind. Cas. 240; 107 P. R. 1917; 111 P. L. R. 1917; 92 P. W. R. 1917, followed.

Letters Patent Appeal from the decree and judgment of Mr. Justice Martineau, dated the 6th February 1922, passed in Civil Appeal No. 1426 of 1921, and published as 63 Ind. Cas. 415, reversing that of the District Judge, Hoshiarpur, dated the 1st April 1922.

Bakhshi Tek Chand and Saikh Niaz Ali for the Appellant.

Mr. Abdul Rashid and Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—The circumstances which have given rise to this appeal under clause 20 of the Letters Patent are briefly as follows:—

Mian Mauammad Khan, a *Pir* of the *Chishti* sect, lived in the defendants' village, Bassi Nau, in the Hoshiarpur District. The second defendant was married to one of his daughters, and the plaintiff is the son of another daughter. The *Pir* died in May 1914 at Bassi Nau and was buried in a grove belonging to the defendants in the neighbouring village of Kakkon. On the 23rd June 1914 the fortieth day after his death, a large number of persons, including his disciples and representatives of the leading shrines of the *Chishti* sect, assembled at the tomb, and the plaintiff was installed by a majority of the congregation as *sajjada nashin*. The plaintiff claims that the defendants dedicated 16 *kanals* of land to the shrine as *wakf* and he has brought the present action for a permanent injunction restraining the defendants from interfering with the shrine and with his management thereof.

Now, the Courts below have concurred in holding that the plaintiff was duly appointed a *sajjada nashin*, but that the alleged appropriation of the land to religious purposes has not been established. The question which has been argued before us by the learned Advocate for the plaintiff-appellant is, that the land on which the tomb of the saint was erected is trust property, and that

the plaintiff is entitled to a free access thereto. It is admitted that the defendants, who were undoubtedly the owners thereof, did not expressly dedicate the land under or around the tomb to religious uses, and the only question is whether a presumption of implied dedication arises from the fact that the saint was buried there and that *urs* has since been held at the tomb four or five times on his death anniversary.

Now, it is true that, on account of the saintly character of the deceased, the parties intended that his tomb should be regarded as a religious institution of a sort, but we are not prepared to dissent from the conclusion of Mr. Justice Martineau that the circumstances mentioned above do not justify the finding that the defendants divested themselves of their rights of ownership and appropriated the property to a religious trust. The plaintiff was undoubtedly appointed *sajjada nashin*, but in the absence of a *wakf* this title must, as pointed out in *Zinat Bibi v. Emma* (1), be regarded as a courtesy title.

Mr. Tek Chand for the appellant is unable to cite any authority to support the contention that the mere burial of a saintly person in a plot of land has the effect of converting that land into trust property, and we do not think that the circumstances that *urs* was held for a few years without any demur by the defendants materially advances the case for the plaintiff. It must be remembered that the deceased was the father-in-law of the second defendant and there is nothing improbable in the theory that he himself buried the saint in the land of which he was a part proprietor. Be that as it may, the onus was clearly upon the plaintiff to establish a dedication, express or implied, to public religious uses, and we consider that he has failed to discharge that onus.

The appeal is accordingly dismissed with costs.

Z. K.

Appeal dismissed.

(1) 40 Ind. Cas. 240; 107 P. R. 1917; 111 P. L. R. 1917; 92 P. W. R. 1917.

RAM NATH V. MANNU LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1156 OF 1921.

March, 20, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Daniels.

RAM NATH—DEFENDANT—APPELLANT
VERSUSMANNU LAL AND ANOTHER—PLAINTIFFS
RESPONDENTS*Contract Act (I.X of 1872), s. 62—Contract, novation of—Non-performance—Original contract, reversion to.*

Where, although the defendant is, by virtue of a contract entered into with the plaintiff, under a liability to the latter, both the parties agree to have their rights determined by an arbitrator and the arbitrator does determine the defendant's liability, it is not open to the plaintiff. On failure of the defendant to satisfy his claim in accordance with the award, to revert to the original contract and bring a claim in violation of the terms of the award and based upon the original contract.

Manohur Koyal v. Thakur Das Naskar, 15 C. 319; 7 Ind. Dec. (N. S.) 796, dissented from.

K. M. P. R. N. M. Firm v. P. T. Theperumal Chetty, 67 Ind. Cas. 905; 45 M. 180; 14 L. W. 660; (1921) M. W. N. 861; 42 M. L. J. 236; (1922) A. I. R. (M.) 314; 31 M. L. T. 478, relied upon.

Second appeal from a decree of the District Judge, Jhansi, dated the 25th of October 1920.

Mr. Haribans Sahai, for the Appellant.

Dr. S. N. Sen, for the Respondents.

JUDGMENT.—After hearing the learned Counsel in this case we are of opinion that this appeal should be allowed and that the order of the First Court should be restored.

The suit was brought by the plaintiffs-respondents to recover a certain sum of money alleged to be due in respect of a contract which was entered into on the 12th September 1918, for the delivery by the 18th November of that year of a bale of *dhotis* at a certain rate.

The date fixed for payment was the 27th of November 1918. It is not denied that the goods were delivered to the defendant on the date in question and it is also not denied that the price was not paid on the date fixed for payment.

It appears, however, that after this latter date, inasmuch as there had been much speculation in this class of goods, a Committee of the Cloth Merchants of Jhansi assembled and brought out a plan by which claims for breach of contract of delivery of those goods or for failure to pay the price due

in respect of these goods were to be settled.

The decision of this Committee was that the dealings should be settled and the goods paid for on the basis of a price of Rs. 5-12-0 per pair of *dhotis* plus half the difference between the price so fixed and the contract price.

Both the Courts below have found that the parties to this case submitted to what we may call the award of this Committee and agreed that the claim which the plaintiffs had against the defendants should be settled on this basis.

The present suit, however, has been brought by the plaintiffs on the basis of the old contract and the question arose as to whether the plaintiffs were entitled to resort to the old contract and to claim damages accordingly. The Court of first instance held against the plaintiffs and found that they could only recover on the basis of the scheme which was laid down by the Cloth Merchants Committee. It was found that if this scheme were enforced, the defendant was liable to pay to the plaintiffs a thousand rupees. In appeal the learned District Judge has reversed the decision of the First Court. He has taken a view of the case which is based upon a decision of the Calcutta High Court, *Manohur Koyal v. Thakur Das Naskar* (1). The result of this is that he found that, although the parties had agreed to be bound by the decision of the Committee, nevertheless, as the defendant had failed to satisfy the plaintiffs' claim in accordance with the Committee's decision, the plaintiffs were entitled to revert to the old contract and to claim damages on a larger scale.

We may mention that the decision on which the learned Judge relies has been dissented from in the case of *K. M. P. R. N. M. Firm v. P. T. Theperumal Chetty* (2).

For ourselves we do not think that, in the circumstances of this case, the plaintiffs were entitled to revert to the original contract. They agreed to accept settlement of their claim for damages on the basis of

(1) 15 C. 319; 7 Ind. Dec. (N. S.) 796.

(2) 67 Ind. Cas. 905; 45 M. 180; 14 L. W. 660; (1921) M. W. N. 861; 42 M. L. J. 236; (1922) A. I. R. (M.) 314; 31 M. L. T. 478.

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the scheme which was laid down by the Cloth Merchants' Committee and we think they ought to be bound thereby. In this view, therefore, the Court below was in error in increasing the sum which had been awarded to the plaintiffs by the judgment of the First Court. We, therefore, allow this appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellant is entitled his costs in the Court below and in this Court.

As regards the cross-objections they have no force and are dismissed with costs.

M. A. A. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2799 OF 1918.

March 6, 1923.

Present:—Mr. Justice Abdul Raoof and
— Mr. Justice Campbell.

TIRATH RAM AND OTHERS—DEFENDANTS
—APPELLANTS

versus

**MUHAMMAD ABDUL RAHIM SHAH AND
OTHERS—PLAINTIFFS—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), s. 91, O. XXII, rr. 4, 9, O. XXVI, r. 9—Suit to establish right of way, nature of—Appeal—Abatement—Death of respondent—Ignorance of death, whether sufficient cause for setting aside abatement—Judgment based solely on local inspection, legality of.

A suit to enforce the enjoyment of a right of way as an easement does not fall within the purview of section 91 of the Civil Procedure Code and does not, therefore, require the sanction of the Collector. [p. 618, col. 1.]

It cannot be said that an appellant's ignorance of the death of a respondent can in no case be a sufficient cause for setting aside an abatement. A question of this nature cannot be decided on generalities and independently of the circumstances of each particular case before the Court. [p. 617, col. 2.]

Mir Nawab v. Hardeo, 12 Ind. Cas. 871; 60 P. R. 1911; 42 P. L. R. 1912; 238 P. W. R. 1911, *Daya Singh v. Bula Singh*, 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916, referred to.

A judgment should not be based solely on the result of a personal local inspection made by the Judge. [p. 618, col. 2.]

Ahmad Sahib Shulari v. Magnesite Syndicate Ltd., 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598, *Kessowji Issur v. G. I. P. Railway Company*, 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461;

9 Bom. L. R. 671; 2 M. L. T. 435; 34 I. A. 115 (P. C.), relied on.

Second appeal from a decree of the District Judge, Multan, dated the 4th July 1918, reversing that of the Subordinate Judge, First Class, Multan, dated the 21st December 1916.

Bakhshi *Tek Chand* and *Lala Jagan Nath*, for the Appellants.

Sheikh *Niaz Ali*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit out of which this second appeal arises were 15 inhabitants of a suburb of Multan City called Basti Faridabad. The defendants were Tirath Ram and Lachhmi Narain, sons of Ram Chand, who are the recorded owners of certain fields numbered 181-7 and 193-5 lying between Basti Faridabad and the outskirts of the City proper. The matter in dispute is the right of the plaintiffs to use as a path or road a strip of land falling within the boundaries of those fields and running along the edge of the *basti*.

On 7th November 1910 the uncle of the present defendants, who was then the owner of the fields, applied successfully to the Municipal Committee for permission to erect a wall shutting off access to the fields from a road to the south. The sanction lapsed, but was renewed on 24th October 1912. Subsequently, on the recommendation of the Deputy Commissioner, President of the Committee, the sanction was cancelled. The plaintiff's uncle appealed to the Commissioner who restored the original resolution granting sanction. The plaintiffs then filed the present suit.

In its amended form the plaint asked for a declaration that the inhabitants of Basti Faridabad were owners of the pathway shown in the plan attached to the plaint, and in the alternative for an injunction directing the defendants not to obstruct the pathway by their wall on the ground that the inhabitants of Basti Faridabad had a right of way over it by easement. The Trial Court dismissed the suit. On appeal by the plaintiffs the District Judge granted them a decree declaring that they have the right to use "as a public right of way" a strip of land 6 feet broad which he specified, and enjoining the defendants not to obstruct the use of that strip of land by the plaintiff as a path.

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The defendants have preferred a second appeal.

A preliminary objection is raised by the plaintiffs-respondents that one of their member, Rahim Dad, died on 30th November 1918, that no application was made by the appellants to implead his legal representatives within the period then allowed by law, and that, therefore, the appeal has abated not only against Rahim Dad's representatives but also in its entirety under O. XXII, r. 4 (3).

It is admitted that Rahim Dad died on the date alleged. The appellants presented an application on the 7th July 1919, stated to be under O. XXII, r. 4 and 9, praying that the minor son of Rahim Dad under guardianship of one of the existing respondents be made a respondent in his father's place, and pleading that the application had not been made earlier because the appellants were unaware of Rahim Dad's death. The application was supported by an affidavit that the defendants had been living out of Multan, one as a student at Lahore and the other as a student at Lyallpore, and that for that reason they had had no knowledge of the death of Rahim Dad. An order was passed by a Single Judge granting the application subject to all just exceptions.

We can see no reason for refusing to treat this application, in accordance with the usual practice of this Court, as one for an order setting aside the abatement of the appeal. An illustration of the practice is *Arur Singh v. Todar Mal* (1), and many others could be quoted.

The learned Counsel for the respondents has contended strenuously that the abatement should not be set aside putting forward the following reasons:—

(1) Rahim Dad's death was registered by the Municipal Committee, Multan, on 2nd December 1918.

(2) The appellants are residents of Multan and have many relations permanently living there who could have been asked to watch their interests and perform their duties in this particular respect.

(3) The appellants must have come home for the Christmas vacation of 1918 and thus have been in a position to ascertain the fact of Rahim Dad's death.

(1) 49 Ind. Cas. 501; 22 P. W. R. 1919,

(4) Their deceased father was a member and Vice-President of the Municipal Committee for over twenty years and, therefore, the appellants had special facilities for access to Municipal records.

(5) In the case of the death of another respondent, Jumma, the appellants applied for substitution of his legal representative on 30th September 1920, saying that the death had occurred 3½ months previously, and actually the death was not reported to the Municipal Committee until a subsequent date, the 12th October 1920.

These allegations are not supported by affidavit and, so far as the record shows, (2) and (3) are based on mere conjecture. A copy of the entry registering Rahim Dad's death has been shown to us, but we cannot assume from the fact that the appellants' father was at one time Vice-President that the appellants have any special connection now with the Municipal Committee. The incident of Jumma's death, if anything, goes to show that the appellants have used reasonable and honest diligence in their conduct of the appeal.

Two reported cases *Mir Nawab v. Hardeo* (2) and *Daya Singh v. Buta Singh* (3) have been cited to us in which this Court held that an appellants' ignorance of the death of a respondent was no sufficient cause for setting aside an abatement, but each of these was decided upon its own facts and it is impossible to decide a question of this nature on generalities and independently of the particular circumstances of the particular case before the Court. Here we have got an affidavit that the appellants, Tirath Ram and Lachhmi Narain, one of them a minor and the other his brother and next friend a mere youth, were absent from Multan for the eminently laudable purpose of prosecuting their studies. The respondents have not challenged this statement by counter-affidavit, and we see no reason why it should not be believed. It is scarcely necessary to say that a student, who wishes to do himself justice, concentrates his full attention upon his work, and we cannot presume, without any testimony to support the assertion, that the appellants

(2) 12 Ind. Cas. 871; 60 P. R. 1911; 42 P. L. R. 1912; 238 P. W. R. 1911.

(3) 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916.

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came back to Multan at Christmas 1918. We hold that sufficient cause is established and we set aside the abatement and order that Haq Nawaz, minor, under the guardianship of Khaliq Dad, be made a respondent in place of Rahim Dad, deceased.

We come now to the merits of the appeal.

The defendants pleaded in the Trial Court that there was no pathway, that the plaintiffs were not owners, that they had no right of easement, and that the suit could not lie without the sanction of the Collector under section 91, Civil Procedure Code, read with section 93. The issues with which we are concerned were drawn as follows:—

1. Is the land in suit the plaintiffs' property?

2. If not, had the plaintiffs an unobstructed and continuing right of easement for 20 years before the institution of the suit?

3. Do sections 91 and 93, Civil Procedure Code bar the suit?

The Trial Court decided the first issue against the plaintiffs. The decision was challenged in appeal but the learned District Judge recorded no specific finding upon it.

The second issue was decided against the plaintiffs by the Subordinate Judge and in their favour by the learned District Judge.

On the third issue the Subordinate Judge held that the suit came within the scope of section 91. The District Judge held that it did not.

We uphold the learned District Judge on this latter point. The form of the pleadings in no way supports the contention of Mr. Tek Chand for the appellants that the suit is of the character referred to in section 91. The fact that the plaintiffs' witnesses described the place in dispute by such expressions as *shar-i-am* cannot affect the pleadings, nor can we hold that these are modified by a casual statement recorded as made by the plaintiffs' Counsel during the hearing of evidence in reply to some question by the Subordinate Judge that the place "is a public pathway." The plaintiffs clearly claimed enjoyment of a right of way as an easement. It is true, as pointed out by Mr. Tek Chand, that in order to constitute an easement there must be two distinct tenements one dominant and the other servient, and that an easement cannot

be claimed except with reference to the claimant's connection with a certain tenement. This requisite is fulfilled here. The easement is claimed for the *bashindgi abadi* and the *abadi* is the alleged dominant tenement. No relief is sought in respect of a public nuisance and there is no claim and so there can be no declaration, that the place in suit is a public thoroughfare and has been obstructed as such.

The learned District Judge's method of deciding the second issue relating to the claim to an easement is one which we are constrained to hold was not in accordance with law and it is necessary to return the appeal for re-decision. None of the evidence produced in the Trial Court by the plaintiffs was discussed or noticed. The learned District Judge visited the spot, and recorded that the result of his inspection raised so strong a presumption that the right of way had existed since the *abadi* was built that the burden of proof initially on the plaintiffs shifted at once on to the defendants, who denied the right of way. The judgment proceeded, "I am myself satisfied that whether or not the pathway now running along the western edge of the valley is part of the old *Khasra* No. 196, the plaintiffs have undoubtedly the right to use it and have exercised this right since the *basti* was inhabited. To deny the right by judicial decision would be a monstrous oppression."

It was laid down in *Ahmad Sahib Shutari v. Magnesite Syndicate Ltd.* (4), that a judgment should not be based solely on the result of a personal local inspection made by the Judge, and both this ruling and the strictures passed by the Privy Council on the procedure of the Court below in *Kessowji Issur v. G. I. P. Railway Company* (5) are peculiarly applicable here. The learned District Judge had to adjudicate upon the state of affairs existing when the suit was filed. The suit was filed on 23rd November 1914. The District Judge visited the spot in July 1918. He ignored all the evidence given about conditions at the

(4) 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598.

(5) 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 2 M. L. T. 435; 34 I. A. 115 (P. C.).

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time of suit and prior thereto, and based his decision entirely upon what he himself observed nearly four years after the institution of the suit.

The decision on the preliminary point of onus of proof was for this reason entirely wrong and we accept the appeal, set aside the judgment and decree of the District Judge and remand the appeal under O. XL r. 23, for re-decision in accordance with law upon the evidence. Stamp on appeal will be refunded and costs will be costs in the cause.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 705, 758
AND 828 OF 1922.

January 11, 1923.

Present.—Sir Walter S. Schwabe, Kt., Chief
Justice, and Mr. Justice Wallace.

C. SARVOITHAMA RAO—PETITIONER

versus

THE CHAIRMAN, MUNICIPAL COUNCIL,
SAIDAPET—DEFENDANT—

RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 352—Specific Relief Act (I of 1877), s. 42—Municipal Election—Rejection of Nomination Paper by Chairman—Local Government declining jurisdiction to decide as to validity of Nomination Paper—Injunction restraining holding of election pending decision of civil suit—Jurisdiction of Civil Courts—Election held—Injunction restraining Councillor elected from acting, whether can be granted—Civil suit, maintainability of—Remedy.

A Nomination Paper put in on behalf of a candidate for election as a Municipal Councillor was wrongly rejected by the Chairman of the Municipal Council and on the rejection of the Nomination Paper, the only other candidate was declared under the rules to have been duly elected. In a suit by the candidate whose nomination was rejected for an injunction to restrain the elected candidate from acting as Councillor and the Chairman of the Council from holding a meeting of the Council, as then constituted for the purpose of electing a new Chairman:

Held, (1) that the plaint disclosed no cause of action against either of the defendants; the successful candidate did nothing wrong, as he simply found himself elected and proposed to take his seat nor could the Court be properly asked to restrain the Chairman from holding a meeting of the Council; [p. 623, col. 2.]

(2) that the proper remedy of the plaintiff was to proceed by an Election Petition to set aside the election which had already taken place. [p. 623, col. 2.]

Where after the rejection of the Nomination Paper of a candidate for a Municipal Council the election regarding the other candidates validly nominated was to be held and the candidate whose Nomination Paper was rejected attempted under rule 31 of the Madras Municipal Election Rules to refer the question of the rejection of his nomination to the Local Government and the Local Government wrongly declined jurisdiction and thereupon he brought a suit for a declaration that his Nomination Paper was wrongly rejected by the Chairman and for an injunction to restrain him from holding the election without the plaintiff as duly nominated candidate and also to compel him to hold an election with plaintiff as a candidate:

Held, (1) that the plaintiff was not bound to wait till the election was held; he had a cause of action to prevent by injunction the carrying out of the threatened action which would have the effect of illegally interfering with his rights; [p. 624, col. 1.]

(2) that section 352 of the Madras District Municipalities Act did not preclude a suit for an injunction to restrain the doing of a threatened wrongful act to the detriment of the plaintiff; [p. 624, col. 2.]

(3) that the Local Government having declined jurisdiction to interpret the rules and there being no conclusive ruling on the point, notwithstanding rule 31 of the Madras Municipal Election Rules, the Civil Court had jurisdiction to inquire into and decide the matter. [p. 624, col. 2.]

Per Schwabe, C. J.—If a man entitled to vote or be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him; but if the act by which the right is interfered with is done in a judicial capacity, no action for damages will lie unless the act is done maliciously, *i.e.*, dishonestly. [p. 623, col. 2; p. 624, col. 1.]

Ashby v. White, 1 Sm. L. C. (11th Ed.) 240 at p. 295 and (10th Ed.) 231; 2 Ld. Raym. 938; 14 Howell St. Tr. 695; 92 E. R. 126, *Municipal Board of Agra v. Asharfi Lal*, 65 Ind. Cas. 984; 44 A. 202; 20 A. L. J. 1; (1922) A. I. R. (A.) 1, *Pickering v. James*, (1873) 8 C. P. 489 at p. 509; 42 L. J. C. P. 217; 29 L. T. 210; 21 W. R. 786, relied on.

Apart, however, from an action for damages in respect of past acts, there is also a cause of action of a different nature to prevent by *injunction* the carrying out of any threatened action which would have the effect of illegally interfering with the plaintiff's rights. Where there is a legal right which can be asserted in law or equity, a Court of Equity can grant an injunction in protection of that right. [p. 624, col. 1.]

Aslatt v. Southampton Corporation, (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117 45 J. P. 111, *Richardson v. Methley School Board*, (1893) 3 Ch. 510; 62 L. J. Ch. 943; 3 R. 701; 69 L. T. 308; 42 W. R. 27, relied on.

Per Wallace, J.—The right of being nominated to stand as a candidate for a Municipal election is a legal character within the meaning of section 42 of the Specific Relief Act; but this legal charac-

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ter is itself the creation of a specific Statute and where the Statute itself sets up a proper Tribunal for trying cases of the infringement of the right to such a legal character and that Tribunal has functioned judicially, the Civil Court has no jurisdiction to deal with a case of an alleged infringement of that right. [p. 625, col. 1.]

But where the duly constituted tribunal has declined jurisdiction and refused to try the question of the right of a party to a legal character the aggrieved party is thus bereft of his statutory and constitutional remedy, and it is the province of the Civil Court as a Court of Equity to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise. [p. 626, col. 2.]

Accordingly, where the Local Government which is the statutory tribunal in a particular case, misinterprets its own rules as giving it no jurisdiction to decide the validity of a Nomination Paper at a Municipal election, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried. [p. 626, col. 2; p. 629, col. 1.] (Case-Law English and Indian, considered.)

Petitions Nos. 758 and 828 of 1922 under section 115 of Act V of 1908 and Petition No. 705 of 1922 under section 115 of Act V of 1908 and section 197 of the Government of India Act, praying the High Court to revise the order, dated 13th October 1922, passed by the District Court of Chingleput, in Miscellaneous Appeals Nos. 37, 39 and 38 of 1922 in Original Suits Nos. 454, 462 and 461 of 1922, on the file of the Court of the District Munsif of Poonamalle.

Mr. M. S. Venkatarama Iyer (with him Messrs. A. K. Madhava Rao and Janakirama Iyer), for the Petitioners.—These are petitions to revise orders of District Judge of Chingleput dissolving temporary injunctions issued by the District Munsif in three suits to declare the plaintiffs therein as having been duly nominated as candidates at certain Municipal elections and for injunctions against the Chairman restraining him from holding an election and a meeting of the Council. The Nomination Papers in two of the three cases were rejected on the ground that the Ward numbers were not mentioned and in the other that the thumb impression of the seconder was not attested.

The rejections were all of them clearly wrong. Since the Rules do not provide for any of these at all,

A question of jurisdiction of the Civil Courts to entertain the suit has been raised.

The right to stand as a candidate and be nominated as such is undoubtedly a civil right. It is a right to a status and is a legal character within the meaning of section 42 of the Specific Relief Act and a suit for declaration as to such right, therefore, lies.

Sabhapati Singh v. Abdul Gaffur (1), *Nataraja Mudaliar v. Municipal Council of Mayavaram* (2), *Mella Ataul Huq v. Chairman of Manickirola Municipality* (3), *Narendra Nath Mitter v. Radha Charan Pal Bahadur* (4).

Even if section 42 of Specific Relief Act does not in terms apply plaintiff is entitled to bring a suit for the declaration of his right to stand as a candidate. Section 42 is not exhaustive of the declaratory suits entertainable by Civil Courts; see *Lakshminarasimha v. Ramalingam Pillai* (5), *Robert Fischer v. Secretary of State for India* (6). This is really a suit to set right the infringement or contravention of a statutory right. The onus of proving want of jurisdiction of the Civil Court is on the defendant. (See section 9 of the Civil Procedure Code). *Srimath Kidambi v. Pitipiti Kutumbayudu* (7).

The next question is if the cognisance of the suit is barred by any express or implied provision of law.

Rule 1 of the Municipal Election Rules deals only with the remedy after an election is held, not before. That rule cannot apply.

Rule 31 empowers the Local Government to decide questions relating to interpretation of rules otherwise than in connection

(1) 24 C. 107; 12 Ind. Dec. (N. S.) 736.

(2) 12 Ind. Cas. 311; 36 M. 120 at p. 125; 10 M. L. T. 219; (1911) 2 M. W. N. 233; 21 M. L. J. 878.

(3) 57 Ind. Cas. 960; 48 C. 378; 24 C. W. N. 969.

(4) 48 Ind. Cas. 314; 22 C. W. N. 943; 28 C. L. J. 289; 46 C. 119.

(5) 59 Ind. Cas. 245; 39 M. L. J. 319 at p. 321; 12 L. W. 202; (1920) M. W. N. 519; 28 M. L. T. 205.

(6) 22 M. 270; 3 C. W. N. 161; 26 I. A. 16; 7 Sar. P. C. J. 459; 8 Ind. Dec. (N. S.) 192 (P. C.).

(7) 25 Ind. Cas. 891; 39 M. 21 at p. 22; 27 M. L. J. 233.

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with Election inquiry. The present cases are not, however, cases of interpretation of rules at all but of their application to proved facts in a given case.

Secondly, the question of interpretation can arise under that rule only on a reference by the Municipal Chairman himself and a private party has no right of reference at all to the Government.

Thirdly, even if it is a case of interpretation of rules a decision of the Local Government can be final so far as it goes only as between the superior and inferior officers of the Government and cannot oust the ordinary jurisdiction of the Civil Court.

Sri Raja Simhadri Appa Rao v. Chelasanane Bhadrappa (8), *Municipal Board, Agra v. Ashrafi Lal* (9).

In order to oust the jurisdiction of the Civil Court the language must be clear, express and unambiguous and there is a well recognised presumption against ouster of jurisdiction of Civil Courts.

Maxwell's Interpretation of Statutes, Chapter V, section 1, 3rd Edition, pages 193-195, *Bhupendra Nath Basu v. Ranajit Singh* (10).

Fourthly, in any case, even if there was an original bar on account of the creation of a special tribunal under rule 31, the bar has been removed in the present cases when the Local Government has declined to act. There is no final, legal or conclusive decision or adjudication by any authoritative tribunal and the decision of the tribunal that it has or has no jurisdiction cannot be final and is obviously subject to consideration by Civil Courts. See *In re Sharafaly Mamooji* (11), *Ganesh Mahadev v. Secretary of State for India* (12); *Nataraja Mudaliar v. Municipal Council of Mayavaram* (2).

Hence rule 31 does not stand in plaintiff's way. Neither section 352 of the District Municipalities Act affects, the plaintiff's right of suit. It is confined to *acts done* and not

to acts threatened, necessitating a preventive remedy. Further, the protection is only in respect of acts done in "good faith," which means, according to the definition in the Madras General Clauses Act of 1891, "done with due care and attention." In the present case, there was no care since the rejection was obviously due at least to an imperfect reading or understanding of the rules by the Chairman.

See *Izzat Ali v. Muhammad Sharafatullah Khan* (13), 23 Halsbury's Laws of England, 350, 356.

Again, the act of the Chairman in rejecting the Nomination Papers was clearly of a ministerial or executive character and not judicial, and even if it is judicial, a right of suit is not barred in cases where there has been merely colourable and illusory exercise of discretion as in the present cases. See *Leslie Williams v. Haines Thomas Giddy* (14), *Gell v. Taja Noora* (15), *Reg. v. Tynmouth Rural District Council* (16).

That being my right and there being no bar, the next question is what are my remedies. I am entitled both to a mandatory and preventive injunction.

That a Civil Court will grant a mandatory injunction when there would be no other adequate remedy for an aggrieved party is well established by the decisions in *Narendra Nath Mitter v. Radha Charan Pal Bahadur* (4), *Molla Attaul Huq v. Chairman of Manicktola Municipality* (3).

Wherever, in Presidency Towns, a writ of mandamus can be issued under section 45, a mandatory injunction can be issued under the Specific Relief Act, section 55. *Narendra Nath Mitter v. Radha Charan Pal Bahadur* (4).

At any rate, where a subject has rights secured to him under the Statute he must be protected in the enjoyment of such rights and threatened infringement will be prevented by preventive injunction.

(8) 30 M. 41; 1 M. L. T. 414.

(9) 65 Ind. Cas. 984; 44 A. 202; 20 A. L. J. 1; (1922) A. I. R. (A.) 1.

(10) 20 Ind. Cas. 676; 41 C. 384 at p. 386.

(11) 7 Ind. Cas. 958; 34 B. 659 at p. 661; 12 Bom. L. R. 737.

(12) 49 Ind. Cas. 427; 43 B. 221; 21 Bom. L. R. 27.

(13) 39 Ind. Cas. 553; 39 A. 516 at p. 519; 15 A. L. J. 541.

(14) 11 Ind. Cas. 509; 21 M. L. J. 641; 15 C. W. N. 669; 10 M. L. T. 288 (P. C.).

(15) 27 B. 307; 5 Bom. L. R. 133.

(16) (1896) 2 Q. B. 219; 44 W. R. 646.

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See *Aslati v. Southampton Corporation* (17); *Richardson v. Methley School Board* (18), *Municipal Board, Agra v. Ashrafi Lal* (9); *Robert Fischer v. Secretary of State for India* (6).

Mr. K. S. Krishnaswami Iyer (with him Mr. T. M. Kasturi), for the Respondent.—In two of these three cases, it is necessary to remember the elections have been completed and the other candidates have been returned and they stand on a different footing from the other case. Whatever may be the case as to the third, the two suits do not lie.

The first position I take is that there is no right of suit in regard to a judicial act and it is based on principles of public policy that a public officer should not be harassed by suits in regard to acts done judicially in the performance of his public duties unless there is proved dishonesty and *mala fides*.

No such suggestion or allegation has been made in the present case.

A Returning Officer's functions are partly judicial and partly ministerial; but the rejection of a Nomination Paper is undoubtedly a judicial act; see *Woodward v. Sarsons* (19), *Reg. v. Collins* (20), *Akers v. Howard* (21), *Pritchard v. Bangor Corporation* (22), [vide also *Izzat Ali v. Muhammad Sharaf-ullah Khan* (13), *Municipal Board, Agra v. Ashrafi Lal* (9) as to distinction between judicial and ministerial acts].

Unless, therefore, wilful malice is proved there can be no cause of action against the rejection of a Nomination Paper by Returning Officer. See *Pickering v. James* (23), *Ashby v. White* (24).

Where a special tribunal has been constituted by the Legislature for decision of

(17) (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

(18) (1893) 3 Ch. 510; 62 L. J. Ch. 943; 3 R. 701; 69 L. T. 308; 42 W. R. 27.

(19) (1875) 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867.

(20) (1877) 2 Q. B. D. 30; 46 L. J. Q. B. 257; 36 L. T. 192.

(21) (1886) 16 Q. B. D. 739 at p. 751; 55 L. J. Q. B. 273; 54 L. T. 651; 34 W. R. 609; 50 J. P. 519.

(22) (1888) 13 A. C. 241; 57 L. J. Q. B. 313; 58 L. T. 502; 37 W. R. 103; 52 J. P. 564.

(23) (1873) 8 C. P. 489 at p. 509; 42 L. J. C. P. 217; 29 L. T. 210; 21 W. R. 786.

(24) 1 Sm. L. C. (11th Ed.) 240 at p. 295 and (10th Ed.) 231; 2 Ld. Raym. 938; 14 Howell St. Tr. 695; 92 E. R. 126.

certain questions arising under the Act, the jurisdiction of the Civil Court is clearly ousted. The right of standing as a candidate in a Municipal election is itself a statutory right and infringements thereof be governed by specific provisions. There is no general right of suit at all. *Bhaishankar Nana-bhai v. Municipal Corporation of Bombay* (25); *Nataraja Mudaliar v. Municipal Council of Mayavaram* (2); *Lakshminarasimha v. Ramalingam Pillai* (5).

Here, after an election the election tribunal is alone competent to hear petition and before election the Local Government is constituted the tribunal. See section 36 and rule 31 of the Election Rules.

Section 352 of the District Municipalities Act bars the present suit.

The scope of the section is not restricted to acts done but includes also cases of injunction. Under the almost identical provisions of section 80 of the Civil Procedure Code it has been held at any rate by this High Court that notice to Secretary of State must be given even in suits for injunction.

See *Superintending Engineer, Bezwada v. Chitturi Ramakrishnayya* (26), *Secretary of State v. Kalekhan* (27), *Samanthala Koti Reddi v. Pothuri Subbiah* (28).

Further, there is no question of want of good faith at all and section 352 is a complete answer to plaintiff's suit.

There is again another remedy open to the aggrieved party, namely, section 36 of the District Municipalities Act under which the Governor in Council may prohibit the doing of any action by the Chairman under the Act or under colour of the Act if it is in excess of his powers.

Again, under rule 31 of the Election Rules the Local Government is constituted the sole tribunal for deciding questions of interpretation of rules. The point for decision is whether or not the rules require the Nomination Paper to contain certain particulars.

(25) 31 B. 604; 9 Bom. L. R. 417.

(26) 58 Ind. Cas. 885; 39 M. L. J. 151 at p. 152; 12 L. W. 193; (1920) M. W. N. 495; 28 M. L. T. 163.

(27) 16 Ind. Cas. 947; 37 M. 113; (1912) M. W. N. 786; 23 M. L. J. 181; 12 M. L. T. 224.

(28) 46 Ind. Cas. 86; 41 M. 792; 7 L. W. 586 34 M. L. J. 494; 23 M. L. T. 357; (1918) M. W. 414 (F. B.).

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Where the party has had a decision, right or wrong, by the Local Government there is no power in the Civil Court to interfere with that decision.

But what exactly is the plaintiff's right. A right to vote or stand as a candidate may be a civil right but there is no civil right recognized at every intermediate stage leading up to the standing as a candidate. The right of nomination is only one of the steps leading up to the right to stand. Every infringement of the rules does not confer a civil right. Right to stand as a candidate may be a civil right but there is no civil right to being nominated.

Assuming there is a civil right, the remedy is only by way of damages. See *Ashby v. White* (24) and not to sue for declaration or for injunction while the election is still going on.

Rule 1 provides for an Election Petition after the election is over and the improper refusal of a Nomination Paper is one of the grounds on which an election can be set aside. That excludes impliedly a right of action in respect of such rejection otherwise than at an election enquiry.

As no suit would lie, no injunction can be granted. In any case, the Court will not by an order of injunction compel the Chairman to do what he has no power to do. There is no provision of law under which the Chairman can revise or review or cancel his orders. He has no option but to proceed with the election. *Rogers on Election* page 577, *Pritchard v. Bangor Corporation* (22).

JUDGMENT.

Schwabe, C. J.—These are civil revision petitions in three suits, all arising out of the Municipal elections for Saidapet. The first Civil Revision Petition No. 705 is in a suit which asks for a declaration that a Nomination Paper put in on behalf of the plaintiff as a candidate for election as a Municipal Councillor was wrongly rejected by the Chairman of the Council, the defendant, and for an injunction to restrain him from holding an election without the plaintiff as a duly nominated candidate, and also to compel him to hold an election with the plaintiff as a candidate.

The other two Civil Revision Petitions Nos. 758 and 828, are in suits by two persons,

whose Nomination Papers were also rejected, against two other candidates who being the only other candidates for the Wards in question were by the rules deemed to have been elected when these Nomination Papers were rejected. The claim in the suits is for an injunction to restrain these persons from acting as Councillors and also against the Chairman, who is made a party for this purpose, to restrain him from holding a meeting of the Council as now constituted for the purpose of electing a new Chairman.

In the first case, and in one of the others, the rejection of the Nomination Papers was on the ground that it did not give the number of the Ward for which the candidates desired to stand; and in the other case, on the ground that the thumb-mark of the seconder of the candidate had not been attested.

The District Munsif of Ponnamalle granted *interim* injunctions in all three cases, the District Judge on appeal dissolved them all.

I am clear that the rejection of the Nomination Papers was not in law justified in any of the three cases, and that all three plaintiffs ought to have been treated as duly nominated.

In the two latter suits, I am, however, of opinion that the injunctions ought not to have been granted, because the plaints in them disclosed no cause of action against the defendants. The successful candidates have done nothing wrong. They have simply found themselves elected and, therefore, as their duty is, propose to take their seats. Nor do I think that any Court can properly be asked to grant an injunction restraining the Chairman from holding a meeting of the Council as at present constituted. It is open to these plaintiffs to proceed by Election Petitions. In my judgment, there being no cause of action against the defendants in these two suits there can be no ground for granting an injunction.

Turning now to Civil Revision Petition No. 705 of 1922, if a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. This was established in England in *Ashby v. White* (24), which case has since been uniformly followed, and in my judgment this is also the law of this country as was stated in *Municipal Board, Agra v.*

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Asarfi Lal (9). But this statement requires qualification, for if the act by which the right is interfered with is an act done in a judicial capacity, then the rule applies that no action lies unless the act is done maliciously, which in this context really means dishonesty; see *Pickering v. James* (23), particularly the judgment of Brett, J., at page 509. In this case the Chairman was acting in a judicial capacity in rejecting these nominations and it is not alleged that he acted dishonestly and, therefore, no action would lie for damages against him. But there may still be a cause of action of a different nature, not in respect of the Chairman's past acts, but to prevent by injunction the carrying out of any threatened action by him which would have the effect of illegally interfering with the plaintiff's rights; and, in my judgment, this is such a case. The Chairman has unlawfully rejected the plaintiff's Nomination Paper and he has announced his intention of holding an election for Ward No. 5 without permitting the plaintiff to be a candidate. I do not think that the law is such that the plaintiff must wait until the election is held and then bring an Election Petition, which is bound to succeed; nor, indeed, would that remedy give him all that he is entitled to, because after the Election Petition had succeeded, there would have to be fresh nominations and there might be other candidates in the field that he would not now have to meet, to say nothing of the trouble and expense that he would necessarily be put to. There is ample authority to support this view. In *Aslatt v. Corporation of Southampton* (17), where it was proposed to hold an election of an Alderman of a Borough in the place of the plaintiff, who, it was wrongly alleged, had vacated his seat, the Court of Chancery interfered by an injunction forbidding the holding of the election. In *Richardson v. Methley School Board* (18), that Court granted an injunction to prevent the holding of an election for the post of School Master in place of the plaintiff, who was wrongly alleged to be disqualified for the office, and it was laid down that, where there is a legal right which can be asserted in law or equity a Court of Equity can grant an injunction in protection of that right. I have no doubt that this Court possesses

the same powers under the Specific Relief Act, 1877, and, in my judgment, this is a case for exercising them. Reliance is placed by the defendant on section 352 of the Madras District Municipalities Act, 1920, which protects the Chairman from suits in respect of acts done in his official capacity, but, in my judgment, there is nothing in that section to preclude a suit being brought to restrain him from doing a threatened wrongful act to the detriment of another. It is also contended that no action lies because the decision of the Chairman is final and conclusive. I can find nothing in the rules to make it so. Under rule 31, if any question arises as to the interpretation of the rules, otherwise than in connection with an Election inquiry, the question shall be referred to the Local Government whose decision shall be final. The plaintiff tried to refer the question of the rejection of his nomination, which was a question of the interpretation of the rules, to the Local Government but the Local Government declined jurisdiction in the matter on the grounds, as they inform us through the Government Solicitor, that the matter had not been referred to them by the Chairman, or otherwise officially, and that the matter was already *sub judice*. The result is, that there has been no conclusive ruling on the point and it is open to us to decide the matter.

I venture to express a hope that it may be possible for the Local Government, acting under section 36 of the Act, to cancel the rejection of this nomination by the Chairman and direct the election to be held with the plaintiff as a candidate. They will, no doubt, also consider whether any action can be taken in the other two cases so as to avoid the necessity of an Election Petition.

The defendant must pay the costs of the proceedings for injunction before the District Munsif and before the District Judge and of this Petition No. 705. The plaintiffs in the other two suits must pay the costs of these petitions Nos. 758 and 828.

Wallace, J.—These petitions are all petitions to restore the order of the District Munsif granting temporary injunctions pending disposal of the petitioners' suits. Certain general features are common to all and with these I shall first deal.

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The Nomination Papers of the three petitioners as candidates for the Municipal election were declared invalid by the Chairman. In two cases there was only the other candidate, who was declared duly elected, and in the other case the election has not yet been held. All the three candidates are suing for declarations that their nominations were proper and that they were entitled to stand. The original Court, by injunction, has in the former two cases restrained the duly elected candidates from sitting, and in the latter case, Civil Revision Petition No. 705 of 1922 before us, has restrained the holding of an election. The District Judge on appeal dissolved all the three injunctions, and we are now asked to restore them pending disposal of the petitioner's suits, framed to restore to them the right to stand as a candidate of which they have been deprived.

2. The main contention of the respondents in all the cases is that the suits themselves will not lie and, therefore, no injunctions can be granted. The District Munsif in his final order granting injunctions avoided deciding that question. It would have been better if he had decided the suits and the injunction petitions together. It is impossible in deciding the propriety of these injunctions to avoid deciding on the maintainability of the suits.

3. The petitioners' chief contention is that the suits are maintainable under section 42 of the Specific Relief Act as being suits by persons entitled to legal character for the declaration of their title. That the general right of being nominated to stand as a candidate for a Municipal election is a legal character cannot, I think, admit of doubt, but before it follows that section 42 will give a right of suit, we have to note that this legal character is itself the creation of a specific Statute, the District Municipalities Act, V of 1920, and that it is settled law that where a Statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction. So that we have to examine, firstly, what is the nature of the infringement of the right complained of; secondly, is there a tribunal appointed by the Act or the Rules under it to deal judicially or

quasi-judicially with such an infringement, and thirdly, if there is one, has it functioned?

4. As I conceive the position, no one is denying the petitioners' general right to be nominated to stand as candidates in this or in other elections, provided that their Nomination Papers are in proper form. No one, least of all the Chairman, is concerned to deny that the petitioners were entitled to stand if their interpretation of the rules is correct and if their Nomination Papers were in proper form, and no one, least of all the petitioners, is concerned to deny that they were not entitled to stand if the Chairman's interpretation of the rules is correct and their Nomination Papers were not in proper form.

5. Therefore, the only question of substance that the suits really raise is, whether or not the petitioners' Nomination Papers were in proper form, that is, whether the rules on this matter have been properly followed. No allegation of bad faith is made against the Chairman, and there is no contention that he deliberately misinterpreted or disobeyed perfectly clear rules with the object of depriving any one of his lawful rights. Hence, we must take it that the Chairman honestly considered that he was conforming to the rules when he rejected the three nominations. The position then is this: that the Chairman in good faith, although mistakenly, in my opinion, held the meaning of the rules to be in one way, while the petitioners hold it to be another. The real point at issue and the point which the District Munsif who has to try the suits must decide, therefore, is merely whether the rules have been properly interpreted, and according as his interpretation inclines towards the petitioners' view or the Chairman's view, the petitioners will or will not have a cause of action. If the petitioners get a decision of the proper authority, whose decision is final in this matter, interpreting the rules in the manner for which they contend, their rights will be once for all restored.

6. Is the Civil Court then the final authority for that purpose, and will a civil suit lie, which, in essence is merely calling upon the Civil Court to interpret these rules regarding the nomination of candidates for election? I think that the answer

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would ordinarily be in the negative for the short reason that, as I read the rules, another tribunal is set up for that very purpose. Rule 31 of the Election Rules clearly lays down that "if any question arises as to the interpretation of these rules otherwise than in connection with an Election enquiry, the question shall be referred to the Local Government whose decision shall be final," that is, the Local Government which drafted the rules is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong.

7. There is, however, in one of these cases Civil Revision Petition No. 705, this peculiar feature which was disclosed to us only towards the close of the argument before us, namely, that the petitioner had, after the unfavourable ruling of the Chairman, made a reference to the Local Government and asked it to interpret the rules and revise the Chairman's order and permit his nomination, and that the Government's answer was that it declined to interfere. The answer is before us and on its face it is not clear on what grounds the Government declined to interfere, but the letter, also before us, produced by the Government Solicitor on 18th December 1922, makes it clear that the refusal to interfere was on the ground that the Local Government had no jurisdiction, Government apparently holding that, while a reference can be made in such a case under rule 31 it cannot be made by a *private* party but only by the Chairman. I am myself unable to read rule 31 so, and, so long as it is read so, so long will an aggrieved candidate be driven for his remedy to the cumbrous method of a civil suit and an injunction. The net result, however, is that the Government conceived that it had no jurisdiction and, therefore, declined to function as the judicial or *quasi-judicial* tribunal it was intended to be, because it thought that the case had not been properly brought before it.

8. Now, if this tribunal had functioned in this case and given a decision—whether right or wrong in the opinion of the Civil Court is immaterial—I am clear that the Civil Court would have no jurisdiction and the remedy provided by the Statute would have been used and exhausted and its

decision on the matter would be final. But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court, as a Court of Equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise.

9. It cannot be admitted that the *fiat* of the Chairman in the matter of interpretation of the rules is absolutely final, and that he can by his mere order prevent a candidate from standing for election; such a principle is not deducible from the Act or the rules. The rules not only do not say so, but provide a method of appeal or revision from such an order. Self-Government has not progressed so far in the direction of autocracy. If Government then misinterprets its own rules as giving it no jurisdiction so as to take away from the aggrieved party the remedy provided by the rules, and thus, in effect, declares that it never intended itself to have jurisdiction then the Civil Court must take it either, that the Statute does not oust the jurisdiction of the Civil Court or that the Government, nevertheless has jurisdiction, but refused to exercise it. In the latter case the Civil Court may legitimately be called on to interfere in order to decide whether a particular authority has or has not jurisdiction in a particular matter, and if that authority has jurisdiction but refused to exercise it, then to exercise it itself, and not to leave the aggrieved party without any remedy. In other words, the ordinary jurisdiction of a Civil Court may, in the first instance, be barred by a Statute or Rule setting up another authority, but when that Statute or Rule is not obeyed and that other authority refuses to function then the bar is removed, and there is nothing to prevent the Civil Court itself functioning.

10. The attitude of the Government in declining jurisdiction in this case is difficult to understand. In other cognate matters, a definite tribunal has been set up by it, which automatically ousts the jurisdiction of the Civil Court. In the case of an elector wrongfully excluded from the Electoral Roll, the rules under the Act provide for the decision of the case by a special tribunal. In the case of malpractices or irregular procedure at an election, the

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rules provided for an Election Petition being brought before the District Court or a Sub-Court. It is difficult, therefore, to believe that the Government intended to leave without remedy a candidate whose nomination was improperly rejected by the Chairman, and I am fortified by this, in my opinion, that the Government in this case wrongly declined to exercise a jurisdiction which was intended to be exercised by it.

11. In Civil Revision Petition No. 705 of 1922, therefore, I am satisfied that the tribunal was then really set up but refused to function, and such refusal is the direct source for the petitioner's cause of action and the basis for the maintainability of his suit. On that ground the suit out of which that Civil Revision Petition has sprung is *prima facie* maintainable.

12. I shall now deal with the three points urged by the respondents against the maintainability of that suit and the other two suits. The first is section 352 of the District Municipalities Act. That is a bar to suits only in respect of acts *done*, but the real grievance in Civil Revision Petition No. 705 of 1922 is not that the Chairman rejected the nomination but that he intends to hold an election without allowing petitioner to stand, that is that the Chairman is *threatening* to do wrong. Section 352 is no bar to such a suit. But it will, I conceive, be a bar to the other two suits from which Civil Revision Petitions Nos. 758 and 828 have sprung, since in my view, the election in those cases has been held, there being no difference between a case where a contest has taken place and a case where a contest has not taken place. If a candidate has been returned as elected, the election is over and has been held. Therefore, in these two cases the suits are to set aside acts *done* and not acts *threatened*. I am not at present, however, very sure of the correctness of this opinion and to prefer to decide the fate of these two suits on the next ground of objection.

13. This ground is that all the three suits are barred because the petitioners have their remedy by way of Election Petitions. In the case of Civil Revision Petitions Nos. 758 and 828 I am clear that this is a good objection. Elections have been held and there is a tribunal set up by the rules for the decision

of petitions to set aside elections, a tribunal whose decision under the rules is final. The Statute itself, therefore, provides the remedy and the statutory tribunal has not refused jurisdiction. The ordinary Civil Courts, therefore, have at present no jurisdiction. In my opinion for this reason also these two suits are not maintainable in the Civil Court.

14. But as regards Civil Revision Petition No. 705 of 1922 the position differs radically. The election has yet to be held and I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some another election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether *in limine*. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed; but, when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit.

15. The third ground of objection relates more to the grant of the injunction in Civil Revision Petition No. 705 of 1922 than to the suits themselves, and, that is, that this Court or any other cannot by injunction compel the Chairman to do what he has no longer any power to do, it being urged that the Chairman has no power under the rules to revise or cancel his own orders, and must automatically proceed to hold an election. I am not impressed by this argument. It is tantamount to saying that the Chairman has no power to set right an admitted wrong. I should hesitate to draw any such conclusion, and, in any case, the Chairman can apply

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for the intervention of the Local Government which under section 36 of the Act has ample powers to set right any blunder or mistake.

10. The cases quoted before us do not appear to me to affect these conclusions. Both sides have quoted freely from English Law, mostly from cases of *mandamus* and *quo warranto*, which clearly lay down that a Returning Officer is acting judicially in deciding on the validity of a nomination paper, and that, in respect of such judicial act, no suit for damages can be maintained against him. That is a different question. The case in *Pritchard v. Bangor Corporation* (22) is a case in which the Civil Court claimed jurisdiction to interfere with the order of the Returning Officer disqualifying a candidate as passed without jurisdiction and proceeded itself to decide on the validity of an election. That also was a case of *mandamus*. The only English cases really helpful are *Aslatt v. Southampton Corporation* (17), and *Richardson v. Methley School Board* (18) which follows on the former, in which injunctions similar to those now in controversy were granted in actions for an injunction by a Court of Equity, the injunctions being granted under section 25 of the Judicature Act, 1873.

17. As regards Indian Cases, apart from cases such as *In re Surendra Chandra Ghose* (29) and *Narendra Nath Mitter v. Radha Charan Pal Bahadur* (4) and *In the matter of Amulyadhan Addy* (30) founded on *mandamus*, the case in *Sabhapat Singh v. Abdul Gaffur* (1) is one in which it was declared generally that a suit by a candidate in a *Mofussal* election will lie for a declaration of his right to vote and to stand as a candidate, and that he was duly elected. It proceeded partly on the consideration of a saving clause in section 15 of the Bengal Municipal Act III of 1884, which it was held must be read into to previous Act of 1884 and partly on the ground, that if no such suit lay, there will be no way of upholding and maintaining such civic rights in the *Mofussal*. The grounds for this decision seem open to question since the rules

under the Act of 1884 evidently provided for an election petition before the District Magistrate and the *ratio decidendi* would imply that section 42 of the Specific Relief Act will support such a suit in the *Mofussal*, though it cannot be called in aid in the Presidency Town, because section 45 of the Act, which was called in aid in that case and has so often, been called in aid in similar cases in Calcutta, implies, by force of clause (d), that there is no other remedy and, therefore, no remedy under section 42. I do not think that that case is of very much assistance. In *Molla Ataul Huq v. Chairman of Manicktola Municipality* (2) the question of jurisdiction was dealt with in a very summary manner, the want of jurisdiction not being seriously pressed, probably in consequence of the earlier ruling in *Sabhapat Singh v. Abdul Gaffur* (1).

18. In *Municipal Board Agra v. Asharfi Lal* (9) the suit was for damages for wrongful refusal to enter the voter's name on the Electoral Roll, and it may be noted that in that case the party had had his name already entered on the Electoral Roll by the District Magistrate before he came into Court, so that it does not help us to decide whether in Allahabad a suit for entry on the Electoral Roll or a similar relief will lie.

19. Coming to the Madras cases *Nataraja Mudaliar v. Municipal Council of Mayavaram* (2), relying on *Bhaishankar Nanabhai v. Municipal Corporation of Bombay* (25), declares that a civil suit will not lie to set aside an order of the Collector, (who was the tribunal designated under the rules under Act IV of 1884 to pronounce finally on the validity or the invalidity of an election), declaring an election invalid, after an enquiry has been held by him. The decision is clear that a Civil Court cannot, as it were, sit in appeal over a tribunal appointed by Government to decide such a question finally. No doubt the learned Judges in that case say that a suit would lie to declare that the plaintiff was a person qualified to vote and stand as a candidate and that so far is authority for the position that such a suit is not under all circumstances wholly unmaintainable. The case in *Valli Ammal v. Corporation of Madras* (31) proceeds on the general

(29) 49 Ind. Cas. 454; 45 C. 950.

(30) 50 Ind. Cas. 307; 46 C. 132.

(31) 16 Ind. Cas. 971; 38 M. 41; 12 M. L. T. 469; 23 M. L. J. 531; (1912) M. W. N. 1162.

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principle that the Legislature would not have intended the word "final" in a particular section of the Municipal Act to be so interpreted as to leave the Municipal Council to be a final Judge in its own cause. The principle is applicable to the present case, and, in so far as it declares the jurisdiction of the Civil Court to prevent such a wrong, it is in point.

20. The case in *Lakshminarasimha v. Ramalingam Pillai* (5) was sufficiently decided by one learned Judge on the ground that the particular rules of the Local Boards Act which he was considering, were *ultra vires* and could not, therefore, oust the jurisdiction of the Civil Court but he also held that the rules in that particular case, if valid, would oust that jurisdiction. The other learned Judge concurred in the latter opinion. This case does not deal with the particular difficulty here, which is occasioned by the rules not being carried out.

21. I, therefore, agree that the correct principle is that, when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried. Civil Revision Petition No. 705 of 1922 is exactly such a case and the injunction granted by the original Court was, therefore, a proper one. In the other two cases, the election has been held and the petitioners have a remedy not yet employed or exhausted, namely, by way of Election Petition, and, therefore, their suits are at the least premature, and in my view at present unobtainable. The injunctions granted in those cases cannot, therefore, be upheld. In Civil Revision Petition No. 705 of 1922 the order of the District Judge should, therefore, be reversed and the injunction granted by the District Munsif restored. The other two Civil Revision Petitions should be dismissed.

V. N. V. & N. H.

C. R. P. No. 705 accepted.

C. R. P. Nos. 858, 828 dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES
Nos. 398 TO 457, 554 TO 569, 571 TO 636, 638
TO 657, 659 TO 699 AND 785 OF 1921.

April 23, 1923.

Present :—Justice Sir John Bucknill, Kt.,
and Mr. Justice Ross.

NATHUNI RAI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Maharajadhiraj SIR RAMESHWAR
SINGH BAHADUR—PLAINTIFF
—RESPONDENT.

Maharajaahiraj SIR RAMESHWAR
SINGH BAHADUR—PLAINTIFF—
APPELLANT

versus

DAMODAR DAS AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

*Landlord and tenant—Trees, whether belong to
tenant—Burden of proof—Pleadings and proof—
Custom set up not proved—Court, whether can find
portion of custom set up proved.*

Under the general law trees standing on land held by a tenant on cash-rent belong to the landlord and if any custom deviating from this general proposition is alleged, it must be proved conclusively by those who maintain it. [p. 631, col. 1.]

Semble:—Enquiries as to the existence of a custom are not on the same footing as those relating to a contract, and yet in modern times, since there has been attached to the form of pleadings less rigid adherence than in former days, a Court would have little hesitation in finding on the evidence in a case that, although an entire custom set up by a defendant does not exist, yet a material part of it does. [p. 638, col. 2; p. 639, col. 1.]

Eshenchunder Singh v. Shamchurn Bhutto, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3, *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412; 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 474; 9 Ind. Dec. (N. S.) 971 (P. C.); *Ward v. Shepherd*, (1817) 146 E. R. 367; 3 Price 608 and *Desai Ranchhodas Vithaldas v. Rawal Nathubhai Kesabhai*, 21 B. 110; 11 Ind. Dec. (N. S.) 75, distinguished.

Appeals from the decision of the District Judge, Darbhanga, dated the 7th October 1920, modifying a decision of the Subordinate Judge, Darbhanga, dated the 31st March 1920.

Messrs. L. N. Singh and D. P. Sinha,
for the Appellants.

Messrs. S. Sultan Ahmad, Murari Prasad
and R. K. Jha, for the Respondents.

JUDGMENT.

Bucknill, J.—An important question is involved in these numerous second appeals from and applications in civil revision

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relating to a decision of the District Judge of Darbhanga, dated the 7th October 1920, modifying a decision of the Subordinate Judge of that place, dated the 31st of March of the same year. There are also cross-appeals by the respondent. The facts are substantially similar in all the suits and are extremely simple.

The plaintiff is the Maharajadhiraj of Darbhanga and the defendants are occupancy *raiyats* in a Mouza called Narar Darbhanga, belonging to his estate. The dispute is simply as to whether the defendants can cut down and appropriate trees on the land which they occupy.

Now, in his plaint in Second Appeal No. 398 of 1921 (the papers in which I, throughout, shall for convenience alone refer), the plaintiff, after reciting that Mouza Narar belongs to him in his proprietary interest and that the defendants are *Kashikars* under the *ticca* system, alleges that they have legally no connection and concern with the timber of the Mango, Jack-fruit, Siso, Pithi, Babul and Gamhar trees which were, or are still, standing on the land occupied by the defendants and that when any such trees are cut down or fall down the plaintiff is legally entitled to appropriate the entire timber thereof. The plaintiff then details the alleged breaches of his recited rights, and, after setting out the value of the timber wrongly appropriated by the defendants, prayed for the following reliefs:—

(a) that on adjudication of title it might be held by the Court that the entire timber of the trees standing on the *Gachhi* of the defendants belongs to the plaintiff after they happen to fall or are cut down, and that the defendants have no connection and concern whatever therewith;

(b) that it might be held by the Court that the defendants had, without any right, cut down the trees and appropriated the timber thereof as detailed in his plaint and that he is, therefore, entitled to recover damages to the amount of the value as indicated by him.

The defendants in their written statement alleged that there is a custom prevailing in the Mouza where their lands are situated that the *malik* has no right to the trees standing on *Khap* (cash-rent-paying) lands but that the tenants are

entitled to appropriate and sell the entire timber of the trees when they are cut and when they fall down. The defendants also maintained that the plaintiff's claim was barred by limitation. In addition to this the defendants drew attention to a suit brought by the plaintiff a short time previously against two persons named Sondhari Rai and Bachan Rai in which the same question as in the present suit had been raised and in which he had been unsuccessful. The defendants further put forward certain other contentions, which are not here really material, traversing the allegation as to the number of trees alleged to have been cut and the value of the timber appropriated by them. The pleadings in all the other cases were substantially the same with minor differences which are not before us of any moment. On these pleadings the case went for trial before the Subordinate Judge. It will be observed that the principal question for determination is as to the allegation by the defendants of the custom existing in the village under which the tenantry have the right to cut trees and appropriate their timber without the permission or assent of the plaintiff and without paying him any compensation. There is also the subsidiary question as to whether the plaintiff's claim was barred by limitation or affected by the previous decision in the case which the defendants mentioned in their written statement. Now, the Subordinate Judge drew up numerous issues: to five only of which I think it is necessary that I should refer. These issues are:—

No. 3. Is the plaintiff entitled to the timber alleged by him?

No. 4. Is there any custom by which the *raiyats* are to get the entire timber of the trees standing on their *kashi* lands?

No. 6. Is the suit barred by limitation?

No. 8. Are the trees *Agachha* (useless for utilization as timber) as alleged by the defendants; if so, can the claims lie?

No. 10. Is the plaintiff's claim barred by estoppel?

Now, it may be advantageous, before attempting to deal with the decisions at which the Subordinate Judge and the District Judge respectively arrived, to enunciate clearly the fundamental principles of law upon which the consideration of this case must be approached. It is

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common ground that, in cases where such a relationship of landlord and tenant as obtains in this case exists, the property in trees and their timber lies with the landlord and that, if any custom deviating from this general proposition is alleged, it must be proved conclusively by those who maintain it. In these cases the plaintiff pleaded the general law, the defendants pleaded a custom varying the general law to the effect that the tenants are entitled to cut trees as they wish and to appropriate to themselves the timber thereof. Having thus defined the law, it may now be stated that the Subordinate Judge found that the plaintiff was entitled only to half the timber of the trees and decreed the 127 suits in favour of the plaintiff on that basis but without costs. From this decision there were appeals and cross-appeals by the plaintiff and the defendants, respectively. The District Judge dismissed both without any order as to costs in favour of either party; he, however, slightly modified the judgment of the Subordinate Judge by holding as against the plaintiff that some kinds of trees which the Subordinate Judge had thought could not be regarded as properly falling within the category of timber or fruit trees (*i.e.*, *Agachha*) ought not to be excluded from that classification. It is from this decision of the District Judge that these appeals and cross-appeals have now been preferred to this Court. It may be convenient to consider and deal with first the Issue No. 10 relative to estoppel. This question relates to what, if any, bearing a decision in a case which was brought by the plaintiff against one Sondhari Rai and others in the Small Cause Court of Darbhanga has on this suit: in that action the plaintiff alleged a claim similar to that in the present case against the defendants who were in the same position as are the defendants in these appeals. No evidence was, however, there adduced on behalf of the plaintiff to rebut certain testimony which was brought forward by the defendants in that case to show that the custom under which the tenants were entitled to cut the trees and appropriate their timber existed in this village. It was there held that the defendants had proved a custom and that the plaintiff failed. It is, I think, obvious, as is pointed out by the Subordi-

nate Judge, that such a judgment could not affect any decision which ought to be arrived at in the present cases; as, here, the parties are entirely different. The matter, however, came to this Court in Civil Revision No. 132 of 1916 principally upon another point:—Namely, as to whether the Munsif was right, in taking into consideration what is known as the "Village Note"; this is a kind of memorandum, drawn up by Survey Officers at the time of Land Settlement Operations, which is supposed to give some account of, *inter alia*, any customs which exist in a locality concerned. The "Village Note" in respect of Mouza Narar was said to support the defendants' allegations but it was contended on behalf of the plaintiff in the revisional proceedings before this Court that it was of no evidential value. Mr. Justice Jwala Prasad, before whom the matter came, ruled that the Village Note did possess evidential force and should not be excluded from consideration. The Subordinate Judge has rightly pointed out that this previous decision by the Munsif, sitting as a Small Cause Court Judge and in a suit in which the defendants were not the same as those in these appeals, could not act as *res judicata*; whilst the District Judge has indicated that any argument that an entry in a Village Note to the effect that a landlord had given up his claim to the value of trees on *khaf* lands paying full *bhit* rent, could operate as an estoppel against him, in a suit in which he contended to the contrary, must obviously be fallacious.

With regard to Issue No. 3 "Is the plaintiff entitled to the timber as alleged by him?" and Issue No. 4, "Is there any custom by which the *raiya*s are to get the entire timber of the trees standing on their *kasht* lands?" the Subordinate Judge and the District Judge have both correctly pointed out the fundamental principles of law. The former says it is clear that, according to well-established propositions of law, "the right to appropriate the entire timber of the trees standing over the tenant holdings belongs to the *malik* who is the proprietor of the soil. That being the case, the onus lies on the tenants (defendants) to prove a custom by which they are entitled to appropriate the entire timber of the trees standing over their *nahdi* holdings which

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are known as *khap* holdings. The question to be decided in these cases is as to whether the defendants have succeeded in proving custom in the manner alleged by them. I have carefully considered the nature of evidence adduced in these suits on behalf of the defendants that they have failed to prove any such custom as is alleged by them." The District Judge writes: "It has been decided in several cases that by the Common Law of India trees growing on tenants' lands are part of the soil and as such the right to appropriate the wood primarily belongs to the landlord. There are innumerable rulings on this point and it would serve no useful purpose to enumerate them here. As a matter of fact, this rule of Common Law was not questioned before me by either party. No exception is made in the case of trees planted by the tenants or their ancestors. The only exceptions allowable are in respect of comparatively valueless trees which come under the designation of *Agchhas*. Of course, the case of a tenant having a permanent right in the land is a different one. As, however, none of the defendants claim any permanent right to the lands it is not necessary for me to discuss the law relating to such tenants. This Common Law of India may, however, be modified by local custom or usage. But such custom or usage must be proved by the tenants." The Subordinate Judge and the District Judge, each then, continue to discuss the nature of the evidence upon which the defendants had placed reliance in order to prove the custom alleged by them; they both remark that it was essentially the same as that which had been adduced before the Munsif in the case which the plaintiff had brought against Sondhari Rai and they both, unhesitatingly, reject such evidence as supporting any such custom as they alleged. It may be, here, advantageous to quote from what the District Judge writes in his judgment upon this question as he summarises, in my view, very capably the value of the evidence. He writes, "I shall now examine the evidence of custom. Both sides have given evidence, oral and documentary, in support of their respective allegations. The documentary evidence on behalf of the tenants is practically the same as was filed in Sondhari Rai's case

referred to above, with this exception that the judgment in Sondhari's case also is relied upon by the tenants in support of their allegations. The judgment of Mr. Justice Jwala Prasad in Sondhari's case, however, shows that the documentary evidence was not sufficient to prove any custom. Reasons in support of this finding are given in the judgment and I accept those reasons as my own. The case was practically decided on the oral evidence in that case, or rather, the absence of oral evidence on the side of the landlord. The question is, how far the judgment in Sondhari's case strengthens the position of the tenants in the present suits. The law, no doubt, is that a judgment though not *inter partes* is evidence and sometimes good evidence of custom in other suits. The judgment in Sondhari's case has, if possible, a greater value by reason of the fact that the present plaintiff was the plaintiff in that case. But it cannot operate as *res judicata* and the evidence of custom afforded by it can be rebutted. In the present case there is ample evidence on the record on the plaintiff's side to rebut the whole evidence, oral and documentary, on the defendant's side. It is also to be seen that Sondhari's case was a petty Small Cause Court one, in which the plaintiff was not expected to produce evidence so exhaustively. The evidence on the side of the plaintiff in these suits consists both of oral testimony and documents. The principal documents are lots of *kabuliyats*, including about 40 executed by the defendants or their predecessors-in-interest in 40 of these suits. All the *kabuliyats* are registered documents and most of them were executed in 1902, that is, shortly after the publication of the Record of Rights. There are, however, some earlier in date than the Survey proceedings. All the *kabuliyats* are almost to the same effect. The portions relevant for the present inquiries are paragraphs 7 and 9. In paragraph 7 the tenants agreed not to cut away the trees bearing fruits and those not bearing fruits from the demised lands without the consent of the *malik* and it is stated that this is according to previous custom. Paragraph 9 runs as follows: 'In pursuance of the terms enumerated in paragraph 10 of the former *kabuliyat* and in accordance with the previous

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usage prevailing in the village, I shall not sell trees bearing fruits and those not bearing fruits without permission in writing of the *malik* or his authorised agent.' It was contended by the learned Vakil for the tenants that these *kabuliyats* cannot help the plaintiff because, in the first place, the permission related to the cutting of the trees and there is always a distinction between the right to cut trees and the right to appropriate the wood after they fall down or are cut. No doubt, the two things are entirely different as has been held in the cases reported as *Samsar Khan v. Lochin Dass* (1) and *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal* (2) and the notes to the same. But in these *kabuliyats*, the custom or usage is admitted in respect to both these rights separately. Paragraph 7 relates to the first right and paragraph 9 to the second right. Paragraph 9 says that permission is to be taken according to previous usage before selling trees and that half the value will go to the landlord. The *kabuliyats*, therefore, clearly show that according to the prevailing usage the tenants are to obtain the landlord's permission in selling the trees and the landlord is to get half the value. The *Chalan* and account papers proved by the plaintiff show clearly that all along the tenants did ask for permission and the *malik* got half the values of the trees. The number of instances proved by the plaintiff is innumerable. There is also oral evidence in support of the plaintiff's case that the right to the wood is all along with the landlord. The contrary evidence on the side of the tenants is worthless. Most of the witnesses are interested witnesses and some of them have themselves paid half the price of the wood to the landlord. In my opinion, therefore, the evidence on the plaintiff's side is overwhelming to rebut the oral and the documentary evidence on the side of the defendants."

Now, before I proceed to consider the arguments which have been addressed to us on behalf of the appellants (that is by the defendants) in these appeals in their endeavour to show that the District Judge was wrong in deciding that

they had not proved the custom which they maintained, I think it is desirable to point out that the main contention which is strongly urged upon us by the learned Counsel who appeared for the plaintiff in his cross-appeal upon this point is that, having come to the conclusion as they did that the defendants had failed to prove the custom which they alleged, the Subordinate Judge and the District Judge, ought, so far as any question of custom was concerned, to have decided forthwith against the defendants. Instead of this, however, the Subordinate Judge and the District Judge, after having thus held that the defendants had not proved the custom pleaded, then proceeded to enquire as to whether they, upon the evidence adduced before them, could find any ground for thinking that the plaintiff was not entitled to the whole of the rights which he claimed; and, as I have already stated, their decision was that the plaintiff was only entitled to half the value of the timber of trees cut by the tenantry or fallen. It has been strongly contended on behalf of the plaintiff that, in thus making out a case for the defendants which was not the defendants' own case, and in thus in effect finding in favour of a custom which was not suggested by the defendants, the Subordinate Judge and the District Judge have both made a serious legal error. With this important question I shall deal later.

Now, the arguments which were put forward on behalf of the defendants in their attempt to show that the District Judge was wrong in thinking that the defendants had not proved the custom which they alleged, do not, I may at once say, appear to me to be of any great cogency. It was first urged that as in *Sondbari's* suit there had been a decision that a custom such as is here alleged by the defendants had been proved, that decision, if not absolutely conclusive, was of the highest evidential value. In this connection our attention was drawn to several cases: in *Beg v. Allah Ditta* (3) a general custom of agnatic succession put forward by claimants to property was traversed by

(1) 23 C. 854; 12 Ind. Dec. (N. S.) 567.

(2) 22 C. 742; 11 Ind. Dec. (N. S.) 493.

(3) 38 Ind. Cas. 354; 44 C. 749; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 45 P. R. 1917; 15 A. L. J. 525; 21 C. W. N. 842; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

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the allegation of an established custom which was referred to in the *Riwaj-i-am* (Official Records of Custom). In *Tulsi Mahton v. Jhandoo Pandey* (4) it was similarly held that the *Fard-Rawaj Bhaoli* was receivable in evidence and of evidential value in proof of a custom of the nature of rental payable; whilst in *Lekraj Kuar v. Mahpal Singh* (5) it was also held that the *wajib-ul-arz* (Village Administration Papers) was admissible in evidence in support of proof of custom. I do not think, however, that there is really anything which can be added usefully to what the District Judge has said with regard to the evidential value either of decision in a previous case between different parties or as to that of such matters as a Village Note, or papers of the class referred to in the cases just quoted. These latter are perhaps in a somewhat different category and of stronger utility than the first named, but, even so, are in no sense conclusive. It was next urged that the District Judge had not sufficiently discussed in his decision the evidence adduced by the defendants as to the existence of the custom and in particular had discarded the oral testimony given on their behalf in a very perfunctory manner. I do not, however, think that it can be said that the District Judge's judgment in this respect is materially irregular. He does not, it is true, discuss the oral evidence put forward by the defendants in any detail nor, in view of the very large number of witnesses (stated by the Subordinate Judge to be about 170) is it reasonable to suggest that he should have done so. The Subordinate Judge has himself said quite rightly: "It is not the largeness of their numbers but the quality of their deposition that is of use. I have carefully considered the nature of the evidence adduced by the defendants' witnesses which are generally of the same nature. Their statements do not appear to be truthful." And the District Judge, as does also the Subordinate

Judge, points out that their evidence is entirely of interested character. I, therefore, think that there is no ground for differing from the view to which both the Subordinate Judge and the District Judge came, namely, that the defendants did not prove the custom which they alleged in their written statement.

Having now thus expressed my view that the District Judge was right in his conclusion that the defendants had not proved the custom pleaded it is next most convenient here to deal with the question which is the principal subject of the plaintiff's cross-appeal. I have already outlined how that cross-appeal arises. The plaintiff (respondent here) contends that it was not open to the Subordinate Judge and the District Judge to find a case for the defendants which they themselves never pleaded and that, even if it had been right for the Subordinate Judge and the District Judge to find evidence of some custom other than that pleaded, their finding was, in this case, based upon inferences which could not properly be drawn from the facts as placed before them. To both these arguments the defendants (appellants here) reply that it is open to a Court when a particular custom is pleaded to find one of a more limited nature than that adduced and that here the finding was warranted by the evidence.

It is particularly important, before considering the first of these two contentions, to observe carefully why the Subordinate Judge and the District Judge thought fit to enter upon such an enquiry. I must admit that I have felt some misgiving as to whether their action was correct. Under the general law the plaintiff had admittedly a good claim; the defendants had set up a custom that the tenantry was entitled to cut the trees and appropriate the timber; they had failed to prove such a custom; they had alleged no alternative.

I am inclined to think that the phrasing of the third issue "Is the plaintiff entitled to the timber as alleged by him?" was probably partly responsible for the pursuance of their investigations after it had been decided that the defendants' contention of custom as pleaded should be rejected; but this further enquiry was actually dealt with both by the Subordinate Judge and

(4) 38 Ind. Cas. 176; 2 P. L. J. 187; 1 P. L. W. 238.

(5) 5 C. 744; 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081 (P. C.).

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the District Judge as part of the Issue No. 4 "Is there any custom by which the *raiya*ts are to get the entire timber of the trees standing on their *kasht* lands." The Subordinate Judge, after discussing the evidence as to this issue (*i.e.*, Issue No. 4), appears to have been struck by the undoubted fact that it was to his mind satisfactorily shown by the plaintiff's witnesses that the practice of the Raj in this Mouza was that these *raiya*ts should apply to the Raj for permission to cut a tree, that they were as a general rule allowed to fell it and to appropriate the timber on payment in of half of the estimated value of the wood to the Raj treasury. He writes, "I accordingly disbelieve the defendants' witnesses on this issue and hold that their statements that the tenants used to get 16-annas timber without any payment of price to the Raj are false. Considering all the oral and documentary evidence adduced on behalf of both parties I have no hesitation in coming to the conclusion that it has been satisfactorily proved that the Raj used to realise half prices of timber from the tenants of Narar in respect of their trees standing on their *nakhi* holding which are known locally as *khap* holdings as have been proved by the plaintiff's witnesses. No doubt the oral and documentary evidence adduced by the plaintiff shows that the practice was for the tenants to apply and then half price was settled on behalf of the Raj on the reports of the Raj *amlas* and then the tenants used to deposit half prices by means of *chalans* and then they used to cut the trees and appropriate the entire timber. It was contended on behalf of the Raj that the Raj is entitled to get price of 16-annas timber and the price of half the timber was remitted to the tenants as *maf* because they applied for permission and hence those that cut them without any such permission are not entitled to get such *maf*. In my opinion this story of treating the remaining half price, which the tenants used to get as *maf* is an afterthought. The *chalans* filed on behalf of the plaintiff do not treat them as *maf*. It is not written therein that the landlord's share is 16-annas price out of which half is remitted for applying for permission to cut as is now alleged. On the other hand, these *chalans* of the plaintiff, *viz.*,

most of them both of the period prior to the execution of the *kabuliyats* in 1902 and prior to the time of Survey proceedings and also the *chalans* produced by the plaintiff subsequent to the said periods clearly show that it was expressly written there that the *malik*'s share of the timber is half. That being the case, the fact that the remaining half share was the *raiya*ti share was practically acknowledged in these *chalans*. This was done in pursuance of a clear custom which is expressly stated in the registered *kabuliyats* of 1902, *vide* Exhibit 63 (117). It is clearly mentioned that the tenant would not sell trees without the written permission of the *malik* in pursuance of previous custom. The words are *rewaj* and *dastur sabik*, it is further written therein that if he sells such trees with such permission then he would pay half price to the *malik* as he is always doing. Thus payment of half price in pursuance of an old and previous custom is clearly mentioned in these *kabuliyats*. The idea of treating the remaining half as *maf* was not present then. No doubt it is written in these *kabuliyats* of 1902 that if he does not pay the half price then the *malik* would be entitled to realise the real price thereof by suit. It was contended on plaintiff's behalf that the plaintiff is entitled to realise the price of 16 annas share by this stipulation. In my opinion, in the first place, it is not quite clear whether the expression *real* price thereof refers to the price of half share, stated before in the said paragraph or to the price of 16-annas share. If it means as price of 16-annas share then it is in the nature of penalty for not previous payment of the half share after filing application for permission. The *malik* did not reserve the right to realise more than half share according to his discretion when the tenants applied for permission. Moreover, in the older *kabuliyats* Exhibit 63 (137) of 1895 and in the *kabuliyat*, Exhibit 63 (136) of 1898 there does not seem to be any trace of even this alleged penal clause. In the *kabuliyats* of 1895 and 1898 there is no trace whatever of the said penal clause. Rather, it is expressly written therein that if a tenant would sell any tree, then half share thereof belongs to the *malik* and if he does not pay half share amicably (*bakhu-da men*) then the *malik* would be entitled

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to realise by suit. There is not a word about the *malik's* right to realise price of 16-annas share in default of amicable payment is contended. That being the case it is clear from the old papers filed by the Raj that in pursuance of old *rewaj* prevalent in this village from a long time the *malik* is entitled to get half prices only and not prices of 16-annas timber. And, therefore, the general law has been modified by special custom prevailing in this village of the tenants paying half share only. No doubt one or two papers have been filed of recent years to show that the Raj realised full share when the tenant did not pay the half share by application. But these recent attempts cannot, in my opinion, override the long established usage by which the tenant became entitled to get half share and the *malik's* share was acknowledged to be only half. In my opinion these recent attempts of realising 16-annas share on the strength of general law, ignoring the old custom prevalent in the village of taking only half share, has provoked this litigation and has led the tenants to deny even half price which they were paying amicably from before. Taking all these facts and circumstances into consideration, I have no hesitation in coming to the finding that in accordance with local custom the landlord is entitled to get only price of half the share of timber in this village. Nara and the tenants are entitled to get the other half share. I further hold that the plaintiff is not entitled to get more than half share even if the tenant has not taken permission or has cut without permission or previous payment of half price. In any case, the *malik* is not entitled to get more than price for half the share. Of course, it is for the convenience of both parties to get the half price settled and paid by means of previous applications. But if the tenant does not do that there is nothing in the evidence of the custom to justify a penalty of payment of full price for default when no such penalty was even thought in the old *kabuliyats* of 1895 and 1898 referred to above. I decide this issue accordingly and hold that the tenants are liable to pay only price of half the timber of the trees standing over their *nakdi* holdings."

The District Judge follows the same line of thought adopted by the Subordinate

Judge and remarks:—"The next question is, whether the landlord is entitled to the whole value of the wood. On behalf of the landlord an attempt was made to say that in those cases in which the tenants obtained previous permission of the landlord half the value was remitted to the tenants. But where no such permission was taken the tenants are to pay the full value. I have been taken through the evidence of these witnesses and I do not think that their evidence on this point is worth anything. Not a single instance of the landlord getting the whole value has been given in case of trees cut before the present dispute arose. The instances given after the dispute are very few in number. The *kabuliyats* relied upon by the landlord do not show any such distinction. The learned Vakil for the Maharaja laid great stress on the last sentence of paragraph 9 of the *kabuliyat* and argued that it supported his contention, but I cannot agree with him on this point. This last sentence shows that in case payment is not made to the *malik* he will be at liberty to realise from the tenant "*assal* with interest." The learned Vakil contended that this word "*assal*" means the full price. I, however, do not agree with him on this point. The word "*assal*" literally means principal. The context shows that the principal is. I have, therefore, no hesitation in holding, that the *kabuliyats* do not support the learned Vakil's contention that the full value is to be paid in case the trees are cut without permission. I may here add, that in the plaints no such distinction is mentioned and plaintiff did not claim the whole price on the ground that the trees in these cases were cut without any permission. I am, accordingly, of opinion, that by custom and local usage half the value of the wood goes to the landlord and the other half to tenants whether the latter cuts the trees with or without previous permission. In respect to the argument of the learned Vakil for the tenants that half the value is given to the landlord as price of his permission I may refer to Exhibit 19/18, which is a petition by a tenant for permission to appropriate the wood on payment of price. Half the price was taken.

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In this case as well as in some other cases covered by some other applications there was no question of permission to cut trees. In other case, no doubt, the applications contained prayer for permission to cut and appropriate. But the right to cut the trees is conferred on the tenants by section 23 of the Bengal Tenancy Act and so the permission must be taken to be permission to appropriate and not the permission to cut. The two rights are dealt separately in two different paragraphs of the *kabuliyats*. The right of the landlord to half the value of the trees is recognized in paragraph 9 which has nothing to do with the right to cut the trees. So this right has nothing to do with the permission to cut. The learned Vakil argued that the *kabuliyats* cannot be taken as evidence of custom as it is always open to the contracting parties to expressly disregard custom in making contracts. But the recital in paragraph 9 shows, that this stipulation was made in express recognition of the custom and not in spite of the same. So there is no force in the argument of the learned Vakil."

It does not seem to have been suggested to the Subordinate Judge or the District Judge that the plaintiff's case resting on the general law and the defendants having failed to establish the very clearly defined custom which they pleaded, there might be, in law, nothing further for the plaintiff to do in order to justify a decree being passed in his favour; or that it was not, in law, open to the Court to find the existence of some custom not alleged by the defendants and of a more limited nature than that put forward by them.

Apart from this purely legal aspect of this procedure, they did, it is true, mention shortly the proposition that what is gained by a regular repeated permission cannot be the foundation of a custom as against a licensor but they dismiss the suggestion on the ground apparently, that the contracts made between the plaintiff and the defendants were so made in express recognition of the custom and not as negating it.

The question as to whether the inferences drawn from the evidence as to the existence of such a custom, are justified or, of course, a separate matter for consider-

ation. I attempt, therefore, in the first place, to consider the important point as to whether it was open to the lower Courts to find a custom other than that adumbrated by the defendants. Unfortunately, there were but few authorities quoted to us on behalf of the plaintiff and none on behalf of the defendants on this point; the only suggestion indeed made on behalf of the latter being that a plea of a wide custom might justify a finding on the evidence of the existence of a narrower. In Volume X of Halsbury's Laws of England, at page 236, paragraph 446, it is stated: "Evidence to prove a custom must not only be consistent with the custom which is alleged but must also prove a custom which is no wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest." But this proposition does not, in my view, necessarily tend to establish the converse; namely, that if a broad custom is pleaded the existence of a lesser custom could not, if proved, be found. In the case of *Eshenchunder Singh v. Shamachurn Bhutto* (6), it was held by the Privy Council, that it was incorrect to conclude parties (*i.e.*, to hold parties bound) by inferences of fact not only inconsistent with the allegations in the plaint, but, which were, in reality contradictory to the case made by the plaintiff in the Court below. There was a suit for specific performance of an agreement the object of which was to recover possession of a four annas undivided share in a *putni talook*. The decision of the Court of first instance found the case in direct contradiction to the allegations contained in the plaint. When the matter, however, went on appeal to the High Court of Calcutta that Court appears to have formed a conclusion upon an assumed case which was inconsistent with the recorded evidence contained in the original judgment. Lord Westbury in the course of his decision stated:—

"This case is one of considerable importance, and their Lordships desire to

(6) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 29 B. R. 3.

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take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made." I do not, however, think that these remarks bear very forcibly upon the decision in the appeals now before us. For although it is quite true, that in the pleadings there is nothing indicated as to the exact custom which the lower Courts have found to exist it is difficult to say that the determination to which the lower Courts have come was not founded upon, or a part of, the case as it was presented in evidence before them. The case of *Bhagwan Singh v. Bhagwan Singh* (7) which was also quoted to us seems to me to have little bearing upon the matter. Their Lordships of the Privy Council in that case merely pointed out, that special customs may be pleaded by way of exception to a general rule of law, but must be proved by evidence. They condemned the procedure which the learned Chief Justice of Allahabad had apparently adopted of tying the plaintiffs down to the obligation of showing a custom providing for a specific application of general law; their Lordships considered that in adopting this procedure the learned Chief Justice was inverting the process by which the law should properly be ascertained; or, in other words, that where a plaintiff relies upon the general law it is not necessary for him to prove any custom as to the practice of any such general legal principle. The ancient case of *Ward v. Shepherd* (8), which was also referred to, merely lays it down that a defendant could not plead a contractual relationship as well as a custom. If a defendant pleads that he has a right arising out of a contract with a plaintiff, he cannot, at the same time, plead that that right arises out of a custom; presumably, because it would be embarrassing. Perhaps, the case of *Desai Ranchhoddas Vitthaladas v. Rawal Nathubhai Kesabhai* (9) is of slightly more value

in this appeal than any of the others which have been placed before us; but even that does not appear to me to be of much practical utility. It was a second appeal. The plaintiffs sued to obtain recovery of possession of certain lands to which they alleged they had succeeded on the ground that there was a custom amongst their people excluding widows and daughters from inheritance. It was held by the lower Courts that a custom excluding daughters, but not widows, had been established. The High Court of Bombay held that, if a decree appealed against was based upon wrong views of the law of evidence or upon a misconception of the canons which the Privy Council and the High Court had defined as to how a special custom should be proved, the High Court ought to interfere in a second appeal. It was held that the *plaintiffs* should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows, and daughters to one, which only excluded daughters. The point, however, for decision in the present appeals is to my mind very different from that, which obtained in the case quoted. The plaintiff here never based his claim upon any custom at all. The defendants alleged the custom which they failed to prove; but, from the evidence given on behalf of the defendants, the lower Courts considered that it was apparent that a custom had been proved, of the same type as that which the defendants had alleged but of a narrower character: was it permissible for them to record and decide upon such a finding? I have not much doubt that it is only within comparatively recent times and since there has been attached to the form of pleadings less rigid adherence than in former days, that the answer to this question would have been in the affirmative. Enquiries as to the existence of a custom are not on the same footing as those relating to a contract. There is little analogy between a case in which a plaintiff claims £1,000, the defendant denies any indebtedness, and a Court finds £500 due and a suit in which a plaintiff claims to close his private park and the defendants plead a right of way by custom across it: and yet I cannot help thinking that

(7) 21 A. 412; 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 474; 9 Ind. Dec. (N. S.) 971 (P. C.).

(8) (1817) 146 B. R. 367; 3 Price 608.

(9) 21 B. 110; 11 Ind. Dec. (N. S.) 75.

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in modern times a Court would have little hesitation in finding, that although the entire custom alleged by a defendant did not exist yet a material part of it did. It is perhaps best to illustrate what I mean by a simple hypothetical illustration drawn from English life. A landowner has an estate on which lies a large lake and near which is situated a village. By the Common Law all the fishing rights in the lake belong to the landowner. The villagers, however, *net and angle* for fish in the lake and he brings actions against villagers A. B. C. D. and E. to restrain them from doing so. They plead that the villagers have by custom a general right of fishing in the lake; they fail, however, to prove that they have any general right of fishing; but, in the evidence, which is brought forward by the plaintiff to rebut that which has been adduced by the defendants, it transpires very clearly that there is a custom from time immemorial by which the villagers may catch fish in the lake *with rod and line*. I do not think that a Court would have any hesitation in refusing to take away from the villagers that customary right or in finding the existence of this limited custom. I am disinclined, therefore, to consider that, it may not have been open to the Subordinate Judge and the District Judge to find the existence of this custom (if indeed it did exist), and in this way to limit the relief granted to the plaintiff. On the other hand, there is much to be said for the argument here that there was no real proof of any custom. There is no doubt, that the plaintiff's evidence *and* indicate that there was some kind of *practice* and it would seem clear that the Subordinate Judge and the District Judge have substantially discarded the oral evidence given on behalf of the plaintiff and have based their finding as to the existence of custom upon a construction of the *kabuliyats* under which tenants leased land from the Raj. Our attention has been drawn by the learned Counsel who appeared for the plaintiff to some of the oral evidence given on the part of the plaintiff and notably to that of P. T. Onraet, who is one of the Managers of the Darbhanga Raj. He deposes very definitely (and his evidence may be taken as typical

of that which was given on behalf of the plaintiff in connection with this matter) that, "In Narar, when the *raiya*s applied for permission to cut trees standing on their *nakai* holdings, permission used to be given on receiving half of the price to the timber. When they did not apply, then the Raj used to realise full price of the timber. The *raiya*t was allowed the other half when they applied for permission. The other half was allowed to the *raiya*s as a matter of concession to them when they applied for permission and not as a matter of right." The Subordinate Judge, however, was of the opinion, that this allegation, that the grant of the half of the value of the timber to the tenant was a matter of grace, was an afterthought: whilst the District Judge is impressed by the fact that no instance of the landlord getting the whole value was given in the case of trees cut before the present dispute arose. It is not proper in second appeal generally to consider whether or not the lower Courts have taken a right view of evidence in coming to findings of fact; but, putting aside the oral evidence, the construction of the *kabuliyats*, upon which the Subordinate Judge and the District Judge mainly based their view that a custom was shown, can certainly be considered by this Court in order to see whether their meaning has been properly interpreted. A typical specimen of this *kabuliyat* is shown in that executed by one Musan Barahi, dated 1st of August 1902. The material portion reads thus:—

Paragraph 7.... "I shall not cut and fell the fruit-bearing and non-fruit-bearing trees existing on the lands without the consent of the proprietor, and paragraph 9, in conformity with the conditions laid down in paragraph 10 of the previous *kabuliyat*, and the custom, and usage formerly prevailing in the village, I shall not sell the fruit-bearing or non-fruit-bearing trees without the written consent of the proprietor or his authorised *amla*. If I sell the same after obtaining a written permission of the proprietor or his authorised *amla* then I shall continue to pay the price in moiety therefor, to the proprietor as I have all along paid the same to him without any objection whatever. If I fail to pay the same, proprietor is and shall be compe-

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tent to realise the principal amount of price besides interest, thereon, till the day of realisation from my person and property by instituting a suit in Court."

Now, the Subordinate Judge seems to have been very dubious as to what the "principal" or as he describes it the "real" price actually meant. He suggests, however, that if it means the whole value of the timber it might be regarded as in the nature of a penalty on the tenant, if he did not apply for permission to cut the tree. He also points out that in still older *kabuliyats* than those of 1902, this penalty clause (as he calls it) does not appear to be included. The District Judge, however, is decided in his view, that the word "principal" or "real" does not mean the "full price" at all, but that from the context it indicates only the half price. I am bound to say, that, I think, the construction which has been placed upon these *kabuliyats* is incorrect; and that even if it were correct its effect would not be that of proving a legal usage which could be regarded as a custom capable of being supported by the tenantry against the landlord. It is instructive to observe here that even now in their grounds of appeal the defendants in paragraph 8 maintain that the District Judge was wrong in his decision; on the ground that the *kabuliyats* were taken by the plaintiff in defiance of the custom; and of the Record of Rights, and that these *kabuliyats* sought to set up another custom which, however, could have no effect in destroying the custom which was alleged by the defendants, that is to say, their rights to the whole, so far as I can see there is nothing in these *kabuliyats*, which would support a definite custom, which could be recognised by law. It seems to be admitted that as, at any rate, a matter of contractual relationship between the plaintiff and the tenantry, the latter could not cut down a tree without obtaining the permission of the former; and, although the District Judge thinks, that the recital in paragraph 9 of the *kabuliyats* shows, that the stipulation as to obtaining consent to sell the timber was made in express recognition of a custom that the tenant should get half the value, it is equally clear that neither the cutting of the tree nor its sale could

lawfully be effected without the consent of the proprietor: and this was so, whether under the *kabuliyats* or by the general law. I cannot think that where it is necessary for a tenant to get permission to cut down a tree, the fact that, if he does so obtain such permission before cutting it down, he is granted half the value of the timber can well be shaped into circumstances upon which any custom recognised as such in law can be based. To follow this line of thought to its logical conclusion let us suppose that to-day an individual applies to the plaintiff to lease some of the plaintiff's land as a *kashkar* on the *ticca* system. If the plaintiff chose it seems to me that there is nothing to prevent him from putting in the *kabuliyat* of lease a clause simply saying that he would not allow the tenant to cut down any trees. The tenant might complain that he was being treated differently to the way in which the plaintiff had previously treated other tenants in the village; but it is difficult to see how he would be in a position to force the plaintiff to accede to his wishes. Although, therefore, I think that the evidence in the case undoubtedly indicates that, as a matter of practice, the plaintiff has been in the habit of allowing upon application a tenant to sell and appropriate half the value of the timber of a tree which has been, with the plaintiff's assent, cut down or which has fallen down, I do not think, that that practice can be regarded as under the circumstances capable of being crystallized into a custom recognizable by law. For this reason, therefore, I think, that the cross-appeal of the plaintiff in connection with this part of the case must be allowed.

That the plaintiff's case was barred by limitation was not very strongly urged before us. It is difficult, indeed, to see how it could be. The period of limitation is one of three years but both the Subordinate Judge and the District Judge on Issue No. 6 entirely disbelieved the defendants' evidence and believed that given on behalf of the plaintiff.

The Subordinate Judge finds as a fact that the trees in connection with which the suits were brought were cut within the period of limitation: whilst the District Judge, after discussing the evidence most

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carefully, in great detail, comes to the conclusion that there can be no doubt that the Munsir's decision is correct.

There remains only a small matter upon which the plaintiff has entered a cross-objection: it relates to the difference of opinion between the Subordinate Judge and the District Judge as to what are the species of tree to which the plaintiff's right applies. It is common ground that the tenantry have the right to cut and appropriate to themselves trees which can be classified as *Agachha*, a word which I understand means useless or valueless for fruit-bearing or timber purposes. The Subordinate Judge points out that the defendants alleged that many sorts of trees giving them by name (*Sisam, Gambar, Gular, Mahua, Jamun, Khair, Babul, Imli, Barhar, Bair, Siris, Simal* and *Sahijan*) were *Agachha*. He held that of these species, two only, namely, *Bair* and *Sahijan*, were *Agachha* and excluded them from the plaintiff's claim. The District Judge, however, came to the conclusion that there were other trees which should properly be placed in the *Agachha* category and stated that these were *Barhar, Simar, Gular, Jimal, Bair, Sahijan* and *Siris*. The learned Counsel for the plaintiff objects to the inclusion of the two first named and points out that even from the Judge's own remarks it is not possible that they should be regarded as in the *Agachha* class. What the District Judge says is, "As for *Barhar* and *Simar*, though they are comparatively big trees and their timber is sometimes used for some other purposes, they cannot be classed as either timber or fruit-bearing trees. Their timber is of very inferior kind and planks, etc., made of them do not last long. On the other hand, the tenants derive very little profit from these trees when they are allowed to stand on the land. They sometimes occupy much room and the tenants are required to pay rent for the lands occupied by such trees. So I must class these as *Agachha*. I am of opinion that, whether *Agachha* or not, the tenant is entitled to these trees." I think that the contention put forward on behalf of the plaintiff is here justified. I am not sufficiently familiar with the nature of the trees mentioned by name

to be able to express any opinion as to what particular trees should be included in the useless class; where trees, however, are such as bear useful fruit or are utilizable as timber it seems clear that they fall within the class over which the proprietor has rights. One can well understand that there are certain trees or bushes which are not in this class; but the two trees mentioned are stated to be big trees the timber of which, although inferior, is utilizable for making planks. I think that they should not have been included in the category of trees over which the landlord has no rights.

The result, therefore, will be that the defendants' appeal is dismissed with costs throughout. The plaintiff's cross-appeal will be allowed with costs. The judgment of the District Judge will be set aside and plaintiff be granted a decree in the terms of his plaint other than with regard to such trees as are found by the Subordinate Judge to be *Agachha*.

The general order in the above appeals and civil revisions will, therefore, be:

(1) the second appeals filed by the tenants-defendants are dismissed in each case with costs, except that there will be one joint hearing fee assessed at Rs. 60 to be distributed equally in all the cases;

(2) the second appeals by the plaintiff-landlord with regard to suits the value of which exceeded Rs. 500, are decreed, in each case with costs, except that there will be but one joint hearing fee assessed at three gold *mohurs*, to be distributed *pro rata*;

(3) second appeals arising out of suits the value of the subject-matter of which did not exceed Rs. 500 and with regard to which application in civil revision's have been filed are dismissed, but without costs;

(4) Civil Revision Cases except No. 244/21 which related to Second Appeal No. 658/21 are allowed, but without any order for costs;

(5) Civil Revision No. 244/21; which was excepted in the previous clause will be dismissed as having abated without any order for costs and

(6) the memorandum of second appeals arising out of suits not exceeding Rs. 500 in value, and with regard to which no

TIRKHA V. SOLHU.**E. I. R. CO. LTD. V. GOPIRAM-COURISHANKAR.**

applications in civil revision cases were filed, will be treated as applications in civil revisions and be allowed as such, without any order for costs.

The order for costs governs all the Courts.

Ross, J.—I agree.

Z. K. *Defendant's appeals dismissed.*

Plaintiff's cross-appeals accepted.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. II OF 1923.

May 9, 1923.

Present :—Sir Shadi Lal, K.T., Chief Justice, and Mr. Justice Martineau.

TIRKHA AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

SOLHU AND OTHERS—DEFENDANTS—
RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Memorandum of terms of mortgage—Registration.

An entry in a *bahi* which recites the terms of a mortgage but is not signed by any of the parties to the alleged mortgage, is not an instrument creating any right within the meaning of section 17 of the Registration Act and does not require registration.

Letters Patent Appeal from an order of Mr. Justice Harrison, passed in Civil Appeal No. 853 of 1922, dated the 30th November 1922, and published as 71 Ind. C.S., 739, remanding the case to the lower Appellate Court (District Judge, Delhi) for decision on the merits.

Lala Amar Nath Chona, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This is an appeal under the Letters Patent from an order of a Single Judge, remanding the case to the lower Appellate Court for decision on the merits. The suit is for redemption of a mortgage which plaintiffs allege to have been effected by their predecessors for Rs. 137. They obtained a decree in the First Court, but on appeal the District Judge dismissed the suit on the ground that the entry in their account-book which was the basis of the suit was inadmissible in evidence for want of registration. On second appeal the learned

Judge in Chambers held that the document in question did not require registration as it had not been executed by any one. We agree with this view. The document is not signed by either of the parties to the alleged mortgage, so that it is clearly not an instrument creating any right, and section 17 of the Registration Act has no application.

It is argued for the appellants that the respondents have changed their cause of action, inasmuch as in their plaint they were suing on the basis of the entry in the account-book, whereas later on their Counsel stated that the mortgage was oral and that the entry in the book was only a memorandum of the transaction. The respondents did not, however, in their plaint describe the entry in the book as a mortgage-deed or say that they were suing on its basis. What they said was, that the house had been mortgaged *barue bahi*. These words are not very precise and are not necessarily inconsistent with the definite position subsequently taken up that the mortgage on which the suit was based was an oral one and that the entry in the book was merely a memorandum. There is, therefore, in our opinion, no force in the argument as to the cause of action having been changed, and we dismiss the appeal with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION NO. 370 OF 1922.

May 30, 1923.

Present :—Mr. Justice Macpherson.

EAST INDIAN RAILWAY COMPANY,
LIMITED—PETITIONERS

versus

MESSRS. GOPIRAM GOURISHANKAR—
OPPOSITE PARTY.

Railways Act (IX of 1860), ss. 72, 77—Carriage of goods—Goods consigned under Risk Note, Form B—Non-delivery—Suit for damages—Notice, whether necessary—Authority to sign Risk Note—Wilful neglect, proof of.

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The provisions of section 77 of the Railways Act apply to a suit to recover compensation for the non-delivery of goods consigned to a Railway Company for carriage.

East Indian Railway Company v. Kali Charan-Ram Prashad, 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106, dissented from.

Great Indian Peninsular Railway Company v. Jitan Ram-Nirmal Ram, 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442, followed. Under section 72 of the Railways Act a consignor of goods is bound by the provisions of a Risk Note signed by a person who actually delivered the goods to the Railway Company. [p. 644, col. 2.]

Where goods are consigned to a Railway Company for carriage under Risk Note, Form B, and the Company is sued for compensation for non-delivery of the goods, if the Company proves loss of the goods, the burden is on the plaintiff to establish that the loss was due either to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants. [p. 644, col. 2.]

Civil revision from a decision of the Small Cause Court Judge, Gaya, dated the 11th July 1922.

Mr. N. C. Sinha, for the Petitioners.

Messrs. S. Dyal and B. K. Prashad, for the Opposite Party.

JUDGMENT.—In this case interference is sought by the East Indian Railway Company under section 25 of the Provincial Small Cause Courts Act with the decision, dated the 11th July 1922, of the Small Cause Court of Gaya, whereby that Court decreed the opposite party's suit against the petitioner Company for Rs. 541-8, being the value of loss of one bale of cloth Rs. 399-1, profit thereon, Rs. 25 n interest at 12 per cent, Rs. 41, with costs Rs. 64-6, or a total of Rs. 529-7, on the ground that it is not according to law.

The opposite party consigned by rail from Ahmadabad to Gaya thirteen bales of cloth of which twelve bales were delivered to the plaintiff by the petitioner Company at their Station at Gaya on the 30th April 1921, and one bale has never been delivered. The suit was framed as one for non-delivery of that bale, which was alleged to be due to the unlawful negligence of the Bombay Baroda and South Indian Railway, ^{and} _{or} the East Indian Railway or their servants or theft by their servants; advisedly, loss was not alleged and no evidence of negligence or theft was adduced. The defence was, first, that the claim was barred by

sections 77, 80 and 140 of the Railways Act; secondly, that the bale in suit was lost, and that the loss was not due to the wilful negligence of or theft by the servants of the Company and, finally, that the consignment was booked under Risk Note, Form B, on condition of a specially reduced rate of freight so that the Railway Company was not liable for loss or non-delivery. The suit was decreed against the petitioner Company only.

The Judge, relying upon a dictum in *East Indian Railway Company v. Kali Charan-Ram Prashad* (1), held that no notice under section 77 of the Railways Act was necessary, a suit on the ground of non-delivery only not being barred by that provision. The evidence on behalf of the East Indian Railway Company was that the full consignment started safely from Moghul Sarai by night train and that when the train arrived at Majhwar, the next stop, the Guard found the doors of the wagon open, the seal thereon broken and some goods missing therefrom, including the bale not delivered to the opposite party, but the Judge held that the defendants would not escape liability even if this story be accepted because the wagon was not locked and the seal put on it was a nominal one and did not secure the safety of the goods. He found accordingly that the petitioner Company "did not exercise due diligence which can be expected from a carrier for the safe arrival of goods at their destination, it being proved that the wagons were not locked; further that the Risk Note had not been properly proved since it had been shown 'that the man who signed it had any authority from the consignor to execute such a document on his behalf,' and finally that the loss contemplated by the Risk Note had not been established by the evidence and there was reason to think that the loss was caused by negligence of the Railway servants."

The first contention on behalf of the petitioner Company is that the provisions of section 77 of the Railways Act apply and render inadmissible in law the claim to compensation for the loss of the bale since it was not preferred in writing to the

(1) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.

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Railway Administration within the period allowed by the section. In view of the decision of a Bench of this Court in *Great Indian Peninsular Railway Company v. Jitan Ram-Nirmal Ram* (2), Mr. Shiveshwar Dayal on behalf of the opposite party concedes; that this contention of law cannot here be successfully met.

This would appear to conclude the matter, but Mr. Shiveshwar Dayal urges that the decree under examination should not be set aside since two important considerations which he advances, should be regarded as disentitling the petitioner Company to relief. The first of these is the delay, extending from the 11th July till the 24th November, which occurred in filing the application for revision. Now, in this regard each case must be examined with reference to its own circumstances, and as it appears that in the present instance nearly eight weeks were, owing to defective arrangements in the Copying Department at Gaya, taken up in securing a copy of the judgment and decree, and as even an appeal, if it had lain, would have been in time, the delay is to my mind certainly not so culpable that on that account the Court should in the exercise of its discretion refrain from interference when there has been a serious error of law.

In the second place, it is contended that this Court should not interfere with a decision of the Small Cause Court when the defence is, as in this instance, only a technical one: the petitioner Company, it is argued, have no grievance on the merits inasmuch as it has been found that the loss of one bale was due to the wilful negligence of their servants.

Now the judgment is obscure in places and generally does not inspire confidence; in particular, it is impossible not to feel that the finding is distorted by a further important error of law and by misappreciation of the evidence arising from the learned Judge's misapprehension already referred to of the legal significance of the term 'loss.' In the first place, it is not definitely found that the defence story as to the time and manner of loss of the

bale is not true, as indeed it seems to be. Again, the finding that the Risk Note has not been properly proved, since it has not been shown "that the man who signed it had any authority from the consignor to execute such a document on his behalf" is palpably a mistake of law since under section 72 it is sufficient if the person who delivers the goods to the Railway Administration, signs the Risk Note. Not only did the *karpardaz* of the consignor who delivered the goods sign the Risk Note, but he did so in circumstances which would imply his principal's authority to do so. There can be no doubt, therefore, that the Risk Note is valid against the opposite party.

There remains only the question of wilful negligence. Now, the Risk Note being valid and the petitioner Company having proved loss, the burden was on the opposite party to establish that the loss of the package was due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, and if the loss was due to robbery from a running train, it is specifically excluded from the category of wilful neglect. The findings which have been already quoted fall far short of wilful neglect and indeed as the opposite party offered no evidence on the point a finding even of neglect could only be based on the admission that the Railway wagon was not locked. Such a finding would not take the case out of the Risk Note and, moreover, as the wagon was sealed an inference even of neglect would not be safe in the absence of evidence of the ordinary course of business in such matters. As the opposite party has failed altogether to prove wilful neglect on the part of the petitioner Company or its servants the suit in view of the Risk Note also falls on the merits.

But, even if the case on the merits had been considerably more favourable to the opposite party, this Court would have felt constrained to give full effect to section 77 of the Railways Act, in a case where the opposite party deliberately attempted to evade its operation.

The application is allowed with costs. The decree of the Small Cause Court is set aside and the suit is dismissed with costs.

Z. K.

Application allowed.

(2) 72 Ind. Cas. 440; 4 P. L. T. 1731 (1923) Pat. 824; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442.

GANGA PURI v. MOHAN LAL.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 527 OF 1919.

February 27, 1923.

Present:—Mr. Justice LeRossignol and
Mr. Justice Martineau.Baba GANGA PURI, Chela, AND LEGAL
REPRESENTATIVE OF BHAWANI GIR,
DECEASED—PLAINTIFF—APPELLANT

versus

MOHAN LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 92—
Suit by trustee to enforce his right to possession of
trust properties, nature of—Suit against trespasser
—Sanction of Collector, whether necessary.*

A suit by a trustee to enforce his right as trustee to the possession of trust properties does not fall within the purview of section 92 of the Civil Procedure Code.

Budree Das Mukim v. Chooni Lal Johurry, 33 C. 789 at p. 808; 10 C. W. N. 581, relied on.

Section 92 of the Civil Procedure Code does not apply to a suit brought against trespassers.

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 13th December 1918.

Mr. M. S. Bhagat and Lala Amin Chand Mahta, for the Appellant.

Lala Tirath Ram, for the Respondents.

JUDGMENT.—The property in dispute in the present case was also the subject-matter of a previous suit which was brought by three barbers of Lahore on behalf of the barber community for the ejectment of Shiv Charan, who was the manager of the property. Shiv Charan died during the pendency of that suit, and his minor sons and widow were brought on the record as his representatives. The First Court decided that case in the plaintiffs' favour, but on appeal the Divisional Judge, Mr. Agnew, on the 18th February 1914 dismissed the suit, holding that the property was *wakf*, that Shiv Charan was a constructive trustee, and that under section 92 of the Civil Procedure Code, the suit was not maintainable without the permission of the Collector. The persons who had brought that suit and one other then applied to the Collector for permission to bring a suit, but they subsequently withdrew the application.

In the present case the defendants are the same persons who were impleaded as Shiv Charan's representatives in the

previous case, but the plaintiff is one Bhawani Gir, who alleges that after the death of Shiv Charan he was appointed by the brotherhood of the barbers of Lahore as *Mahant* of the institution to which the property is attached, that he is entitled to possession of the property, and that the defendants are trespassers.

The Subordinate Judge has held that the plaintiff, being a nominee of the barber community, can have no greater rights than the community itself on whose behalf the former suit was brought, and that as the former suit was continued against the present defendants after Shiv Charan's death, and it had been admitted in the application to the Collector that the defendants were *Pujaris* and representatives of Shiv Charan, the plaintiff cannot now treat them as trespassers. He has accordingly dismissed the suit as being, like the former one, not maintainable without the Collector's permission. The plaintiff has appealed and the appeal must succeed.

The plaintiff is suing, not for the purpose of protecting the interests of the public, but in order to enforce his own right as a *Mahant* or trustee, and a suit of this nature does not fall within the purview of section 92 of the Civil Procedure Code, as was held by Woodroffe, J., in *Budree Das Mukim v. Chooni Lal Johurry* (1), where on page 808 the learned Judge said:—"In my opinion the present suit, so far as it is brought by the plaintiffs in their individual capacity as trustees to enforce their individual claim to be such trustees of the temple in suit, is not within the scope of the section. The public may be interested in seeing that their alleged appointees have the administration of this trust, but this right of the public and of the plaintiffs, *qua* members of that public, is not the same as the right of the plaintiffs considered not as members of the public, but as trustees suing to enforce their own personal right of management."

Further, it is admitted that section 92 of the Civil Procedure Code, does not apply to a suit brought against trespassers, as the plaintiff alleges the defendants to be, and we cannot agree with the lower Court that the plaintiff is in any way precluded

(1) 33 C. 789 at p. 808; 10 C. W. N. 581.

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from suing them as trespassers. In the first place, he was not a plaintiff in the former suit, nor did he join in making the application to the Collector, and, in the second place, the present defendants were impleaded in the former suit merely as the legal representatives of Shiv Charan and not in their personal capacities.

Mr. Agnew's judgment is no bar to the present suit, and we hold that the suit is not one to which section 92 of the Civil Procedure Code applies. We accordingly accept the appeal, set aside the decree of the lower Court, and remand the case to that Court under O. XLI, r. 23, Civil Procedure Code, for decision on the merits. The Court-fee paid on the memorandum of appeal will be refunded and other costs will be costs in the case.

Z. K.

*Appeal accepted.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 351 OF 1921.

March 20, 1923.

Present.—Mr. Justice Lindsay and
Mr. Justice Daniels.**RAGHUBIR SINGH AND ANOTHER—
DEFENDANTS—APPELLANTS***versus***JODHA SINGH AND ANOTHER—****PLAINTIFFS—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), O. XXI, r. 36—Pre-emption decree—Vendee not in possession of property—Payment of pre-emption money—Formal possession, whether necessary—Trusts Act (II of 1882), s. 82—Pre-emption decree—Pre-empted property under mortgage—Redemption with money paid by pre-emptor—Possession of vendee, nature of.

In a pre-emption suit, if the pre-empted property is in the possession of a mortgagee, the vendee being only the owner of the equity of redemption, it is not necessary for the pre-emptor, after he has paid the pre-emptive price, to apply for formal possession of the property. His title is complete on payment of the price. O. XXI, r. 36, Civil Procedure Code, has no application to such a case. [p. 647, col. 2.]

Sita Ram Pande v. Madho Pande, 23 Ind. Cas 876; 12 A.L. J. 521, relied on.

Where in the case of pre-emption of sale of property subject to a mortgage, the vendee, on being paid the pre-emption money, redeems the mortgage and takes possession of the property, he will, on the analogy of section 82 of the Trusts Act, be considered to hold the property on behalf of the pre-emptor. [p. 647, col. 2.]

Second appeal from a decree of the District Judge, Farrukhabad, dated the 10th December 1920.

Dr. S. N. Sen and Mr. U. S. Bajpai, for the Appellants.

Mr. Gulzari Lal, for the Respondents.

JUDGMENT.—This is an appeal in a suit for possession brought by the plaintiffs-respondents, Jodha Singh and Dilla Singh. The land in suit originally belonged to one Murat Singh who mortgaged it for Rs. 300 with possession on 19th May 1891 to one Ganga Ram. Ganga Ram remained in possession as mortgagee till the year 1918 but the rights of the mortgagor were the subject of various transfers which it will be necessary to specify.

On 12th December 1903 Murat Singh sold his equity of redemption to the defendants-appellants, Raghubir Singh and Gajraj Singh, for a sum of Rs. 1,300. Rs. 300 of this amount was left with the vendees for payment to the mortgagee, Ganga Ram, to pay off his mortgage. One Bharat Singh instituted a pre-emption suit in respect of this sale of the equity of redemption and obtained a decree against the defendants on 25th January 1905. Under this decree the whole of the purchase-money, Rs. 1,300, was made payable to the defendants though Rs. 300 of it was really for payment to the mortgagee, Ganga Ram. Bharat Singh, the successful pre-emptor, deposited the entire amount in Court within the time allowed by the decree and the amount was withdrawn by the defendants. As, however, the defendants were not in possession of the property Bharat Singh did not think it necessary to take out any formal execution of his decree. The contention of the defendants is that Bharat Singh and his successors-in-interest have lost their entire interest in the property by not doing so.

In order to pay the amount of Rs. 1,300 under the pre-emption decree Bharat Singh executed a mortgage in favour of one Meharban Singh. The present plaintiffs insti-

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tuted a pre-emption or pre-mortgage suit on the basis of this mortgage, obtained a decree and stepped into the shoes of Meharban Singh. This was on 6th June 1906. They then sued on the mortgage, brought the equity of redemption to sale and purchased it themselves. They have thus succeeded to the rights of Bharat Singh. The mortgage suit was brought in the year 1917 but the plaintiffs did not get formal possession of the property till February 1919. In the meantime, on January 1918, the defendants had paid off the three hundred rupees due to Ganga Ram under his mortgage and have recovered possession of the property. The plaintiffs on their purchase being completed brought the present suit for possession against them.

The suit was dismissed by the learned Subordinate Judge on the ground that Bharat Singh not having executed his pre-emption decree the defendants had been in adverse possession of the equity of redemption for over twelve years. The learned District Judge pointed out that there could be no adverse possession of the equity of redemption under the circumstances and that as the plaintiffs or their predecessor, Bharat Singh, could not have got possession while Ganga Ram's mortgage subsisted it was not necessary for them to go through the formality of executing the pre-emption decree. He accordingly decreed the suit. The defendants appeal to this Court and put forward the same contentions which they advanced in the Court below. They do not indeed now contend that there was any adverse possession of the equity of redemption by them against Bharat Singh. Their contention is that it was absolutely necessary for Bharat Singh to put his pre-emption decree into execution and that as he failed to do so his right in the property absolutely ceased at the conclusion of twelve years from the date of his decree.

The respondents rely, among other grounds, on the provisions of O. XX, r. 14, which prescribes the form of pre-emption decree. That rule lays down that the decree shall direct that on payment into Court of the purchase price the defendants shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of the payment;

It is quite clear that in this case no delivery of possession could take place as the defendants themselves were not in possession. Under the rule, therefore, it must be held that when the plaintiff had complied with the terms of the decree his title was complete. The same point was considered by a learned Judge of this Court in the case of *Sita Ram Pande v. Madho Pande* (1). That was also a case in which no possession could be delivered the pre-emptor being himself in possession in another capacity. The argument was put forward that unless he applied for formal delivery of possession under O. XXI, r. 36, he obtained no right as proprietor in virtue of his decree. That contention was, we think, rightly repelled by the Court. In this case if, after complying with the condition of the pre-emption decree, Bharat Singh had proceeded to redeem Ganga Ram's mortgage it is clear that his right to do so could not have been disputed. The reason why he did not do so almost certainly was that the portion of the sale price which was specially ear-marked for re-payment of this mortgage had been paid for by him to the defendants in the pre-emption suit.

The rights of the case are entirely with the plaintiffs. The defendants having obtained the full price for the property are now seeking to retain the property as well. The very money with which they redeemed Ganga Ram's mortgage was money left with them for the purpose of redeeming that mortgage. Under these circumstances, it is reasonable to hold that from the time they redeemed the mortgage they have held possession on behalf of the plaintiffs on the analogy of section 82 of the Indian Trusts Act. On both these grounds we affirm the decision of the Court below and dismiss the appeal with costs including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed.*
(1) 23 Ind. Cas. 876; 12 A. L. J. 521.

FIRM GOBIND SAHAI-RUP LAL, v. GURDAS MAL, BHAGWATI SHUKUL, v. RAM JATAN TEWARI.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 438 OF 1922.

January 24, 1923.

Present:—Mr. Justice Campbell.

THE FIRM GOBIND SAHAI-RUP LAL,
THROUGH ITS MANAGER RUP LAL—
PLAINTIFF—PETITIONER

versus

GURDAS MAL, AND OTHERS—DEFENDANTS
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 148—
Ex parte decree set aside conditionally on payment
of costs by certain date—Failure to make payment
within time—Extension of time—Power of Court.*

Where an application to set aside a decree *ex parte* is allowed conditionally on the applicant paying a certain sum by a certain date to the plaintiff as damages and payment is not made by due date, the Court has jurisdiction under section 148 of the Civil Procedure Code to extend the time fixed.

Jagarnath Sahi v. Kamta Prashad, 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38, relied on.

Petition, under section 44 Act IX of 1919, for revision of an order of the Senior Subordinate Judge, Gujrat, dated the 8th May 1922, granting application for cancellation of the *ex parte* decree.

Lale Ram Chand Manchanda, for the Petitioner.

Mr. Anant Ram, for the Respondent.

JUDGMENT.—The only authority on the point at issue which is cited before me is against the petitioners. This is *Jagarnath Sahi v. Kamta Prashad* (1) in which a Division Bench ruled that when an application to set aside a decree *ex parte* has been allowed conditionally on the applicant paying a certain sum by a certain date to the plaintiff as damages and payment is not made by due date, the Court has jurisdiction, under section 148, Code of Civil Procedure, to extend the time fixed.

I agree with this interpretation of the law and reject the petition with costs.

Z. K.

Petition rejected.

(1) 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 85 OF 192

November 29, 1922.

Present:—Sir Grimwood Mears, Kt.,
Chief Justice, and Mr. Justice Stuart.

BHAGWATI SHUKUL—PLAINTIFF—
APPELLANT

versus

RAM JATAN TEWARI AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Marriage of daughter—
Gift to son-in-law—Legal necessity.*

It is the duty of a Hindu mother to provide husband for her daughter and for this purpose she has power to make a gift of property to her son-in-law whenever it is necessary.

No hard and fast rule can be laid down as to extent of a Hindu widow's right of alienation in this respect. If the property is of large value, probably the alienation of more than a quarter would not be upheld. But where the property is very small in value and other circumstances, such as, blindness of the girl, also require it the alienation of the whole even will be a sheer legal necessity. [p. 649, col. 2.]

Churaman Sahu v. Gopi Sahu, 1 Ind. Cas. 945; 37 C. 13 C. W. N. 994; 10 C. L. J. 545 and *Ramasami Ayyar v. Vengidusami Ayyar*, 22 M. 11; 8 M. L. J. 170; 8 Ind. Dec. (N.S.) 79, referred to.

Letters Patent Appeal from the following judgment of Mr. Justice Ryves, confirming a decree of the Subordinate Judge, Basti, who reversed a decree of the Munsif:—

“Permanand and Krishnanand were two brothers separate in estate. Krishnanand died long ago leaving him surviving a widow, Musammal Mohna, whose daughter was married to Ram Jatan Tewari, defendant No. 1. It was said by the defence that they had a son, Ram Man Tewari, who was defendant No. 2, but both the Courts have found that Ram Man was not the son of Musammal Oreha so he can be disregarded. The plaintiff is the grandson of Permanand. The property in suit belonged to Krishnanand. On his death his widow, Musammal Mohna, became the heir. She made a deed of gift or *shankalapnama*, dated the 23rd of August 1904, in favour of Ram Jatan by which she transferred to him the entire property which she inherited from her husband with full proprietary rights. Musammal Mohna Devi died in September 1908. The suit was brought

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by Bhagwati Shukul in 1918 to recover possession of the whole of this property on the ground that the gift by *Musammât Mohna* to her son-in-law was invalid after her life.

"Various defences were raised but the only one that need be considered for the purposes of this appeal was that the gift, under the circumstances, was not justified.

"The Trial Court found that *Musammât Oreha* was blind and a cripple and that in order to get her married it was necessary to supply her with a handsome dowry. It held, therefore, that there was legal necessity for the gift but only to the extent of one-third of the value of the property. It, therefore, decreed the plaintiff's suit to that extent. Both parties appealed. The lower Appellate Court has allowed the appeal of the defendants and has dismissed the suit altogether. The plaintiff comes here in second appeal.

"Three points are taken. First, that the gift to the daughter on the occasion of her marriage is justified provided that it is reasonable in amount and does not exceed, at the most, one-quarter of the property; but that there is no justification for a gift to the bridegroom. Secondly, that, under the terms of the deed itself, it must be held that a portion, at any rate, was reserved for the use of *Musammât Mohna* herself and that the entire estate was not, therefore, really given away, and, thirdly, that if the mother brought about an unsuitable match of her blind and cripple daughter, that that would be paritically equivalent to selling the daughter in marriage, and, as such, would be opposed to public policy. On this last point I see no indication that this line was taken in either of the Courts below and certainly there are no findings arrived at on which it can be supported. It is found that *Musammât Oreha* was blind and a cripple. It is also found that her husband had already been married to another wife but the crucial finding of the Court below, it seems to me, is, that it being the duty of the mother to provide a husband for her daughter, the alienation was made for "a sheer legal necessity." Stress was laid on the case of *Churaman Sahu v. Gopi Sahu* (1). That was a case of a gift by a

widow of a portion of immoveable property of her husband to her daughter on the occasion of her *gauna* ceremony. This and some other cases that have been quoted all refer to gifts made to the daughter. In the case of *Ramasami Ayyar v. Vengidusami Ayyar* (2), it was held that a gift made to a son-in-law, under similar circumstances of a portion of the property, was binding on the reversioners. In the case of *Churaman Sahu v. Gopi Sahu* (1), reference is made to an old case decided by their Lordships of the Privy Council (*vide* page 7). There it is stated that Lord Gifford laid down "that a Hindu widow" had, "for certain purposes a clear authority to dispose of her husband's property, and might do it for religious purposes, including dowry to a daughter" but that it was impossible to define the extent and limit of her power of disposing it but "it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition." Now, although the general rule seems to be that a gift to the daughter shall not exceed one-quarter, some commentators have held (see bottom of page 5 and top of page 6 of the Calcutta decision) "that the word 'quarter' is here used, not in its plain sense, but simply to enjoy in the allowance of as much as will suffice for the marriage of the sisters."

It seems to me that no hard and fast rule can be laid down. If the property is of large value, probably the alienation of more than a quarter would not be upheld. But where the property is very small in value,—here it is valued at Rs. 500 only—and where under the circumstances the marriage of the girl into a suitable Brahman family, having regard to her blindness and infirmity, necessitated the spending of the equivalent in value of that property, then in the words of the lower Court the alienation was "a sheer legal necessity."

The second point is based on some words in the deed of gift generally to the effect that the donee will look after and support the widow in her lifetime and perform her funeral ceremonies on her death. The property is given out and out to the son-

(1) 1 Ind. Cas. 945; 37 C. 1; 13 C.W.N. 994; 10 C.L.J. 545.

(2) 22 M. 113; 8 M. L. J. 170; 8 Ind. Dec. (N. S.) 79.

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in-law without any sort of reservation and there is no charge on it for her support. The learned Judge of the lower Appellate Court, who is certainly better able to appreciate the meaning of this document than I am, has come to the conclusion that the words in the deed which the learned Munsif read as a provision for maintenance in favour of *Musammât Mohna* were incapable of being interpreted in that way. It is perhaps significant to note that, although the widow died as long ago as 1908, the suit to set aside the gift was not brought till 10 years afterwards. In my opinion the finding of fact arrived at, namely, that in order to get the girl married, it was "a sheer necessity" for *Musammât Mohna* to provide a dowry of Rs. 500 or its equivalent by the gift of the property, concludes this appeal. I, therefore, dismiss it with costs.

His appeal was dismissed under O. XLI, r. 11, Civil Procedure Code."

Mr. *Harmandan Prasad*, for the Appellant.

JUDGMENT.—We are of opinion that the learned Judge decided this case rightly. We, therefore, dismiss the appeal.

M. D. J. & N. H. *Appeal dismissed.*

LAEORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 2607 OF 1922.

March 13, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Ffiorde.

Musammât CHANDO AND ANOTHER—
DEFENDANTS—APPELLANTS
versus

MIRAN BAKHSH AND OTHERS—
PLAINTIFFS MAULA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (4)—Order of remand involving question of custom—Appeal, whether lies.

There can be no appeal from an order of remand passed under O. XLI, r. 23, of the Civil Procedure Code where the question involved is one of custom. [p. 651, col. 1.]

Sawan Singh v. Mothu, 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914, followed.

Umri v. Shah Mohammad, 68 Ind. Cas. 849; 3 I. 218; 4 L. L. J. 359; (1922) A. I. R. (L.) 178 (F. B.), referred to.

Miscellaneous second appeal from an order of the District Judge, Ludhiana, dated the 8th July 1922, reversing that of the Munsif, First Class, Samrala, District Ludhiana, dated the 12th April 1922.

Messrs. J. M. Mackay and M. Obedulla for the Appellants.

Messrs. M. D. Malhotra and Gulzari, Lal Sahgal, for the Respondents.

JUDGMENT.—*Musammât Chando* is the widow of *Imam Bakhsh* who is *adna malik* of the land in suit. Plaintiffs-respondents are the *ala maliks*. *Musammât Chando* made a gift of a part of the land to her daughter *Musammât Kariman* and she sold another portion of the land to *Ghulam Qadir*. The plaintiffs brought two suits for a declaration that these alienations would not affect their rights as reversioners after the death of *Musammât Chando*. The First Court dismissed the suits holding that the *ala maliks* had no *locus standi* to sue. The lower Appellate Court held that as the land would revert to the *ala maliks* on the extinction of the line of the *adna malik*, therefore, the *ala maliks* had by custom a right to contest the alienations. It, therefore, accepted the appeals and remanded the cases to the lower Court for re-decision on other points.

One point which was raised before the District Judge was that the suits were barred by time. The learned District Judge has not discussed this point, but has merely stated that both the suits are within time. It is admitted before us that the suit regarding the sale which took place in 1919 is within time, but it was contended that the suit as regards the gift having been brought more than six years after it was made is barred by time under Art. 120 of the Limitation Act. Now, if the learned District Judge's decision is correct, that the plaintiffs are the persons entitled to the possession of the land after the death of *Musammât Chando*, the limitation for the suits is that provided by Art. 125 of the Limitation Act. If this Article is applicable to the suit as regards the gift is also within

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time. The decision of the learned District Judge is that by custom the plaintiffs have *locus standi* to sue, and it has been objected on behalf of the respondents that, as the question is one of custom, and the appellants have not obtained a certificate from the lower Appellate Court, no appeal is competent. It was held by a Division Bench of the Chief Court in the case reported as *Sawan Singh v. Mothu* (1), that there can be no appeal from an order of remand under O. XXI, r. 23, of the Code of Civil Procedure where the question involved is one of custom. The *ratio decidendi* there was that as the appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under sub-section (3) of section 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the Appellate Court. Having regard to that decision the present appeals are not competent. The question of custom can no doubt be agitated in second appeal from the final decree if a certificate is obtained. The case reported as *Sawan Singh v. Mothu* (1) was considered by a Full Bench of this Court in the case of *Umri v. Shah Mohammad* (2). Two of the Judges of the Full Bench differed from the view expressed in *Sawan Singh v. Mothu* (1), but the decision of the Full Bench proceeded on other grounds and *Sawan Singh v. Mothu* (1) was not overruled.

We, therefore, follow it and dismiss the appeals with costs.

Z. K.

Appeals dismissed.

(1). 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914.

(2) 68 Ind. Cas. 849; 3 L. 218; 4 L. L. J. 359; (1922) A. I. R. (L) 178 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1732 & 1733
OF 1921.

November 13, 1922.

Present.—Mr. Justice Stuart and
Mr. Justice Ryves.

KUMAR SAINTHWAR—DEFENDANT—
APPELLANT
versus

BISHUN MOHAN SAHAI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Occupancy rights, mortgage of—Relinquishment in favour of landlord—Redemption.

Where an occupancy tenant relinquishes his holding in favour of the *zemindar*, the *zemindar* becomes the transferee of any mortgagor's right, which might have been created on it and is entitled to redeem the mortgage. [p. 652, col. 1.]

Second appeal from the decision of the District Judge, Gorakhpur.

Mr. Dang, for the Appellant.

Mr. Shankar Saran, for the Respondents.

JUDGMENT.—Bodhai, who is an occupancy tenant, mortgaged his occupancy holding for Rs. 99, in favour of one Bachchan Saithwar, on the 31st March 1896. On the 10th June 1922 Bodhai relinquished his holding in favour of the *zemindars*-respondents. The *zemindars* then sued to eject the mortgagees, and, although they got a decree, failed to execute it, with the result that the mortgagees remained in possession.

The *zemindars* then brought a suit to redeem the mortgage and they got a decree, the Courts below allowing them to redeem the mortgage on payment of Rs. 523 within the time stated in the decree of the Courts below.

The mortgagees appeal. Three points have been taken.

(1) That the relinquishment of Bodhai was in favour only of some of the *zemindars* of the village and was not a complete relinquishment. This point was not taken in the written statement. No issue was raised upon it and, of course, no evidence was led on the subject. It is taken for the first time in appeal and there are no materials on which it could be disposed of in the way in which the appellant wishes. We do not think the Court below ought (to have allowed it?) to be raised for the first time in appeal. We see, how-

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ever, no reason to differ from the Court below in its conclusion on the point.

The next point is to the effect that the *zemindars* are not entitled to redeem this mortgage. It is admitted that the mortgage is still in existence; therefore, there must be somebody who is entitled to redeem it. It has been held by this Court that in a case of this kind where an occupancy tenant relinquishes his holding in favour of the *zemindar*, the *zemindar* becomes the transferee of any mortgagor's right, which might have been created on it. The *zemindar*, therefore, is entitled to redeem.

The last point taken is that the amount fixed by the Court below should have been Rs. 599 and not Rs. 523. This argument is based on the assumption that a particular compromise was come to between the parties in a former litigation in which the amount was fixed at Rs. 599. The Court below has found that that compromise has nothing to do with the present case.

Under the circumstances, none of these pleas raised has any force.

The result is the appeal fails and is dismissed with costs.

M. D. J.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 875 OF 1921.

February 8, 1923.

Present:—Mr. Justice Abdul Raouf and Mr. Justice Campbell.

DAVID SUTHERLAND CLARK—

PLAINTIFF—APPELLANT

versus

MRS. ROSE GRIMSHAW—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 25 (3)—Stamp Act (II of 1899), s. 2 (5), Sch. I, Art. 15—Written promise to pay barred debt, requisites of—Promise, whether bond.

A document sufficiently complies with the provisions of section 25 (3) of the Contract Act, if it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a promise. [p. 654, col. 1.]

Appa Rao v. Suryaprahasa Rao, 23 M. 941 9 M. L. J. 330; 8 Ind. Dec. (N. S.) 459, relied on.

A written promise to pay a barred debt is not a bond within the meaning of the Stamp Act and is not required by any of the provisions of the Act to be stamped. [p. 653, col. 2.]

Defendant pleaded in answer to a suit on a pro-note that the suit was barred by time. Plaintiff produced certain letters written by the defendant containing a clear promise to pay the debt. The suit was within limitation from the date of these letters, although the debt had become barred before the letters were written:

Held, that having regard to the provisions of section 25 (3) of the Contract Act the suit must be held to be within limitation. [p. 654, col. 1.]

Second appeal from the decree of the District Judge, Lahore, dated 4th January 1921, reversing that of the Subordinate Judge, First Class, Lahore, dated 17th May 1920.

Mr. Des Raj Sawhney, for the Appellant.

Bakhshi Tek Chand, for the Respondent.

JUDGMENT.—This second appeal has arisen out of a suit for the recovery of Rs. 3,000 on a pro-note. The following relevant facts may be stated to disclose the nature of the question that requires decision in this appeal:—

The plaintiff, Mr. David Sutherland Clark, lent Rs. 4,200 to one Mr. W. H. E. Fellows under a pro-note dated the 11th of October 1901. Out of this amount Mr. Fellows paid Rs. 1,200 on the 11th of October 1913. The balance due remained unpaid and Mr. Fellows died in 1918. By his Will he had appointed the defendant Mrs. Rose Grimshaw as his executrix. The defendant having obtained Probate of the Will succeeded to the assets of Mr. Fellows. On a demand being made by the plaintiff the defendant wrote to him on the 2nd December 1918 promising to pay the balance of the debt as soon as she could. Again, on the 20th December 1918, she wrote to Mr. O. M. Chiene, the Vakil of the plaintiff, again promising to pay the debt in the following words:—"I certainly intend to pay the debt claimed by your client Mr. D. S. Clark."

On the 20th January 1918 she wrote to Mr. Chiene asking him to send the promissory-note to Mr. A. G. Clark so that she might see it. A copy of the pro-note was sent for her perusal on receipt of which she again wrote to Mr. Chiene on the 26th of

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February 1919 in the following terms:—

"Sir,
Your letter dated 5th February received with copy of pro-note. I accept it to be a true copy and hope to pay the money very soon."

In spite of these promises she failed to pay the debt and the plaintiff had to institute a suit for the recovery thereof. He filed his plaint on the 15th of December 1919, and in paragraph 4 thereof he specifically stated that the defendant by her letters, dated the 2nd of December 1918, and the 20th of December 1918, had admitted the claim of the plaintiff. In paragraph 7 it was stated that in addition to the admissions contained in the letters dated the 2nd of December 1918, and the 20th of December 1918 the fact that Mr. Fellows had paid interest up to May 1918 brought the suit within limitation.

The suit was resisted mainly on the ground that it was barred by limitation. In a half-hearted way the defendant questioned the genuineness of the pro-note also. The Trial Court framed two issues, namely:

(1) Was the pro-note in suit executed by the late Mr. Fellows, and was it so executed for consideration?

(2) Is the suit within time?

In support of his claim the plaintiff filed a number of letters written to him by Mr. Fellows from time to time acknowledging the debt and paying interest from time to time. He went into the witness-box and proved all the facts stated in the plaint. Mr. Gillmore, Deputy Registrar of the Lahore High Court, was called as witness and he swore that the pro-note was in Mr. Fellow's handwriting. The defendant made a statement before the Court. On the pro-note for Rs. 4,200 being shown to her she admitted that the handwriting looked like that of Mr. Fellows, but she said that she did not admit the pro-note and demanded proof of its execution. On being questioned as to her statement contained in her letter dated the 20th December 1918 she said:—"In my letter of the 20th December 1918 I wrote to say I would pay the amount due on the pro-note, because Mr. Clark wrote to say he held a pro-note of Mr. Fellows. Mr. Grimshaw was ill and I, therefore, said I would pay. I again agreed to pay in my letter of the

26th February 1919, but took too much upon myself."

Taking the evidence into consideration, the Trial Court held that the pro-note was sufficiently proved and that as it was established by the evidence of Mr. Clark that he had received interest right up to May 1918, the suit was within time.

The defendant preferred an appeal to the lower Appellate Court with the result that the suit of the plaintiff was held to be barred by time. The lower Appellate Court hesitated to hold upon the evidence of Mr. Clark alone that interest had been paid by Mr. Fellows. The suit having been dismissed in appeal the plaintiff has preferred this second appeal through his Counsel, Mr. Des Raj Sawhney.

On the facts being stated by the learned Counsel it at once became clear to us that, having regard to the several promises made by the defendant in her letters to Mr. Clark and to his Vakil at Allahabad, the case came within the provisions of section 25 (3) of the Indian Contract Act. We, therefore, called upon Mr. Tek Chand, the learned Advocate for the defendant, to show cause why the appeal should not be decreed. With regard to the applicability of section 25 (3) of the Indian Contract Act the only argument addressed by the learned Advocate was that the letters containing the promise to pay ought to have been stamped as a bond and because they were not so stamped they were not admissible in evidence. This argument ignored the circumstance that the letters had been admitted in evidence in the First Court without any objection. We are not prepared to accept the contention that the letters did require a stamp under Act II of 1899; but, even if they did, the present contention cannot be raised in second appeal as section 36 of the Indian Stamp Act provides that "where an instrument has been admitted in evidence, such admission shall not... be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." The real ground, however, upon which we repel the objection taken by Mr. Tek Chand is that a written promise to pay a barred debt is not required by any of the provisions under the Indian Stamp Act to be stamped. We cannot hold that

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a promise to pay a barred debt is a bond within the meaning of the Indian Stamp Act. Without, therefore, going into the other matters discussed in the judgment of the lower Appellate Court we hold that the suit is within time with reference to the provisions of section 25 (3) of the Indian Contract Act. In this view we are supported by a decision of the Madras High Court in the case of *Appa Rao v. Suryaprakasa Rao* (1). The facts of that case and the rule laid down by the learned Judges are summed up in the head-note which runs thus:—

"In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said 'I shall send by the end of *Vysakha* month:'"

"Held, that the document contained the ingredients required by section 25, clause (3), of the Contract Act, and that the claim was not barred by limitation.

"A document sufficiently complies with section 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a 'promise'. To create a 'promise' within the meaning of the section it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted."

In that case the suit was not specially based on a new contract brought about by the promise to pay. It was a suit for rent which was resisted on the ground of limitation. The plaintiff had, however, filed a letter in which the defendant had made promise to send the rent due by the end of *Vysakha* month and the learned Judges held that the suit for the rent was within time. In the present case also the suit was based upon the promissory-note, but the

plaintiff had filed the letters containing the promise made by the defendant to pay the debt. The decision in the Madras case is a complete reply to the various arguments put forward on behalf of the respondent.

We, therefore, accept the appeal, set aside the decision of the lower Appellate Court and restore the decree passed by the Trial Court with costs.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 384 OF 1923

April 5, 1923.

Present:—Mr. Justice Walsh.

PUDAI SINGH—DEFENDANT—

APPELLANT

versus

BRIJ MANGAL AND OTHERS—PLAINTIFF
AND DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 63. (5)—*Secondary evidence*—"Seen," meaning of—*Illiterate witness*.

Under s. 63 (5) of the Evidence Act secondary evidence of the contents of a document must be given by a person who has seen the original. If a document is read over to a man because he cannot read it himself, and he signs it and signs it as containing what has been read over to him, he may be said within the meaning of section 63 of the Evidence Act to have "seen" the contents of the document. [p. 655; col. 2.]

Ghure v. Chattrapal Singh 23 Ind. Cas. 11; 12 A. L. J. 239, explained.

Second appeal against the decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Allahabad, dated the 7th of December 1922.

Mr. Haribans Sahai, for the Appellants.

JUDGMENT.—I have heard the whole of the evidence of the witness called by the plaintiff read. I find myself unable to say, either that his evidence was inadmissible or irrelevant or necessarily incredible. No body objected to its admissibility and, what is more, the defendants' Counsel cross-examined the man at some length. He was illiterate, but the story he told was that, being on business apparently as a debtor, at the

(1) 23 M. 94; 9 M. L. J. 330; 8 Ind. Dec. (N.).

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mortgagee's premises, he and certain other persons were asked to attest this document of which he gave a fair account. It may be a pure invention but that is the business of the Trial Court to decide. The Trial Court has decided that it is true. I do not know how else a litigant can give the contents of a missing document except by calling a witness who swears both to its existence and to its contents, and the fact that the man is unable to read is merely a fact which goes to the credibility of his oath that he remembers the transaction because there are many people in this world who are unable to read and yet have excellent and accurate memories about things which they are asked or expected to remember. This witness swore that he attested the document and remembered the transaction and the substantial and relevant contents of the document. I do not know whether I should have believed him or not, but both Courts have in fact believed his evidence. The defendants evidently thinking that there was a case to be answered took an entirely different line in the Court below to that which they take here, (what is called confession and avoidance) and endeavoured to prove by a carefully prepared stamped and respectable-looking document that the actual mortgage was entered into on a piece of paper which they swore to by one only of the members of the joint family and not by the two. Both Courts have rejected this story as a wicked fabrication; and not unnaturally, it frequently does and ought to do, a dishonest case in an attempt to prove a negative has strengthened the general view of the Courts in deciding a somewhat weak affirmative case produced by the plaintiff and there the matter ends. Both Courts have found the mortgage proved and it is sought to upset the decision on a so-called point of law. The point of law may be simply stated. Secondary evidence of the contents of a document must be given by a person who has seen the original. As Mr. Justice Tudball says in a case cited to me "seen" in this connection cannot mean the mere transmission of the object to the retina of the eye, because I can see a great many documents from a distance in this Court which I cannot profess to see in the sense of seeing their contents. I take it, if a document is read over to a

man, because he cannot read himself, and he thereupon signs it, and signs it as containing what has been read over to him, he may be said, within the meaning of section 63 of the Indian Evidence Act, to have seen the contents of that document. It is a question of the weight or credibility of his testimony and a question whether he comes within the section. The case cited to me which is said to support this appeal is a case which to my mind does not apply. In that case, *Ghure v. Chatrapal Singh* (1), Mr. Justice Tudball held that, under circumstances not unlike the present, statement of the marginal witness was not admissible. That clearly does not apply here because if there was any objection to the admissibility of this witness's evidence it has been entirely waived by the cross-examination of the witness which was indulged in by the defendants in order to break him down and get the Judge to disbelieve him and it is well established that the parties must be judged by the method with which they conduct their cases; but if it means that under no circumstances illiterate person can give the contents of a document which has been read out to him and the contents of which he professes to remember, I think, I should have great difficulty in following that decision. It seems to me it is a pure question of fact. The plaintiff has succeeded in satisfying both Courts. The appeal is dismissed.

M. A. A.

Appeal dismissed.

(1) 23 Ind. Cas. 11; 12 A. L. J. 239.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 58 OF 1920.

February 2, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

JAI GOPAL, SINGH—PLAINTIFF—

APPELLANT

versus

MUNA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Appeal barred by time—Cross-objections, whether can be heard.

RAM CHANDRA V. MUHAMMAD NUR.

An appeal must be properly before the Court in order that cross-objections may be heard.

Where an appeal is barred by time neither the appeal nor the cross-objections are properly before the Court, and the Court has no power to proceed with either.

Second appeal from the decree of the District Judge, Hissar, dated the 25th August 1919, varying that of the Subordinate Judge, First Class, Hissar, dated the 31st May 1918.

Lala Badri Das, R. B., for the Appellant.
Mr. C. H. Oertel, and Sardar Hazara Singh, for the Respondents.

JUDGMENT.—In this case the Court of first instance gave judgment for the plaintiff for possession of the land in dispute upon payment of a certain sum of money within a definite period. Against this judgment plaintiff appealed and defendant filed cross-objections.

It was held by the First Appellate Court on the preliminary point raised by defendant, that the appeal was late, but, proceeding to dispose of the case on the merits, on the assumption that such finding was wrong, the learned District Judge dismissed the plaintiff's appeal and allowed the defendants' cross-objections.

The matter now comes before us on second appeal by plaintiff. Counsel for the appellant now submits that his appeal in the Court of the District Judge was barred by time and should have been dismissed on that ground.

Respondents' Counsel admits that the appeal was late but urges that the cross-objections could nevertheless be heard and that the order of the District Judge is valid in so far as the cross-objections are concerned.

We cannot accept this view. It is clear that an appeal must be properly before the Court in order that cross-objections may be heard. As the appeal in question was admittedly barred by time, neither the appeal nor the cross-objections were properly before the Court, and accordingly the Court had no power to proceed with the matter. We must, therefore, accept the appeal and restore the decree of the Court of first instance. The plaintiff must deposit the price on or before the 31st

March 1923. In the event of default his suit shall stand dismissed with costs.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 380 OF 1922.

April 4, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAM CHANDRA AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Haji MUHAMMAD NUR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu law—Joint family—Simple money decree against father—Family property sold in execution—Sons, whether can recover their share.

Where in execution of a simple money decree against the father, the family property is sold by auction, the sons cannot recover their share of it unless they can show that the debt for which the property was sold was incurred for illegal or immoral purposes. [p. 657, col. 2.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 6981; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.) and *Chat Ram v. Ram Singh*, 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. J. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), distinguished.

Sripat Singh Dugar v. Prodyat Kumar Tagore, 39 Ind. Cas. 252; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.), *Girdharee Lall v. Kantoo Lall*, 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.), followed.

Second appeal from the decree of the District Judge, Benares, dated the 25th of January 1922.

Mr. *Gulzari Lal*, for the Appellants.

Dr. K. N. *Katju*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit brought by the two minor sons of Suraj Prasad for a declaration that they are the owners of a two-thirds share in the house in dispute which was sold

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at auction in execution of a simple money-decree against the father. It appears that Suraj Prasad executed a simple money-bond on the 6th May 1913 in order to pay interest on a previous mortgage-deed. A suit was brought by the obligee on the basis of the bond and a decree was obtained against Suraj Prasad. In execution of that decree the house in question was attached and was put up for sale and purchased by the decree-holder himself, namely, Pahlad Dass. In spite of getting a formal delivery of possession Pahlad Dass was dispossessed and he had to bring a separate suit for the possession of the house which was decreed in 1919. On the 2nd June 1919 Pahlad Dass executed a sale-deed of the property in question in favour of Janki Pande which sale was pre-empted by Haji Muhammad Nur, the present respondent. Haji Muhammad Nur obtained a pre-emption decree on the 27th March 1920 and has been in possession of the house since. The present suit was brought by the sons on the allegation that the debt, to recover which the property was sold at auction, was without any legal necessity and that in fact it was tainted with immorality.

The Court of first instance found that the house was the ancestral property of the family and that the sons not having been made a party to the previous litigation their interest in the house was not affected. It accordingly decreed the claim, exempting a two-thirds share of the house from the operation of the sale.

On appeal the learned District Judge finding that the debt had not been tainted with immorality, set aside the decree of the First Court and dismissed the suit *in toto*.

The plaintiffs come up in second appeal to this Court, and on their behalf it is contended, on the authority of the cases of *Sahu Ram Chandra v. Bhup Singh* (1), and

Chet Ram v. Ram Singh (2), that the son's interest cannot be affected by the previous sale proceedings, we are of opinion that neither of the two cases relied upon by the learned Counsel for the appellants supports that contention. It was remarked by their Lordships of the Privy Council in *Sripat Singh Dugar v. Pradyot Kumar Tagore* (3) that by the *Mitakshara* Law: "A judgment against the father of the family cannot be executed against the whole of the *Mitakshara* property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." In the present case the rights of third parties have come into existence inasmuch as the property was sold by public auction in execution of a simple money-decree passing not only the interest of the father but that of the whole family; and subsequently the auction-purchaser transferred it by sale which has been pre-empted by the principal respondent. The sons cannot now question the auction-sale unless they can show that the simple money-debt was illegal or tainted with immorality. We need only refer to an earlier pronouncement of their Lordships in the case of *Girdharee Lall v. Kantoo Lall* (4) that, "where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, the sons ... cannot recover that property unless they show that the debts were contracted for immoral purposes, and

(1) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(2) 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).

(3) 39 Ind. Cas. 252; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.).

(4) 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 561; 3 Sar. P. C. J. 380 (P. C.).

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that the purchasers had notice that they were so contracted."

The comment made on this pronouncement by Sir John Stanley in the case of *Chindradeo Singh v. Mata Prasad* (5), and recently approved by the Privy Council, was to the effect that this proposition deals with the cases in which ancestral property has passed out of the family and with no other cases. Even in the case of *Sahu Ram Chandra v. Bhup Singh* (1), their Lordships remarked,—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

We may also point out that in the case of *Chet Ram v. Ram Singh* (2) their Lordships laid special stress on the circumstances that that case was a singularly clear one because it was not affected by other considerations such as the property having been publicly sold and there were no rights of auction purchasers to be considered. We are supported in this view by the Bombay High Court in the case of *Hanmant Kashinath Joshi v. Ganesh Annaji Pujari* (6) and by the Oudh Judicial Commissioner's Court in the case of *Bharat Singh v. Sarsuti Singh* (7). The appeal accordingly fails and is hereby dismissed with costs including fees in this Court on the higher scale.

M. A. A.

Appeal dismissed.

(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(6) 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R.

435.

(7) 60 Ind. Cas. 137; 7 O. L. J. 459; 23 O. C.

244.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1478 OF 1922.

January 15, 1923.

Present:—Mr. Justice Moti Sagar.

LEKH RAJ AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

INDER MAL AND ANOTHER—DEFEND-
ANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 7—Pre-emption—Custom—Mohalla Bagrian of Kaithal in Karnal District—Proof of custom.

Where a town is divided into sub-divisions the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property in dispute is situate and the onus is not discharged by proof of the custom in the neighbouring sub-divisions. [p. 659, col. 1.]

Mela Ram v. Bando, 12 Ind. Cas. 859; 59 P. R. 1911; 198 P. W. R. 1911; 48 P. L. R. 1912, *Prabh Dial v. Bhikhoo Mal*, 61 Ind. Cas. 822; 3 L. L. J. 387, followed.

A judgment based upon a compromise or confession though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negatived. [p. 659, col. 2.]

Imperial Oil Soap and General Mills Co., Limited, Delhi v. M. Masbah-ud-din, 61 Ind. Cas. 325; 2 L. 83, followed.

The custom of pre-emption does not exist in Mohalla Bagrian of the town of Kaithal in the Karnal District. [p. 660, col. 1.]

Jai Devi v. Naubat Rai, 71 P. R. 1905; 129 P. L. R. 1905; 104 P. W. R. 1905, *Muhammad Husain v. Ghulam Muhammad*, 10 Ind. Cas. 240; 78 P. R. 1911; 138 P. L. R. 1911; 241 P. W. R. 1911, *Bul Chand v. Lekhu*, 12 Ind. Cas. 435; 139 P. W. R. 1911; 242 P. L. R. 1911, referred to.

Second appeal from the decree of the District Judge, Karnal, dated the 11th March 1922, reversing that of the Munsif, First Class, Kaithal, dated the 13th June 1921.

Mr. Shamair Chand, for the Appellants.

Lala Jagan Nath, for the Respondents.

JUDGMENT.—This is a second appeal against a decision of the District Judge of Karnal, dated the 11th March 1922, dismissing the plaintiffs' suit for possession by pre-emption in respect of a house situate in Mohalla Bagarian in the town of Kaithal in the Karnal District. The contentions raised by the defendant were that the house was not situate in Mohalla Bagarian, that the custom of pre-emption did not prevail in the Mohalla in question and that the price of Rs. 900 mentioned in the sale-deed was neither actually paid nor fixed in good faith. The Trial

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Court found against the defendant on all these points and decreed the plaintiffs' claim. On appeal the District Judge, however, was of opinion that the plaintiffs had failed to establish that the custom of pre-emption prevailed in *Mohalla* Bagarian, and he accordingly dismissed the suit. The plaintiffs have now come up in second appeal to this Court through Mr. Shamair Chand after obtaining a certificate from the District Judge, while Mr. Jagan Nath has appeared on behalf of the respondents.

The sale question for determination in this appeal is whether the custom of pre-emption prevails in the *Mohalla* of Kaithal where the house sold is situate. In support of the contention that the custom of pre-emption prevails in the *Mohalla* in question, the learned Counsel for the appellants relies upon two things. Firstly, reliance is placed upon certain published judgments of this Court from which it appears that the custom of pre-emption exists in some of the neighbouring sub-divisions. In one of the judgments there is an expression of opinion to the effect that pre-emption prevails very generally throughout the town of Kaithal. It is argued that, in these circumstances, the onus of proving the non-existence of the custom of pre-emption in this *Mohalla* is upon the defendant and that he has failed to discharge this onus. I am unable to agree in this contention. As held in *Mela Ram v. Bando* (1) a case which has been cited with approval in another recent case reported as *Prabh Dial v. Bhukhoo Mal* (2) it may now be taken as settled that where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property is situate and that the onus is not discharged by proof of the custom in the neighbouring sub-divisions. The two authorities, *Jai Devi v. Naubat Rai* (3) *Muhammad Husain v. Ghulam Muhammad* (4)

relating to *Mohalla* Tayyab and *Mohalla* Pansarian in the town of Kaithal, as also the sale-deed of 1883 relating to *Mohalla* Boran to which reference has been made in the course of arguments, are consequently not of any great help to the plaintiffs. As to the general prevalence of the custom of pre-emption in the town, reference may be made to *Bul Chand v. Lekhu* (5) in which it was found that the custom of pre-emption did not exist in *Mohalla* Marhat Khan, another sub-division of the same town. The observations made by the learned Judge in *Jai Devi v. Naubat Rai* (3) that pre-emption prevails very generally in the town are, therefore, not strictly in accordance with the facts.

Next, reliance has been placed on a decision by Lala Amrit Lal, Munsif, dated the 16th December 1913, in the case of *Durga Parshad v. Sita Ram* by which the claim of the plaintiff for possession of a house by pre-emption in this very *Mohalla* was decreed. It is argued that this is a very strong piece of evidence in favour of the plaintiffs and that it completely shifts the onus of proof on the defendants. A reference to the written statement filed by the defendants in that case, however, makes it quite clear that there was no contest between the parties as to the right of pre-emption, the vendee having admitted that the pre-emptor in that case was entitled to claim the house and it is clear, as laid down in *Imperial Oil Soap & General Mills Co., Limited, Delhi v. M. Misbah-ud-din* (6) that a judgment, based upon a compromise or confession though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negated.

The next piece of evidence upon which reliance has been placed is a judgment of Lala Achru Ram, dated the 9th October 1920, in the case of *Joti Ram v. Hisari*. This case also relates to *Mohalla* Bagarian, but it will be observed that the judgment in that case practically proceeds on the basis of the earlier judgment of 1913 in which the right of pre-emption was admitted.

(1) 12 Ind. Cas. 859; 59 P. R. 1911; 198 P. W. R. 1911; 48 P. L. R. 1912

(2) 61 Ind. Cas. 822; 3 L. L. J. 387.

(3) 71 P. R. 1905; 129 P. L. R. 1905; 104 P. W. R. 1905.

(4) 10 Ind. Cas. 240; 78 P. R. 1911; 138 P. L. R. 1911; 241 P. W. R. 1911.

(5) 12 Ind. Cas. 435; 139 P. W. R. 1911; 242 P. L. R. 1911.

(6) 61 Ind. Cas. 325; 2 L. 83.

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The defendant, on the other hand, has produced some evidence to show that many sales have taken place in this *Mohalla* without the exercise of the right of pre-emption. In these circumstances, I do not think that one or two solitary instances of the admission of the prevalence of the custom supported by a few instances in the neighbouring sub-divisions are sufficient to discharge the onus of proving the existence of the custom in *Mohalla Bagarian* which lay heavily upon the plaintiffs. In my opinion, the District Judge was right in holding that the plaintiffs had failed to establish the prevalence of the custom in this *Mohalla*, and I dismiss the appeal with costs.

Z. K.

*Appeal dismissed.***LAHORE HIGH COURT.**

CIVIL REVISION No. 721 OF 1921.

July 20, 1922.

Present.—Mr. Justice Martineau.

JAGAN NATH—PLAINTIFF—

PETITIONER

versus

ABDUL HAKIM AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 13—Ex parte decree, setting aside of—Mistake as to date of hearing.

A Court has no jurisdiction, apart from O. IX, r. 13 of the Civil Procedure Code, to set aside an *ex parte* decree made by itself. The mere fact that the Court thinks it possible that the defendant might have made a mistake about the date of hearing of the suit is not sufficient.

Civil revision from the District Judge, Gujranwala, dated the 20th June 1921.

Mr. B. N. Kapur, for the Petitioner.

JUDGMENT.—An *ex parte* decree was passed by the Subordinate Judge on the 4th August 1920. The next day the defendant Abdul Hakim applied to have it set aside on the ground that he had thought that the 7th August was the date fixed for the hearing. He produced only one witness, who did not prove that Abdul Hakim's allegation was correct, and the Subordinate Judge accordingly dismissed the applica-

tion. On appeal the District Judge set aside the *ex parte* decree on the ground that although the defendant had not been able to adduce any evidence in support of his allegation, his statement might be true. The plaintiff has applied for revision of the District Judge's order and I think his application must be accepted.

The defendant did not go into the witness-box to give evidence in support of the allegation made in his application, nor did he produce his Pleader, who had represented him at the previous hearing. He has also not explained how he happened to come to the Court on the 5th August (the date on which he filed his application) if he thought the case had been fixed for the 7th.

The District Judge was not competent to set aside the *ex parte* decree under O. IX r. 13, Civil Procedure Code, unless he was satisfied that the defendant was prevented by some sufficient cause from appearing on the 4th August. It is clear that he was not satisfied on the point, but only thought it possible that the defendant might have made a mistake about the date.

In *Gadi Neelaveni v. Marapparedtigari Narayana Reddi* (1) it has been held by a Full Bench of the Madras High Court that a Court has no power, apart from the provisions of O. IX, r. 13, to set aside an *ex parte* decree made by itself, there being no inherent power to do so under section 151.

I must, therefore, hold that the order of the District Judge was not one which he could legally pass, when the defendant had failed to satisfy him as to the truth of his allegation, and I accordingly accept this application, set aside the order of the District Judge, and restore the order of the Subordinate Judge dismissing the application for setting aside the *ex parte* decree. The petitioner will bear his own costs.

W. C. A. & N. H. *Application accepted.*

(1) 53 Ind. Cas. 847; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 696; (1920) M. W. N. 19; 43 M. 94 (F. B.).

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PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 116
OF 1921.

April 18, 1923.

Present:—MR. Justice Das and MR. Justice
Kulwant Sahay.Babu SARJUG PRASAD MISSIR AND
OTHERS—PLAINTIFFS—APPELLANTS
versusHARISHCHANDRA CHAUDHURI AND
OTHERS—DEFENDANTS—RESPONDENTS.*Mortgage—Mortgagees, prior and subsequent—
Decree obtained by prior mortgagee—Subsequent
mortgagee not made party, effect of—Release of
property from mortgage-lien, effect of—Apportion-
ment—Equity of redemption, whether extinguished
by mortgage decree.*

A decree obtained by a prior mortgagee on the basis of his mortgage is not binding on a subsequent mortgagee who was not made a party to the suit on the prior mortgage and does not affect his right of redemption. [p. 664, col. 1.]

A prior mortgagee cannot by releasing a portion of the mortgaged property from his mortgage-lien throw the entire burden of his mortgage-debt on the remaining portion so as to affect a subsequent mortgagee with whom that portion is mortgaged. [p. 664, col. 2.]

The equity of redemption in a mortgaged property is not extinguished merely by the passing of a decree on the mortgage. It subsists until the sale is held and the sale-proceeds are distributed. [p. 664, col. 2.]

Bibijan Bibi v. Sachi Bewah, 31 C. 863; 8 C. W. N. 684; *Muhammad Musa v. Babu Aidal Singh*, 65 Ind. Cas. 801; 3 P.L.T. 232; (1922) A. I. R. (Pat) 92, relied on.

Appeal from the decision of the District Judge, Darbhanga, dated the 28th February 1921.

Messrs. Hasan Imam, A. T. Sen and Harnarayan Pd. for the Appellants.

Messrs. C. C. Das and Shorosh Ch. Mitter, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the plaintiffs against the decree of the District Judge of Darbhanga, dated the 28th February 1921, whereby he declared that the plaintiffs were entitled to redeem the mortgage of the defendant first party on payment of the full amount of the decree passed in their favour on the basis of the mortgage of the 15th August 1884. The facts giving rise to the present litigation are as follows: One Sadiq Ali Khan had 5 annas 17 gandas 2 kawries share in Mauza Athar, Parganna Ahilwar, Tazul No. 335. On the 26th of July 1877 Sadiq Ali Khan executed a mort-

gage in favour of one Balbhadar Prashad Sahu and Matuk Lal Sahu for a sum of Rs. 49,970 mortgaging 4 annas share of the said Mauza Athar and other properties. A suit was brought on the basis of the said mortgage and an *ex parte* decree was passed on the 10th of September 1883. In execution of this decree it appears that Sir Lachhimeshar Singh, the Maharaja of Darbhanga, purchased the 4 annas of Mauza Athar. The exact date of this purchase does not appear from any document on the record.

On the 15th of August 1884 Sadiq Ali Khan executed another mortgage in favour of Awadh Narayan Chaudhuri, father of the defendants Nos. 1 and 2, for a sum of Rs. 2,000 and amongst other properties he mortgaged his entire share of 5 annas 17 gandas 2 kawries of Mouza Athar.

On the 21st March 1885 Sadiq Ali Khan executed a third mortgage in favour of Lalji Lal Sahu for a sum of Rs. 90,000 whereby he mortgaged 1 anna 17 gandas 2 kawries of Mauza Athar and a large number of other properties. On the 14th December 1885 a suit was brought to enforce this third mortgage and a decree was passed thereon on the 15th of February 1886 for a sum of Rs. 1,04,250.

On the 12th September 1898 the defendants Nos. 1 and 2, the sons of Awadh Narayan Chaudhuri, who was the mortgagee under the bond of the 15th of August 1884 brought Suit No. 77 of 1898 to enforce the above mortgage. In this suit Lalji Lal was not made a party, but the Maharaja of Darbhanga was made a party on the ground of his purchase of 4 annas share of Mauza Athar in execution of the decree of the first mortgagee. The defendants Nos. 1 and 2, that is, the plaintiffs to the Suit No. 77 of 1898, released the 4 annas share of Mauza Athar on the objection of the Maharaja of Darbhanga and they obtained an *ex parte* decree for the sale of 1 anna 17 gandas 2 kawries of Athar. This decree was passed on the 10th of May 1899 but it was subsequently set aside. A fresh decree for sale of 1 anna 17 gandas 2 kawries of Athar was passed in favour of the defendants Nos. 1 and 2 on the 2nd August 1905. There was an appeal to the Calcutta High Court

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against this decree, but the appeal was dismissed on the 1st of April 1908.

Lalji Lal took out several executions of his decree of the 15th February 1886. On the 16th of May 1892 a petition was filed on behalf of the defendants Nos. 1 and 2 in one of the execution cases of Lalji Lal which is Exhibit 7 in this case. The defendants Nos. 1 and 2 in this petition stated that amongst other properties, 1 anna 17 gandas 10 kawries share in Mauza Athar had been put up for sale in the execution case of Lalji Lal v. Sadiq Ali Khan, judgment-debtor. They submitted that the said share was first mortgaged to Lalji Lal and thereafter to them under a bond dated the 15th August 1884 without their having any knowledge of the mortgage of Lalji Lal. The defendants Nos. 1 and 2, therefore, prayed that at first other properties might be advertised for sale and that if the sale proceeds thereof proved insufficient to pay off the decretal amount, then the 1 anna 17 gandas 10 kawries of Athar might be sold. Along with this petition, they produced their own bond of 1884. Now, in this petition the defendants Nos. 1 and 2 wrongly stated that the mortgage of Lalji Lal was prior to their own mortgage. As a matter of fact, their mortgage was dated the 15th of August 1884 and Lalji Lal's mortgage was dated the 21st of March 1885. They filed this petition in the execution case of Lalji Lal and if they had taken the trouble to look into the records of that execution case, they would at once have come to know that the mortgage of Lalji Lal was subsequent to their own mortgage. However, it appears that at the time this petition of the 16th of May 1892 was filed, there was no execution case of Lalji Lal pending, it having been struck off on a prior date, and the order made by the Court upon this petition was: "The case referred to in this petition has already been struck off. Ordered: file this petition with the record and return the bond."

The present plaintiff's and one Babu Ram Prashad had a money-decree dated the 21st of February 1895 against Lalji Lal and in execution of this decree the plaintiffs and Ram Prashad attached the decree of Lalji Lal against Sadiq Ali Khan

dated the 15th February 1886 and on the 21st of April 1904 they purchased the said decree in execution of their own decree. On the 2nd April 1904 the plaintiffs and Ram Prashad, as purchasers of the decree of the 15th of February 1886, applied for execution of that decree and for sale of 1 anna 17 gandas 2 kawries of Athar and other properties. The sale was held on the 15th February 1907 and the plaintiffs became the purchaser of the said 1 anna 17 gandas 2 kawries of Athar. By a private partition between the plaintiffs and Ram Prasad, the whole of this share has been allotted to the plaintiffs.

The defendants Nos. 1 and 2 took out execution of their decree of the 2nd of August 1905 and attempted to sell the 1 anna 17 gandas 2 kawries of Athar which had been purchased by the plaintiffs and this led to the institution of the present suit, wherein the plaintiffs prayed for a declaration that they were not bound by the bond of the 15th of August 1884 and the decree of 2nd August 1905 obtained by the defendants Nos. 1 and 2; and that the said bond and decree were null and void as against them. They prayed in the alternative that if the Court found the plaintiffs to be liable under the bond of the 15th August 1884 it might be held that the plaintiffs were entitled to redeem the said mortgage as against the defendants and they prayed that, having regard to the fact that the defendants Nos. 1 and 2 had released 4 annas share of Mauza Athar from their mortgage, lien in favour of the Maharaja of Darbhanga, the plaintiffs were entitled to redeem the 1 anna 17 gandas 2 kawries share of the village on payment of the proportionate amount of the mortgage-money.

The defendants Nos. 1 and 2 filed a written statement alleging *inter alia* that they had no notice of the mortgage of the 21st of March 1885 in favour of Lalji Lal; that as regards the 4 annas share of Athar released by them in favour of the Maharaja of Darbhanga, the fact was that the said Maharaja was the first mortgagee in respect of the said 4 annas share; and that the said Maharaja purchased the said 4 annas share in execution of his decree upon the mortgage and, therefore, they had no right to sell

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the said 4 annas share in execution of their own decree. They further alleged that as they were prior mortgagees, the plaintiffs had only the right to redeem.

The learned District Judge has held that the defendants had no knowledge of the mortgage-bond of the 21st March 1885 in favour of Lalji Lal at the time they instituted their suit on the basis of their bond of the 15th of August 1884 and that, therefore, the decree on the basis of the latter bond was binding upon the plaintiffs and that it was a valid decree. He further held that the effect of the defendants not making plaintiffs partites in their suit was that the plaintiffs' right of redemption is still in existence. He also held that the plaintiffs could redeem only on payment of the full amount of the sum now due under the decree of the defendants Nos. 1 and 2, and he has accordingly made a decree to that effect.

The plaintiffs prefer this appeal and the substantial questions raised by the learned Counsel on their behalf are that the learned District Judge was wrong in holding that the plaintiffs were bound to pay the entire amount due under the decree of the defendants Nos. 1 and 2 in order to redeem the 1 anna 17 *gandas* 2 *kawries* share of Athar purchased by them; and that he was further wrong in holding that the defendants Nos. 1 and 2 had no knowledge of the mortgage of Lalji Lal. In my opinion the grounds taken by the learned Counsel are well founded and ought to prevail.

As regards the knowledge of the defendants Nos. 1 and 2, the plaintiffs produced a copy of the petition filed on behalf of the defendants Nos. 1 and 2 in the execution case of Lalji Lal on the 16th of May 1892 referred to above which has been marked as Exhibit 7 in this case. The learned Judge has held that the petition has not been properly proved and the reasons given by him are that no proper attempt was made to get the original thereof, that it has not been shown that the petition was a *bona fide* petition, and that the petition makes an incorrect statement of fact inasmuch as it alleges that the mortgage of the defendants Nos. 1 and 2 was subsequent to that of Lalji Lal's mortgage. Now the plaintiffs filed the certified copy before the District Judge

and asked him to send for the original thereof from the record-room. The petition did not give the number of the case in which it was filed and the plaintiffs, who were not parties to the execution case in which it was filed, were not in a position to give further details as regards the record in which it was to be found. They did all they could, namely, to produce the certified copy and to ask the Court to send for the original thereof. The learned Judge made a requisition for the original, but the requisition was not complied with on the ground that the date of disposal of the case was not given in the copy of the petition and that, on looking into the index of the year 1892, no number of the execution case in which it was filed, was to be found. For this the plaintiffs cannot be found fault with. They were not in a position to give further details than what was available to them from the certified copy and the evidence of the plaintiffs' witnesses No. 1, Booni Lal Das, and No. 4, Ram Ashray Prashad, is, in my opinion, sufficient to prove that the original could not be traced and that the copy produced was a copy of the petition, filed on behalf of the defendants Nos. 1 and 2. No doubt, the petition made a mis-statement of fact inasmuch as it stated that the bond of the defendants Nos. 1 and 2 was subsequent in date to that of Lalji Lal, but that only shows want of due care on the part of the defendants' advisers who could easily have found out, on a reference to the execution case, that Lalji Lal's bond was subsequent to the defendants' bond. This fact cannot go to throw any doubt as regards the *bona fides* of the petition. In fact, there does not appear any reason to hold that the petition was not a *bona fide* one. There were a large number of other properties to be sold in execution of Lalji Lal's decree and the prayer made was a proper and natural one, *viz.*, that the property mortgaged to the defendants might be sold after the sale of the other properties. No one else was interested in making a false statement and filing an application to that effect. It must, therefore, be considered to be a *bona fide* application filed on behalf of the defendants and it must be held that they

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had knowledge of a mortgage in favour of Lalji Lal, but they did not pursue their enquiry far enough as they ought to have done. Under the circumstances, the conclusion is irresistible that they had notice of Lalji Lal's mortgage before they instituted their suit on 12th September 1898.

But even assuming that the defendants had no notice of Lalji Lal's mortgage, I do not think that their position is in any way altered. The fact remains that Lalji Lal was a subsequent mortgagee and he was not impleaded as a party in the suit brought by the defendants to enforce their prior mortgage. The result was that the decree obtained by the defendants on the basis of their mortgage was not binding upon Lalji Lal, and the plaintiffs, who now stand in the shoes of Lalji Lal, have still the right of redemption left in them.

The next question which arises for determination is on what terms are the plaintiffs entitled to redeem. This raises the question as to whether the defendants Nos. 1 and 2 were justified in releasing the 4 annas share of Athar in favour of the Maharaja of Darbhanga in their Suit No. 77 of 1898. Now the position is that there was a first mortgage of 4 annas of *Mouza* Athar in the year 1877 in favour of Balbhadar Sahu and others. There was a second mortgage of the entire 5 annas 17 *gandas* 2 *kawries* of Athar in the year 1884, in favour of the ancestors of the defendants Nos. 1 and 2. Then there was a third mortgage of 1 anna 17 *gandas* 2 *kawries* share of *Mouza* Athar in favour of Lalji Lal, the predecessor in interest of the plaintiffs. The first mortgagee obtained his decree on the 10th of September 1883. The second mortgagee obtained his decree on the 2nd of August 1905 without impleading the third mortgagee and the third mortgagee obtained his decree on the 15th of February 1886. There is no evidence to show that at the time of the defendants Nos. 1 and 2's mortgage the 4 annas share of *Mouza* Athar had already been sold and purchased by the Maharaja of Darbhanga in execution of the decree under the first mortgage. All that we find is a statement in the judgment

of the High Court of Calcutta passed on the 1st April 1908 in the appeal against the decree dated the 2nd August 1905 to the effect that the name of the Maharaja of Darbhanga was subsequently omitted from the record as it was found that he had been a purchaser of the 4 annas share of mortgaged property in favour of Awadh Narayan. This is no evidence as against the plaintiffs of the fact, that 4 annas share had already been purchased by the Maharaja of Darbhanga before the second mortgage of the defendants. As the plaintiffs were not made parties to the suit of the defendants, as they ought to have been, the statement in the judgment of the High Court referred to above cannot be used as evidence against them. As it has not been shown as against the plaintiffs that the defendants were justified in law in releasing the 4 annas share of Athar, it must be held that the plaintiffs are entitled to call upon the defendants to show in their presence that the release was a legal and valid one. All that we have got on the record is that at the time of the second mortgage of the defendants, a decree had already been passed on the basis of the first mortgage, but that would not extinguish the right of the mortgagor. As has been held by the Full Bench of the Calcutta High Court in the case of *Bibijan Bibi v. Sachi Bewah* (1), and by this Court in the case of *Muhammad Musa v. Babu Aidal Singh* (2), the equity of redemption is not extinguished by merely passing of the decree in a mortgage suit. The equity of redemption subsists until the sale is held and the sale proceeds are distributed. Therefore, in the absence of any evidence to show that the 4 annas share of *Mouza* Athar could not be sold by the defendants in execution of their mortgage-decree, it must be held that the defendants having released a portion of the mortgaged property from their mortgage lien, they are bound to apportion the mortgage debt upon the remaining portion which is now in the hands of the plaintiffs. They cannot, by releasing a portion of the mortgaged property,

(1) 31 C. 863; 8 C. W. N. 684.

(2) 65 Ind. Cas. 801; 3 P. L. T. 232; (1922) A. I. R. (Pat. 92.

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throw the entire burden of the mortgage-debt on the remaining portion so as to affect third parties. That the defendants Nos. 1 and 2 were not in possession of all the facts of the first mortgage and were not justified in releasing the 4 annas, is evident from the fact that even in their written statement in the present suit they stated that the first mortgage was in favour of the Maharaja of Darbhanga, whereas it was in favour of one Balbhadar Prashad Sahu. It must, therefore, follow that the plaintiffs are entitled to redeem 1 anna 17 gandas 2 kawries share of Mauza Athar on payment of the mortgage-money, principal with interest, at the rate stipulated in the mortgage-bond from the date of the mortgage up to the date of redemption which can be legitimately apportioned upon the 1 anna 17 gandas 2 kawries share purchased by them.

The result is, that this appeal is allowed and it is declared that the plaintiffs are entitled to redeem 1 anna 17 gandas 2 kawries share of Mauza Athar on payment of the amount of principal and interest from the date of the bond up to the date of redemption at the rate stipulated in the bond proportionate to the 1 anna 17 gandas 2 kawries share of Mouza Athar. In other words, the amount which the plaintiffs are bound to pay in order to redeem 1 anna 17 gandas 2 kawries of Athar will bear the same proportion to the entire amount, principal with interest at the bond rate up to the date of payment as 1 anna 17 gandas 2 kawries bears to 5 annas 17 gandas 2 kawries. The decree of the lower Court will be varied accordingly. The plaintiffs shall get six months from this date within which they should pay the sum found due, and if the plaintiffs fail to redeem within the said period, the defendants Nos. 1 and 2 will be entitled to sell the 1 anna 17 gandas 2 kawries share of Athar free of the lien of the plaintiffs. The plaintiffs-appellants are entitled to the costs of this appeal.

Das, J.—I agree.

Z. K.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1883

OF 1919.

January 24, 1923.

Present.—Mr. Justice LeRossignol and
Mr. Justice Harrison.

HADAYAT KHAN AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

SHAHAMAND AND OTHERS—DEFENDANTS
—RESPONDENTS.

Adverse possession—Shamilat—Partition—Land to continue joint till certain harvest, effect of—Punjab Land Revenue Act (XVII of 1887) s. 121.

It is quite possible that a partition of *shamilat* should be made and possession of the several lots be given and taken and that no formal instrument of partition be prepared, in which case the giving and taking of possession by the several sharers of their several lots would be held to be the date on which the joint holding ceased to be joint and became severalty. [p. 666, col. 1.]

Where, however, on the termination of partition proceedings, a deed of partition was drawn up under the directions of the Revenue Officer conducting the partition, and in obedience to the provisions of section 121 of the Punjab Land Revenue Act it was provided in the deed that partition should take effect from the following *kharij*:

Held, that the land remained joint till that harvest and that even if the sharers took possession of the plots allotted to them before the harvest, their possession up to that date was merely the possession of co-sharers in separate possession of portions of the joint estate, and did not become adverse to each other till after the harvest. [p. 666, col. 1.]

Khudad v. Alamgir, 116 P. R. 1900, *Lahera v. Mahji*, 50 Ind. Cas. 550.

Second appeal from a decree of the District Judge, Jhang, at Sargodha, dated the 22nd May 1919, affirming that of the Senior Subordinate Judge, Jhang, dated the 31st January 1919.

Dr. G. C. Narang, for the Appellants.

Lala Fakir Chand, for the Respondents.

JUDGMENT.—The only question in this and the connected appeals is whether the suits are within time. The brief facts are that *shamilat* was partitioned in 1904-05, and the defendants were allotted shares in spite of the contention of the present plaintiff that the defendants held no share in *shamilat*.

These suits were brought on the 16th January 1917, and the Courts below have held that the defendants have been in adverse possession since the 31st August 1904 where the proceedings in partition

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were completed before the Revenue Officer, and that the suits were brought more than 12 years after that date. It is necessary to consider what the expression "completion of partition proceedings" means. It means simply that all disputes raised before the Revenue Officer had been decided by him but up to that date the joint estates remained joint. The parties had not been even inducted into the several shares which it was proposed to allot to them under the scheme of any partition, and apparently no formal order of that kind was ever passed. After appeals to the Settlement Officer and applications for revision to the Financial Commissioner had been rejected the Revenue Officer gave orders for the drawing up of the deed of partition and the deed of partition was accordingly drawn up on the 1st December 1905; and in obedience to the provisions of section 121 of the Land Revenue Act it was provided in that deed that the partition should take effect from *Kharif* 1905. It is, of course, quite possible that a partition should be made, and possession of the several lots be given and taken, and that no formal instrument of partition be prepared, in which case no doubt the giving and taking of possession by the several sharers of their several lots would be held to be the date on which the joint holding ceased to be joint and became severalty. The present, however, is not such a case. There were no doubt proceedings taken with a view to effect partition long before *Kharif* 1905, but those proceedings culminated and found their ultimate result and expression in the instrument of partition and that instrument provided that the land should remain joint up to *Kharif* 1905, and become severalty only in that harvest. From this it follows that even if the sharers took possession of the plots allotted to them before *Kharif* 1905 their possession up to that date was merely the possession of co-sharers in separate possession of portions of the joint estate.

We have been referred to *Khudad v. Alamgir* (1) but that judgment is based on quite different facts and the remarks therein made are irrelevant to the matter before us. *Lakhera v. Mahji* (2) has also

been referred to, but it is not clear whether in that case the plaintiffs had any share in the *shamilat* at all. If they had no share in the *shamilat* these partition could not invest them with a right which did not exist before partition. In this case the parties in order to convert their joint holding into several holdings had recourse to the Revenue Authorities, and the partition was effected in accordance with the order of the Revenue Officer. That order must be read as a whole and an integral portion of that order was that the land should remain joint property up to *Kharif* 1905, and should, from that date, be split up into the several portions allotted to the parties.

For these reasons, we accept this and the connected appeals, and remand the cases under O. XLI, r. 23 to the Trial Court for disposal on the merits.

Costs to follow final event.

Z. K.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 785 OF 1921.

September 26, 1922.

Present.—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

TRIBHUVAN UTTAMRAM AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

BAI KUSHAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Agreement conferring pre-emption right—Registration.

An agreement conferring a right of pre-emption does not create any right in immovable property, and is enforceable without being registered. [p. 667, col. 2.]

Kashi Kunbi v. Sumer Kunbi, 5 Ind. Cas. 234; 32 A. 206; 7 A. L. J. 206, followed.

Ramasami Pattar v. Chinnan Asari, 24 M. 449 at p. 461, dissented from.

Second Appeal from the decision of the Extra Assistant Judge, Ahmedabad, in Appeal No. 451 of 1919, reversing the decree passed by the Subordinate Judge, at Borad, in Civil Suit No. 300 of 1917.

(1) 116 P. R. 1900.

(2) 50 Ind. Cas. 550.

UTTAMRAM V. BAI KUSHAL.

Mr. R. J. Thakor, for the Appellants.

Mr. H. V. Divatia, for the Respondents.

JUDGMENT.—The facts which have given rise to this second appeal are these. One Girjashankar made a Will in respect of his properties on September 3, 1907, and he appointed the present plaintiffs as executors under that Will. He died in October 1907. Thereafter, in 1908, a suit was filed by his widow against the present plaintiffs and the present defendant No. 1, who is the sister of Girjashankar. In that suit there was a compromise. In accordance with that compromise, a decree was passed, in favour of the then plaintiff, i.e., the widow of Girjashankar, so far as it related to the suit. The rest of the agreement being outside the scope of the suit was not incorporated in the decree. The present defendant No. 1 sold the properties in suit to defendant No. 2 in April 1917.

Thereupon the plaintiffs filed the present suit in December 1917 with a view to enforce the agreement relating to their right of pre-emption in respect of the two houses in suit.

The defendants raised various defences one of which was that the agreement under which the plaintiffs claimed the right of pre-emption required to be registered, and that as it was not registered, it was inadmissible in evidence.

The Trial Court overruled this plea, and on other points, which need not be detailed, the learned Subordinate Judge decided in favour of the plaintiffs. It accordingly passed a decree in their favour, holding in effect that on the plaintiffs paying Rs. 650 in Court for payment to defendant No. 2, the properties were to be conveyed to the plaintiffs.

The defendants appealed, and in appeal the learned Assistant Judge came to the conclusion that the agreement required to be registered, and accordingly dismissed the plaintiffs' suit. The learned Judge also remarked that even if he had confirmed the decree of the Trial Court, he would have found it necessary to remand the case for findings on the issues relating to the validity of the bequest in the Will relating to *dharmada*.

The plaintiffs have appealed to this Court, and the point as to registration has

been argued before us. It is urged on behalf of the plaintiffs that the agreement does not require registration, and that the decree of the Trial Court is right. The agreement as to pre-emption is in these terms:—"If the plaintiff and defendant No. 1 wish to sell the houses situate at Singlav, they should first sell them to trustees Nos. 2 to 6 at the market-value, that is to say, first right in respect of *safil* is to be reserved for them and accordingly they have been given by this document a right in respect of *safil*." The plaintiff and defendant No. 1 referred to in the agreement are the widow and the sister of Girjashankar. The lower Appellate Court has relied upon the decision in *Kashi Kunbi v. Sumer Kunbi* (1) in support of its view and the same decision has been relied upon before us on behalf of the respondents. On behalf of the appellants reliance is placed in support of the argument that the agreement does not require registration upon the remark in *Ramasami Pattar v. Chinman Asari* (2).

Apart from the authorities, we think that this agreement is an agreement between the parties which could be enforced by the present plaintiffs, and that it does not create any right in immoveable property. It cannot stand on any footing higher than an agreement to sell immoveable property. In terms and in effect it is merely an agreement to sell to certain persons in case the widow or the sister wished to sell the houses which they got under the compromise. It would, in any case, when the occasion for pre-emption would arise, be enforced as an agreement, and the plaintiffs in the present suit seek to enforce that agreement against the owner (defendant No. 1) and the purchaser from her (defendant No. 2).

In the case of *Ramasami Pattar v. Chinman Asari* (2), to which we have referred, Bhashyam Ayyangar, J., observes as follows:—

"In cases in which the right of pre-emption springs from a contract it rests only upon a covenant which does not run with the land. Being only a species of contract

(1) 5 Ind. Cas. 234; 32 A. 206; 7 A. L. J. 206.

(2) 24 M. 449 at p. 461.

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for the sale of immoveable property the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property and does not of itself create any interest in or charge on the immoveable property which is subject to the right of pre-emption—*vide*, section 54 of the Transfer of Property Act. Until the contract is carried out by specific performance either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property which alone can extinguish the mortgagor's right of redemption though he may have a right to call for a conveyance of the property."

This view is no doubt in conflict with the decision in *Kashi Kunbi v. Sumer Kunbi* (1). We have considered the *ratio decidendi* in this case, and with great respect we are unable to concur in the view taken in that case that an agreement, such as we have here, requires registration. We are not concerned in the present case with the question as to whether the compromise, so far as it related to the title of the various parties to the immoveable property and so far as it has not been incorporated in the decree, required registration or not. We are only concerned with the question as to whether this particular agreement relating to the right of pre-emption requires registration. On that point, as we have already indicated, the agreement could be proved without registration, and there can be no doubt in that view of the matter that the present plaintiffs are entitled to the decree which was passed in their favour by the Trial Court.

We should like to make it clear that we agree with the lower Appellate Court that "the properties pre-empted should be only those that are sold by Exhibit 17, and that the present plaintiffs should take them only in their capacity of trustees or executors of Girjashankar's Will so that they will be bound to fulfil the directions in the Will." It is hardly necessary to add this because, in any case, the present plaintiffs are bound to fulfil their obligations with respect to that property as executors under the Will when they get the property in suit.

There is one other point as to which we may add a word. The lower Appellate Court has expressed the opinion that a

remand would have been necessary in order to determine in this suit whether certain bequests were not void on account of uncertainty and vagueness. That is a point which does not arise in the present suit. It is entirely outside the scope of the suit, and the question as to whether any property which the executors may hold should be used as directed in the Will, or that there is any intestacy in respect of any part of that property, is a question which cannot possibly be considered in this suit.

In the result, therefore, we allow the appeal, reverse the decree of the lower Appellate Court and restore that of the Trial Court with costs here and in the lower Appellate Court on the defendants.

W. C. A. & N. H.

Appeal allowed

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 259 OF 1923.

May 22, 1923.

Present:—Mr. Justice Campbell.

NAZAR AND OTHERS—DEFENDANTS
—APPELLANTS

versus

Musammal PARAS—PLAINTIFF
JALAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Public policy—Consideration for stifling prosecution in non-compoundable offence, whether recoverable.

Where an offence which is non-compoundable is compounded, the complainant cannot recover by civil action anything that the accused has undertaken to pay, such an agreement being void as opposed to public policy. [p. 670, col. 1.]

Shah Rahman v. Ismail Khan, 82 P. R. 1904, *Ghulam Mohi-ud-din v. Deoki Nand*, 22 Ind. Cas. 393; 39 P. R. 1914; 54 P. L. R. 1914; 57 P. W. R. 1914, *Nujebar Rahman v. Mukhtashed Husain*, 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854, relied on.

Where during the investigation of a case of theft a *panchayat* was held and some of the persons who were suspected of the theft agreed to pay a certain sum of money to the complainant, as a consequence of which the investigation was dropped:

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Held, that the agreement by the suspected persons to pay a sum of money to the complainant was unlawful as being opposed to public policy and the complainant, therefore, could not recover the money.

Second appeal from the decree of the District Judge, Karnal, dated the 16th November 1922, affirming that of the Honorary Munsif, First Class, Karnal, dated the 8th December 1921.

Messrs. Shamair Chand and Sagar Chand, for the Appellants.

Lala Jagan Nath, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—

On the 28th July 1920 one Rahim Bakhsh reported at the *Thana* that three buffaloes belonging to his relative *Musammat Paras* had been stolen. On the 18th September 1920 *Musammat Paras* sent a complaint to the same effect to the Superintendent of Police in which she named seven persons as the thieves. On the 9th October 1920 she presented a similar complaint in Court. The complaint was sent to the *Zaildar* for preliminary enquiry and he reported that it was true. It was then sent to the Police who submitted a final report on the 4th April 1921 in consequence of which the case was treated as untraced. On the 20th April 1921 *Musammat Paras* renewed her complaint to the Court and wanted to know what had happened to her former complaint. The Magistrate after considering the record of the Police enquiry dismissed this last complaint under section 203, Code of Criminal Procedure, on the 23rd May 1921.

On the 19th August 1921 *Musammat Paras* filed a suit against 11 persons on the following allegations:—

A year ago defendants Nos. 1 to 7 stole three buffaloes belonging to the plaintiff. The plaintiff put in a complaint which the Magistrate sent to the *Zaildar*. The *Zaildar* after investigation reported that the complaint was true. The Magistrate ordered the Sub-Inspector to *challan* defendants Nos. 1 to 7. On this defendants Nos. 1 to 7 in fear of the Sub-Inspector convened a *Panchayat* and in front of the *Panchayat* promised to pay the plaintiff Rs. 600 as the price of buffaloes. Defendants Nos. 8 to 10 stood surety for the payment. On this undertaking a compromise was arrived

at and on this compromise being effected the plaintiffs complaint was dismissed.

The Trial Court found that six of the ten defendants were liable, three as principals and three as sureties. It was held that after the theft of the plaintiff's buffaloes a *Panchayat* was convened, at which the three principal defendants promised to pay the price of the animals and the other three agreed to stand sureties, that the case was not *challaned* on account of its having been disposed of by the *Panchayat*, and that the defendants were liable to make good their promise to the plaintiff. A decree for Rs. 450 was passed in favour of the plaintiff.

The defendants appealed to the District Judge. They attacked the finding on the merits and also pleaded that the alleged agreement was not enforceable as being contrary to public policy since the consideration was the stifling of a prosecution in a non-compoundable offence.

The learned District Judge on the second plea held that it was not clear that the promise of the defendants avoided a prosecution and that, from the point of view of public policy, it was preferable that thieves should be forced to pay the value of stolen property rather than that they should escape entirely. On the merits, he agreed with the Court below and expressed his belief in evidence that the *Panchayat* had decided that the three principal defendants were either to take an oath as to their innocence or to pay the price of the buffaloes at Rs. 150 each. He further found that the *Panchayat* had been held about November 1920.

In second appeal by the defendants it is urged again that the alleged agreement was void under section 23 of the Indian Contract Act, and it is pointed out that that section renders void not only every agreement for which the consideration is unlawful but every agreement of which the object is unlawful. It is urged that the object of the agreement with which the suit is concerned was palpably to stifle the prosecution of the defendants by putting an end to the Police enquiry.

On behalf of the plaintiff-respondent it is represented that in India a complainant who has lost property by means of a criminal act, can pursue his civil remedy apart from any criminal proceedings provided

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that there is no agreement not to prosecute and that all that the plaintiff did was to pursue her civil remedy before the *Panchayat* without entering into any agreement to abstain from criminal proceedings. There is no attempt made to support the learned District Judge's expression of opinion that it is in the interests of public policy that thieves should be forced to pay the value of stolen goods rather than they should escape altogether. It is to be noted in this connection that the question whether the present defendants were the actual thieves was not put in issue and there is no specific finding by the learned District Judge, apart from his remark just quoted, that they were the thieves. The law is clear that when an offence is non-compoundable but is compounded the complainant cannot recover by civil action anything that the accused has undertaken to pay (e. g., *Shah Rahman v. Ismail Khan* (1), *Ghulam Mohi-ud-din v. Deoki Nanl* (2) and *Nujebar Rahman v. Muktashad Husain* (3)).

In the present case the plaint, of which an abstract is given above, is perfectly clear that the agreement alleged in it was made with the object of stifling the prosecution and the plaintiff must be held to her pleadings. Admittedly, the agreement was come to during the investigation of a criminal complaint lodged by the plaintiff against the defendants-appellants and others. It was not a case where the plaintiff had put aside her criminal remedy for the time being and had commenced by pursuing her civil remedy. The fact, too, that the agreement took place in front of a *Panchayat* is significant. What was the reason for holding a *Panchayat* if the plaintiff was merely prosecuting a civil remedy? The *Panchayat* is proved to have been held as part of the Police investigation and the evidence that the three principal defendants, Nazari Dossu and Rahmat, were called upon either to take an oath that they were innocent, or to pay the plaintiff the value of the stolen animals shows unmistakably what the object of the arrangement was.

(1) 82 P. R. 1904.

(2) 22 Ind. Cas. 393; 39 P. R. 1914; 54 P. L. R. 1914; 57 P. W. R. 1914.

(3) 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854.

I hold that the agreement was void within the meaning of section 23 and that the plaintiffs' suit for that reason should have been dismissed. I accept the appeal, set aside the decrees of the Courts below and dismissed the suit, but order the parties to bear their own costs throughout.

Z. K. & N. H.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDERS.

NOS. 172 AND 173 OF 1920.

January 24, 1923.

Present:—Mr. Justice Oldfield and
Mr. Justice Venkatasubba Rao.

GOLCONDA RAMACHANDRULU AND
OTHERS—PETITIONERS—APPELLANTS

versus

INUGANTI VENKATA NARASIMHA
ROW GARU AND OTHERS—COUNTER-
PETITIONERS NOS. 2 TO 4—RESPONDENTS.

Landlord and tenant—Wrongful exclusion of tenant—Rent-suit, dismissal of—Subsequent suit for possession and mesne profits by tenant—Landholder's right to claim deduction for rent.

In calculating the mesne profits to be allowed to a tenant in a suit by him against the landholder for wrongful exclusion, the landholder is entitled to deduct from such profits the rent payable to him during the period of exclusion, notwithstanding that a suit by him for rent in the Revenue Court was dismissed on the ground that the relation of landlord and tenant was not subsisting between the parties.

Appeals against an order of the Court of the Temporary Subordinate Judge, Ellore, dated the 13th March 1920, in Appeal Suits Nos. 32 and 33 of 1920 (Appeal Suits Nos. 327 and 328 of 1919, Sub-Court, Ellore) respectively, preferred against an order of the Court of District Munsif, Ellore, dated the 1st August 1919, in Civil Miscellaneous Petition Nos. 3401 of 1918 and 3402 of 1918 respectively in the Original Suits Nos. 935 and 966 of 1913 respectively.

Mr. P. Narayana Murthi, for the Appellants.

Mr. V. Ramadoss, for the Respondents.

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JUDGMENT.—The point argued in the appeal is that which has been dealt with as the third point by the lower Appellate Court, whether in calculating the profits allowed to the petitioners for the period of their exclusion from the land, the rent payable to the respondents-landholders should be deducted. We agree with the reasons given by the lower Appellate Court for its conclusion against the petitioners and need only refer to the fact dealt with in the judgment under appeal that after the decision of the District Munsif in these proceedings the respondents sued as landholders under the Madras Estates Land Act for rent and their suit was dismissed. It is urged that this is conclusive against their claim to deduct rent from the profits they have to pay to the petitioners. We do not agree. The suit in the Revenue Court was founded on an allegation clearly unsustainable, that the relation of landlord and tenant was subsisting between the parties during the period in question. The failure of the suit on the ground that this relation was not so subsisting can have no effect on the decision as to the amount of the damages payable, the proper basis for that decision being the amount of the profits, which would have been realized if the petitioner's enjoyment of the land in virtue of their title as occupancy *raiyats* liable to pay rent, had continued. It is not shown how the respondents' conduct in bringing this suit in the Revenue Court creates an estoppel or otherwise debars them from their present claim. In these circumstances, the appeal against the appellate order fails and is dismissed with costs.

This judgment applies also to A. A. A. O. No. 173 of 1920, which is similarly dismissed with costs.

V. N. V.

Appeal dismissed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 142 OF 1922.

January 24, 1923.

Present :—Sir Shadi Lal, Kt., Chief

Justice, and Mr. Justice Ffordë.

BANARSI DAS—DECREE-HOLDER—

APPELLANT

Versus

RAMZAN AND ANOTHER—JUDGMENT—

DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, O. XX, r. 11—Limitation Act (IX of 1908), Sch. I, Art. 175—Execution of decree—Compromise—Agreement to pay by instalments, effect of—Limitation.

Where both parties to a decree agree to an order being passed directing the payment of the decree by instalments and act upon it, they are precluded from contending subsequently that the order was an improper one. [p. 672, col. 2.]

Akbar Khan v. Dina Nath, 200 P. R. 1889, followed.

Nanak Chand v. Anant Ram, 26 P. R. 1894, referred to.

In execution of a decree the parties agreed that the amount of the decree should be paid by certain instalments. The Court accepted the arrangement and dismissed the application for execution which was then pending. Some of the instalments were paid, but default having then been made in the payment of others, the decree-holder again applied for execution:

Held, that the order passed by the Court on the agreement of the parties to pay the decretal amount by instalments was in substance an order under r. 11 of O. XX of the Civil Procedure Code and fell within the purview of clause (2) of section 48 of the Code, thus extending the period of limitation contained in clause (1) of the section. [p. 672, col. 2.]

Letters Patent Appeal from the order of Mr. Justice Broadway passed in Civil Appeal No. 2030 of 1920, dated 16th May 1922, and published as 72 Ind. Cas. 477, affirming that of the District Judge, Ferozepore, dated the 21st April 1920.

Lala Fakir Chand, for the Appellant.

Mr. B. D. Kureshi, for the Respondents.

JUDGMENT.—This appeal arises out of a proceeding in execution of a money decree, and the main question for determination is whether the application made by the decree-holder on the 10th February 1919 was barred by the rule of limitation contained in section 48 of the Civil Procedure Code. The facts which are relevant to the question of limitation are as follows :—On the 20th March 1906 the appellant obtained a decree against the respondent for Rs. 79-14-3 and costs. On the 7th August 1907 the decree-holder proceeded to exe-

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cute his decree and applied to the Court for the attachment and sale of certain lands belonging to the judgment-debtor. The usual notice issued to the latter, and on the 28th August he obtained time in order to come to a settlement with the decree-holder.

On the 18th November 1907 an application containing the terms of a compromise arrived at between the parties was presented to the Court. According to this compromise the decretal amount was to be paid by half-yearly instalments of Rs. 50 each and in the event of default in the payment of four successive instalments the decree-holder was at liberty to recover the entire sum at once. The Court to which the above application was presented recorded the statements of both the parties verifying the terms of the compromise and then passed an order by which the case was struck off in accordance with the compromise and the decree-holder was directed to act on the new contract.

It appears that the parties thereafter acted in accordance with this compromise, and that the judgment-debtor paid several instalments on the dates specified therein. He did not, however, discharge the whole of the debt, with the result that on the 10th February 1919 the decree-holder, made the present application for execution.

Now, section 48 of the Civil Procedure Code of 1908 provides that where an application to execute a decree has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. There can be no doubt that if the date of the decree is the *terminus a quo* the present application for execution is barred by time. It is, however, contended that the order made by the Court on the 18th November 1907 amounts to an order directing payment of the decretal amount by instalments and that the case comes within the purview

of clause (b) of the aforesaid section. It is incontrovertible that the parties agreed that the decretal amount should be paid by instalments, and it appears that the Court accepted the compromise and consequently passed an order striking off the execution proceedings. If that had not been the intention of the Court, it would have proceeded to execute the decree in accordance with the application made by the decree-holder on the 7th August 1907. It is true that the order was not explicit in its terms, and that it did not mention section 210 of the Civil Procedure Code of 1882 (corresponding to O. XX, r. 11, of the present Code) which empowered the Court to make an order after the passing of the decree for payment of the decretal amount by instalments; but we are clear that the Court when accepting the request of the parties intended that the decretal amount should be payable by instalments and that the order which it passed was in essence and substance one made under section 210 of the Civil Procedure Code. It will be observed that the order in question is similar to that passed in *Akbar Khan v. Dya Nath* (1) which was held to extend the period of limitation prescribed by section 230 of the old Code, corresponding to section 48 of the new Code.

The learned Counsel for the respondent argues that Art. 175 of the Indian Limitation Act requires that an order directing payment by instalments should be made upon an application presented within six months from the date of the decree and that if it is made upon an application presented after the expiry of the prescribed period, it is ineffectual to enlarge limitation for the execution of the decree. This contention may be accepted, but at the same time it has been repeatedly laid down that, where both parties have agreed to such an order being passed and have acted upon it, they are precluded from contending that it was an improper order *vide inter alia* *Nawabzada Muhammad Akbar Khan v. Dya Nath* (1). Indeed, the judgment of the Division Bench in *Nana Chaud v. Anant Ram* (2) which has been strongly relied upon in support of the view that the order in question cannot be treated

(1) 200 P. R. 1889.

(2) 26 P. R. 1894.

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as one passed under section 210, Civil Procedure Code, because it was made after the expiry of the period prescribed by Art. 175 of the Limitation Act, also lays down in express terms that "where the parties have agreed to an alteration in the decree, either party may be estopped from questioning hereafter the validity of such alteration." The learned Judges, however, held in that case that neither party had, as a matter of fact, agreed to the alteration of the decree and that the Court also did not consent to such an alteration. The facts in the present case are, however, different as stated above, the parties undoubtedly entered into a compromise by which the decree was made payable by instalments and the Court accepted that arrangement and passed an order which substantially complied with the requirements of section 210. Further, both the parties acted upon that arrangement and they cannot be allowed to say that the order was not properly made.

In view of this finding it is unnecessary to adjudicate upon the contention that a subsequent order passed by the Court in 1912 operates as *res judicata* and precludes the judgment-debtor from agitating the question that no valid order was passed making the decretal amount payable by instalments. We accordingly hold that the application for execution is not barred by limitation and, accepting the appeal, we remand the case to the Court of first instance and direct it to dispose of the application in accordance with law. The respondent must pay the costs incurred by the appellant in all the Courts.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2498 OF 1919.

January 11, 1923.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Moti Sagar.DASONDHI—DEFENDANT—APPELLANT
versus

BADAR BAKHSH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3)
(i)—*Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (vi)*—*Jurisdiction of Civil and Revenue Courts*—*Suit by landlord for declaration of right to receive batar*—*Suit for correction of revenue entry.*

There is no foundation for the idea that suits brought under the Specific Relief Act are *ipso facto* entertainable only by Civil Courts. Where a suit falls within the purview of any clause of section 77 (3) of the Punjab Tenancy Act, that suit must be heard by a Revenue Court, whether or not so far as the form of the suit or the particular remedy prayed for is concerned the suit also falls within the purview of any section of the Specific Relief Act. [P. 674, cols. 1 & 2.]

Ibrahim v. Akbar, 34 Ind. Cas. 209; 58 P. L. R. 1917; 104 P. W. R. 1910, followed.

Kahmun v. Hasnam, 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910, dissented from.

A suit by a landlord against a tenant for declaration that he is entitled to take *batar* instead of a cash *malikana* from the tenant falls under section 77 (3) (i) of the Punjab Tenancy Act and is exclusively triable by a Revenue Court. [P. 674, col. 1.]

Ganu v. Karim Khan, 33 P. R. 1908 (F. B.); 83 P. W. R. 1908; 171 P. L. R. 1908 and *Sawan Singh v. Kahmun*, 55 Ind. Cas. 739, relied on.

Obiter dictum:—A suit for the correction of a revenue entry is triable by a Revenue Court alone and the jurisdiction of a Civil Court to try such a suit is barred under section 158 (2) (vi) of the Punjab Land Revenue Act. [P. 674, col. 2.]

Second appeal from a decree of the District Judge, Hoshmarpur and Kangra Districts, dated the 15th August 1919, affirming that of the Munsif, First Class, Garhshankar, District Hoshmarpur, dated the 10th March 1919.

Lala Anant Ram Khosla, for Mr. R. Obbard, for the Appellant.

Lala Gobind Ram for Lala Faqir Chand, for the Respondents.

JUDGMENT.—This was a suit between certain landlords and tenants for a declaration that the former were entitled to take *batar* instead of a cash *malikana* in respect of certain lands. The suit having been decreed by both the Courts below, the defendants-tenants have come up in second appeal

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to this Court. The sole question for determination involved in this appeal is whether the suit was or was not cognizable by a Civil Court. It is urged that the case falls within the purview of section 77 (3) (b) or (i) of the Punjab Tenancy Act, and that it is exclusively triable by the Revenue Courts. In our opinion clause (b) has no application to this case as the suit is obviously not one for an addition to or abatement of rent under section 28 or for commutation of rent. We are, however, clearly of opinion that the case falls under section 77 (3) (i) being a suit between a landlord and a tenant arising out of the conditions on which a tenancy is held. In *Gamu v. Karim Khan* (1) it was held by a Full Bench of the Chief Court that a suit for a declaration that occupancy tenants are not liable to pay *haq bina* dues was cognizable by the Revenue Courts only. This judgment was recently followed by Mr. Justice Broadway in the case reported as *Sawan Singh v. Rahman* (2) in which it was laid down that a suit for a declaration that the plaintiffs are not liable to pay rent as entered in the Revenue Records fall within the purview of section 77 (3) (i) of the Punjab Tenancy Act and was exclusively triable by a Revenue Court. The learned District Judge, following *Rahmun v. Hasham* (3), has held that as the suit is one for a declaration under the Specific Relief Act it is triable by a Civil Court only. This judgment, however, has specifically been dissented from and should now be considered to have been practically overruled by a Full Bench of the Chief Court in the case reported as *Ibrahim v. Akbar* (4), in which it has been laid down "that there is no foundation for the idea that suits brought under the Specific Relief Act are *ipso facto* entertainable only by Civil Courts; and that...where a suit falls within the purview of any clause of section 77 (3), Punjab Tenancy Act, that suit must be heard by a Revenue Court, whether or not

so far as the form of the suit, or the particular remedy prayed for, is concerned, the suit also falls within the purview of any section of the Specific Relief Act." The learned Counsel for the respondents has not been able to distinguish the present case from the cases relied on by the opposite party, and the only contention put forward by him is that the suit is one for the correction of a revenue entry and that, as such, it is triable by a Civil Court alone. We are unable to agree with him in this contention. A reference to the plaint makes it quite clear that the suit is one of an entirely different nature, and is not a suit for the correction of a revenue entry but one for a declaration that the plaintiffs are entitled to receive rent in kind and not in cash. But even if the contention that the suit is one for the correction of a revenue entry be sound, we think that it would be triable by a Revenue Court alone, and that the jurisdiction of the Civil Courts would be barred under section 158 (2) (vi) of the Land Revenue Act. We have no hesitation in holding that the case falls within the purview of section 77 (3) (i) of the Punjab Tenancy Act and that the Civil Courts have no jurisdiction to hear the suit.

Under section 100 of the Punjab Tenancy Act this Court has the power to order that a decree passed by a Civil Court be registered as a decree of a Revenue Court. No cause against the registration of the decree of the Court of first instance in a Revenue Court with jurisdiction has been shown and such registration does not appear to be prejudicial to either side.

We, therefore, accept the appeal and, setting aside the order of the lower Appellate Court, order that the decree of the Court of first instance be registered as that of an Assistant Collector of the first grade, District Hoshiarpur, and that the memorandum of appeal be returned to the appellant for presentation in the Revenue Appellate Court. Under the peculiar circumstances of the case, we do not make any order as to costs in this Court or in the Court of the District Judge.

Z. K.

Appeal accepted.

(1) 33 P. R. 1908 (F. B.); 83 P. W. R. 1908; 171 P. L. R. 1908.

(2) 55 Ind. Cas. 739.

(3) 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910.

(4) 34 Ind. Cas. 209; 58 P. L. R. 1917; 104 P. W. R. 1916.

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PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 123 OF 1921.
April 30, 1923.

Present.—Mr. Pison, J. C.

GUL AHMAD—PLAINTIFF—PETITIONER
versusGHULAM RABANI KHAN AND OTHERS
—DEFENDANTS—RESPONDENTS.*Custom—Succession—Pagwand—Whole blood whether excludes half—Presumption—Swathis of Mansehra Tahsil, Hazara District.*

Where the *chundawand* rule prevails, the whole blood would certainly exclude half-blood, but the converse would not necessarily follow; sons might succeed to their father's estate under the *pagwand* rule and still a full brother might succeed to his brother's estate in preference to a half brother. All that can be said is that, where the relationship through mothers has been ignored in the former case, Courts should not be surprised to find it ignored in the latter also. [p. 676, col. 2.]

Sardar Bahksh v. Ahmad Yar, 150 P. R. 1888, relied on.

A *pagwand* system of succession can be found co-existing with a system under which the whole blood excludes the half in succession to a brother's estate. [p. 677, col. 1.]

The presumption, if any, arising from the *pagwand* rule of succession, in favour of the rule that the half-blood should succeed along with the whole, is a very weak one and is easily rebutted. [p. 677, col. 2.]

The whole blood invariably excludes the half where the descendants of a common ancestor have split up into groups according to uterine descent. [p. 677, col. 1.]

The normal custom among *Swathis* of the Mansehra Tahsil, District Hazara, is for whole brothers to succeed solely to the estate of a deceased brother to the exclusion of half brothers. [p. 678, col. 2.]

Petition for revision of an order of the Additional Divisional Judge, Peshawar, dated the 10th May 1921, set aside an order of the Munsif, First Class, Mansehra, dated the 20th December 1920.

Lala Dewan Chand, R. S., for the Petitioner.

Lala Rim Labhaya, for the Respondents.

JUDGMENT.—After hearing the arguments of Counsel in this case I adjourned it for orders in order to collect as far as possible all the authorities relating to the important question of custom involved in this case. I have now had an opportunity of studying most of the rulings which have passed relating to the tribe to which the parties belong.

The parties are *Swathis* of Shinkyari in the Mansehra Tehsil of the Hazara Dis-

trict. They are the descendants of Abdul Karim who had 14 sons by three different wives. A pedigree-table* of the family is appended to this judgment. The three wives of Abdul Karim were *Musammat* Kafiya, *Musammat* Sarfraz Begam and *Musammat* Bibi Fatima. It will be convenient to allude to the descendants of each wife as branches Nos. 1, 2 and 3, respectively. The estate in suit is that left by Ali Akbar, a member of branch No. 2, who died in January 1910. The estate in question is under mortgage and the suit relates only to the equity of redemption. The plaintiff, Gul Ahmad, is a member of the same branch. The defendants are the members of the 3rd branch, the descendants of *Musammat* Bibi Fatima, the members of the first branch have not disclosed any interest in the land in suit. The suit is one for possession of the mortgage rights. The Revenue Authorities, holding that in succession to a brother's estate there was no distinction between the half and the whole blood, attested a mutation in favour of the surviving descendant of both branches Nos. 2 and 3. The plaintiff claims that he is entitled to succeed exclusively to the estate of Ali Akbar on the ground that the whole blood excludes the half. The Trial Court decreed the suit holding that the plaintiff had established the custom which he alleged. On appeal to the Divisional Court, after a remand had been made for further enquiry upon the question of custom, it was found that the whole and the half blood succeeded equally to a brother's estate, and the suit was dismissed. The plaintiff then applied to this Court upon the revisional side, and I have taken up the question on revision as an important one of law and custom.

It was argued by Counsel for the petitioner at the outset of the case that it had not been proved that the normal rule of succession to a father's estate among *Swathis* of the Mansehra Tehsil was *pagwand* or *per capita*. At a later stage, however, it was conceded by the learned Counsel that when the question of succession to a father's estate only was involved the normal rule of succession was *pagwand*. His present arguments may be summarized as follows:—

* See page 679 for Pedigree-table [Ed.]

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1. No presumption arises from the *pagwand* system that the half-blood succeeds equally in succession to a brother's estate but that, on the contrary, Muhammadan Law recognises at the same time the *pagwand* system of succession by sons to a father and yet excludes the half-blood in succession by collaterals.

2. Even if a general custom excluding half-blood is not proved a special custom exists in this family, the original ancestor having made a separate distribution of his estate to each of the three branches of his descendants.

3. In any case, the members of each branch have fallen into groups, and there is a consensus of authority, even in the Punjab, that when groups exist, inheritance does not pass outside the group.

It is laid down in paragraph 26 of Rattigan's Digest of Customary Law of the Punjab that where the property of a common ancestor was distributed according to the rule of *pagwand* (*per capita*) there is a presumption that the whole-blood and the half-blood succeed together. This *dictum* is based largely upon the Full Bench ruling published as *Ghulam Muhammad v. Muhammad Bakhsh* (1) where all the precedents relating to the question were reviewed at great length. There appears to me to be a prevalent disposition among the Courts of this Province to extend the principle there enunciated to an extent which is neither justified by the terms in which it is expressed, or by the precedents on which it is based. All that is laid down is that a presumption arises until the contrary is proved. In other words, the presumption is one which can be rebutted. There has been a tendency, as shown by a recent case in the Peshawar District, where the same question of custom was involved, to assume that some rule exists by which *pagwand* distribution necessarily and in all cases implies that the whole and the half-blood succeed equally not only to a father's, but also to a brother's estate. The ruling of the Judicial Commissioner of this Province published as Judicial Record No. 21 is nevertheless clear authority for the view that a *pagwand* system can be found co-existing with the system under which the whole-

blood excludes the half in succession to a brother's estate. I have recently had occasion to deal with the same question at some length in the case of the Gigiani tribe of the Peshawar District in Civil Appeal No. 79/44 of 1923, *Sajdar Khan v. Muhammad Zaman Khan*, the ruling in which is now under publication.* In that case it was found that sons succeed *per capita* to a father's estate, but that whole brothers alone succeed to a brother's estate. It is indeed very clearly laid down, even in the Full Bench ruling *Ghulam Muhammad v. Muhammad Bakhsh* (1), that the presumption referred to in Rattigan's Digest is one of fact and open to rebuttal. I cannot help thinking that the soundest enunciation of the principle is that which was given in an older ruling, *Sardar Bakhsh v. Ahmed Yar* (2) where the Court remarked: "No doubt where the *chundawand* rule prevails the whole blood would certainly exclude the half-blood, but the converse would not necessarily follow; sons might succeed to their father's estate under the *pagwand* rule and still a full brother might succeed to his brother's estate in preference to a half brother. All that can be said is that where the relationship through mothers had been ignored in the former case, we should not be surprised to find it ignored in the latter also. We could hardly draw any strong presumption that it is so ignored. It is also to be noticed that the Chief Court of the Punjab have, at least in one comparatively recent ruling, treated the presumption accepted in *Ghulam Muhammad v. Muhammad Bakhsh* (1) as a distinctly weak presumption. *Khuda Yar v. Ahmad* (3) is an instance of this. I confess that I am doubtful if there is really any presumption at all. It is certainly one which can be so easily rebutted that though the onus of rebuttal may lie in the first instance on the party alleging that the whole blood excludes the half, that onus immediately shifts on the discovery of any evidence impugning the presumption. It will, therefore, be a question of evidence in the present case as to whether there is ground for believing

(2) 150 P. R. 1888.

(3) 51 Ind. Cas. 298; 33 P. R. 1919.

*Since published on p. 577 of this Vol., ante.—[Ed.]

(1) 4 P. R. 1891 (F. B.).

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that either among the Swathi tribe as a whole, or in this family in particular, the whole-blood ordinarily excludes the half in succession to a brother's estate. There are, again, many authorities for the view that, among all tribes and especially among Swathis of the Mansehra Tahsil, the whole-blood invariably excludes the half where the descendants of a common ancestor have split up into groups according to uterine descent. The following cases decided among Swathis of the Mansehra Tahsil have been quoted. In the case *Gulzaman v. Ahmad Khan*, decided by the Divisional Judge on the 19th of May 1906, it was clearly held that a *pagwand* distribution did not necessarily imply that the half and the whole-blood succeeded equally and that, as it had been shown that the whole brothers in that case had been associated with the deceased the half brothers could not succeed. In another case decided by the Divisional Judge *Abdul Qasim v. Mirhamza* (Swathis of Dhariel close to the village with which we are now concerned) it was held that the full blood excludes the half. In a case among the Sayids of the Mansehra Tehsil *Ghulam Haidar Shah v. Ahmad Shah*, decided in 1914, a *pagwand* system of distribution was found to co-exist with the system by which the whole brothers excluded the half brothers when a brother's estate was in issue. The learned Divisional Judge in the present case had based his conclusion on the custom recorded in Answers 44 and 65 of Watson's Tribal Custom of the Hazara District. That record naturally carries considerable weight, as Answer 65 deals particularly with the case of succession to a brother's estate and states categorically that succession to a brother's estate follows *chundawand* or *pagwand* according to the prevailing custom, and that no distinction is drawn between associated and unassociated brothers. It is remarkable, however, that that record of custom is, so far as I can discover, the sole authority for that view. I think that the learned Divisional Judge has omitted to notice that the vernacular *riwaj-i-am* which was prepared at the same time as Watson's Customary Law, states very distinctly that when a proprietor dies without issue, his estate goes to full brothers or nephews in preference to step-

brothers. This in itself would seem to me to rebut the presumption derived from Watson's Customary Law, and I have already shown that the presumption to be drawn from the existence of the *pagwand* system is a comparatively weak one. The trend of all judicial precedents which I have examined, is in favour of the custom as recited in the "*riwaj-i-am*." *Kalandar Khan v. Najaf Khan* (4) shows that a father among Swathis of Balakot can interfere with the normal *pagwand* distribution by making an unequal distribution among his sons. It would also appear that the custom of separation into groups by uterine descent is particularly prevalent among Swathis of the Mansehra Tahsil, and this fact has, no doubt, influenced the general question of custom. I should be inclined to say that a system by which the whole-blood normally excludes the half in succession to a brother's estate has grown up and become consolidated for two main reasons. One is the tendency which I have already noticed for descendants to form separate groups by uterine descent and the other is the fact that the exclusion of half-blood is in accordance with Muhamadan Law. In the case among the Gigianis, which I have alluded to above. I had occasion to refer to the tendency of Courts to assume that the reference of a question of custom to the test of Muhamadan Law implies that the custom alleged cannot be a genuine and tribal custom. I have pointed out in that case that there is nothing in the least incompatible with a true statement of custom in the reference of this custom to the test of Muhamadan Law. I had not, at that time, noticed the Punjab Chief Court ruling *Daya Ram v. Sohail Singh* (5), which is an important authority for the same view. It was remarked in that case by Mr. Justice Chatterji: "The principle to be borne in mind then is that whenever there is a gap in the Customary Law which cannot be filled otherwise, it must be filled by reference to the personal law of the litigating parties. This rule underlies all applications of Customary Law to the

(4) 23 P. R. 1893.

(5) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.).

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concrete facts of a case." I am not prepared to say in the present case that this test is the ultimate *ratio decidendi*, but if there were a doubt as to the custom governing the parties or if that custom appeared to be in a state of flux, I should have no hesitation in referring to the principles of Muhammadan Law as a guide. In the present case, however, there does not appear to me to be really any reasonable doubt upon the custom quite apart from the fact of its consonance with Muhammadan Law. All the precedents which I have been shown, confirm me in the view that the normal rule of succession among Swathis is that the whole-blood excludes the half in succession to a brother's estate. I have already remarked that the adoption of this custom is particularly marked in the cases where descendants have split up into groups by uterine descent. It appears to me, further, that in the present case we have very clear indications of a splitting up of this nature. In the first place, it is an admitted fact that the first branch of Abdul Karim's descendants, that of *Musammal* Bibi Kafiya has completely separated from the other two branches. This, of course, does not conclusively prove that branches Nos. 2 and 3 have separated *inter se* but it at least raises some presumption of general disruption. The learned Divisional Judge has alluded to two instances which appear to me to show conclusively that branches Nos. 2 and 3 have also separated. He refers to the fact that when Ismail, a member of branch No. 3, died, the other descendants of *Musammal* Fatima succeeded. He admits that this is certainly a precedent for the whole-blood excluding the half-blood, but I think that he has missed the point that we are not only considering a precedent for the general custom but also the facts of separation of branches. The other instance referred to is succession to the estate of Hazaratullah of branch No. 2. In that case Ali Akbar of branch No. 2 alone succeeded. The learned Divisional Judge describes this instance as inconclusive on the ground that the other full heirs were excluded equally with the half blood. I cannot agree, however, that this instance is thereby inconclusive. On the contrary, it appears to me to show very clearly that the only question considered was the relative

claims if members of branch No. 2 and the members of branch No. 3 do not appear ever to have disclosed the smallest claim or interest in the estate of Hazaratullah. It may further be remarked that I have not been shown one single instance in this family where members of both branches have succeeded to the estate of a member of one particular branch. I can hardly imagine a clearer instance of a family which has been shown definitely to have split up into groups by uterine descent. Even, therefore if I did not hold, as I do, that the normal custom among Swathis is for whole brothers to succeed solely to a deceased brother's estate, I must hold that in the present case the branches of the family have split up into groups by uterine descent and should follow the consensus of authority for the view that, where such groups exist, succession is invariably confined to the group. On the above findings, therefore, the plaintiff's contention must prevail that he is entitled to succeed alone to the estate of the deceased Ali Akbar to the exclusion of the defendants, as members of a different branch of the family.

The point of limitation has been raised again by the learned Counsel for the respondents. It has been found by the Divisional Court that Art. 144 of the Limitation Act applies to this suit, as it is one for constructive possession. The learned Counsel for the respondents argues that it is really one for a declaration and is governed by Art. 120. I must agree, however, with the view taken by the learned Divisional Judge. Art. 144 covers any interest in land and this must clearly include an interest such as the equity of redemption. I agree, therefore, that the suit is within time.

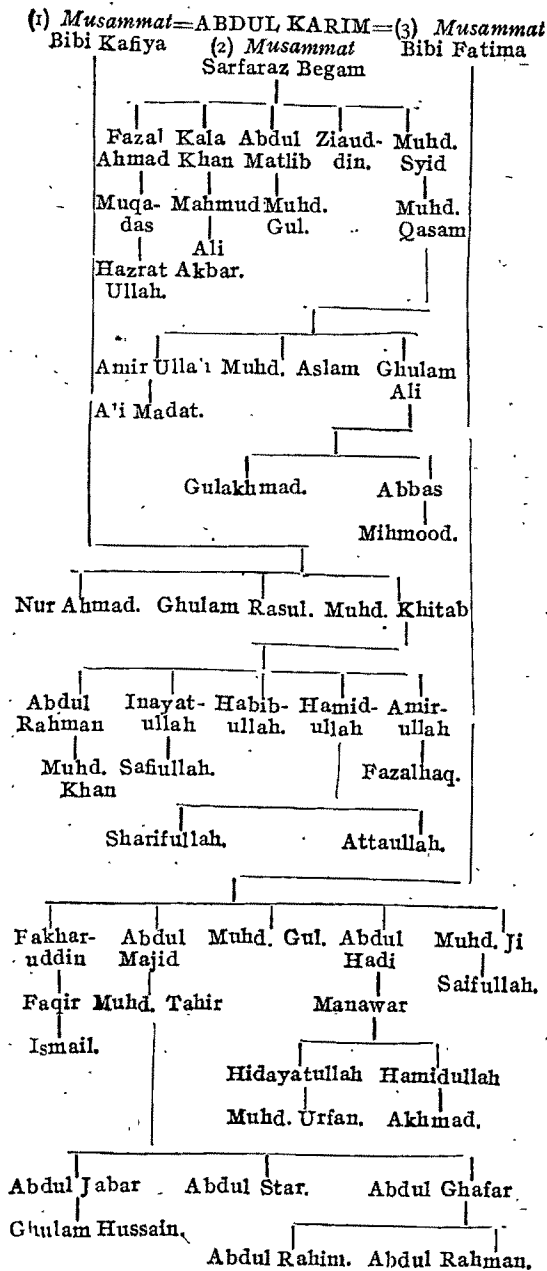
On the above findings, the plaintiff's suit must succeed. I, therefore, set aside the order of the Divisional Court dismissing the suit and restore the order of the Trial Court granting the plaintiff a decree for possession of the mortgagee rights of the land in suit. The defendants will pay the costs of the plaintiff throughout.

Z. K.

Appeal allowed.

ASA SINGH v. JAGJIT SINGH.

PEDIGREE-TABLE.



LAHORE HIGH COURT.

CIVIL REVISION No. 846 OF 1921.

July 24, 1922.

Present.—Mr. Justice Campbell.

ASA SINGH—DEFENDANT—

PETITIONER

versus

JAGJIT SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 151, 152—Amendment of decree—Error in decree following error in plaint—Court, jurisdiction of, to amend decree—Inherent power.

Where an error in a decree is due to following a similar error in the plaint, a Court has jurisdiction under section 152 of the Civil Procedure Code to amend the decree, as such error is one arising by accidental slip or omission. Apart from section 152, section 151 enables a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. [p. 681, col. 2.]

Civil revision against the decree of the District Judge, Hissar, dated 14th June 1921.

Mr. Jagan Nath, for the Petitioner.

Messrs. M. L. Puri and L. C. Soni, for the Respondents.

JUDGMENT.—The circumstances of this petition for revision are as follows:—Jagjit Singh and others sued to pre-empt certain land sold by Ranjit Singh to Asa Singh. The sale was by a registered-deed and the subject of the sale was certain undivided shares in certain joint holdings. The plaint alluded to the sale-deed, a copy of which was attached to it and also to the *fard patwari* and to the mutation in favour of the vendee. The total area sold according to the deed worked out at 671 *bighas* 18 *biswas*. In the heading of the plaint was given what purported to be a detail of each of the holdings from which a share was sold with field numbers and areas, but certain field numbers were omitted and the total area specified in the heading of the plaint amounted to about 401 *bighas* only.

The plaintiffs were given a decree by the final order in appeal to the District Judge and in execution thereof obtained possession of the whole of the land sold, 671 *bighas* 18 *biswas*. The order in the District Judge's judgment was that the plaintiffs should obtain possession by pre-emption of the land in suit.

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The decree specified the land entered in the heading of the plaint by the field numbers given therein.

After possession had been transferred in execution, an objection was put in by the vendee who applied for restoration of the excess over 401 *bighas*. No final order was passed on this application by the First Court. The decree-holders put in an application for amendment of their decree and they were referred by the First Court to the District Judge since his was the decree in suit. They applied accordingly to the District Judge and he has amended the decree so as to include in it all the land contained in the sale-deed.

Against this order the vendee appealed to this Court and the Division Bench before whom the appeal was laid decided that no appeal was competent and directed notice to issue on the revision side.

Counsel for the vendee has commenced by claiming that he can re-agitate the question of whether an appeal lies, and he has quoted a number of rulings to the effect that an appeal can lie against an amended decree in the same way as against any other decree.

[All his rulings, however, make it clear that there can be no appeal against an order amending a decree, and this is plain by what Asa Singh's appeal was. The Court-fee paid was not that chargeable on an appeal against the decree, but was Rs. 2 for an appeal against an order. The heading of the appeal stated it to be one under section 38 of the Punjab Courts Act. The notes made by Counsel on the record in response to queries from the office show that he was appealing from the order. Up to the present no additional Court-fee has been paid or tendered and there is no appeal from the decree before me. In any case, the appeal which was preferred must be taken to have been dismissed by the Division Bench.

Taking the application as a revision, the question is whether the District Judge had jurisdiction to pass the order. It is contended that the amendment was under section 152 of the Code of Civil Procedure and that this section applies only to the correction of clerical errors made by the Court itself and has no concern with mistakes of the parties. In support of this argument

a ruling of the Allahabad High Court, *Ram Chander Sarup v. Mazhar Hussain* (1) is quoted, the facts of which bear no resemblance to those of the present case, but there are several authorities to the contrary.

In *Somasundaram Chettyar v. Rama Krishna Kaair Velasami* (2) Madras High Court held that the Court had power to amend clerical errors which had crept into a decree by following similar errors in the plaint, without causing the pleadings in which the errors first appeared to be amended. The error there dealt with was one of description of the boundaries of the property in suit.

[*Narayanasami v. Natesa* (3) is a ruling on section 206 of the former Code which is less wide in its terms than the present section 152. The High Court refused to interfere on revision with the correction of an error in the decree which rendered it incapable of execution. The error in fact had been made in the plaint but it was held to be so palpable that to disallow its correction could be simply to put an obstacle in the way of plaintiff's executing his decree. One of the Judges of the Bench considered that the proper remedy of the plaintiff was to apply for review for the correction of an obvious error in the judgment, but he held that the only error of jurisdiction by the Court below was to proceed under one section of the Code instead of another and that it did not thereby assume a jurisdiction which it did not possess. He considered, therefore, that there should be no interference on revision.

In *Pherozsha Pestonji v. Sun Mills, Ltd.* (4) a judgment also delivered under the old Code, the plaintiff sued for specific performance of a contract by payment of Rs. 4,475 and was given a decree "for specific performance as prayed with costs." The correct sum was Rs. 4,775 and on a motion to rectify the decree it was ordered that the decree should be rectified. It was held that the objections to the proposed amendment were merely technical, that it was of little consequence that the error arose from the plaintiff's own mistake in his plaint and that a perusal of the contract

- (1) 51 Ind. Cas. 55; 1 U. P. L. R. (A) 69.
- (2) 22 Ind. Cas. 774; 15 M. L. T. 102; (1914) M. W. N. 107.
- (3) 16 M. 424; 5 Ind. Dec. (N. S.) 1002.
- (4) 22 B. 370; 11 Ind. Dec. (N. S.) 830.

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which had been referred to in the plaint showed that the prayer for the specific performance and the prayer for payment of Rs. 4,475 were inconsistent.

It was remarked that procedure is merely subservient to justice and that the intention of the learned Judge who granted the decree was to direct specific performance of that particular contract.

In *Mahaboo Begum Sahiba v. Lal Begum Sahiba* (5), a very short judgment, it was laid down that a clerical error admittedly having been made in the plaint, a Court had power to rectify it in whatever subsequent record it was repeated by slip or inadvertence or mistake.

In *Sheo Balak Phathak v. Sukhdal* (6) there was a suit for possession of a two-anna share in certain land. In the final prayer for relief the word "pie" was used for "anna". Subsequently, in decreeing the claim, the Trial Court described the property in suit in its judgment as a two-pie share and the same description was repeated in the decree. The Trial Court was asked to amend the decree but refused on the ground that it was not at variance with the judgment and that the error sought to be amended was brought about by plaintiff himself. The High Court accepted a revision application by the decree-holder, stated that section 152 clearly applied and that the clerical error in the plaint was due to an accidental slip, and ordered that it should be amended throughout the record beginning with the plaint down to the decree.

In *Basantl v. Kunj Bihari Lal* (7) in a decree for sale on a mortgage both the mortgage-deed and the decree misdescribed the property as *muafi*. The Court below held that it was prevented by reason of this misdescription from putting the property to sale in execution. The High Court allowed the decree to be amended remarking that it was the duty of the Court to see that all errors were amended when there was no question of doubt and that the misdescription had not deceived the opposite party in any way.

[The present case was a suit for pre-emption and it is an elementary proposi-

tion that would be pre-emptor cannot claim pre-emption of a portion of the property sold but must sue to take over the whole bargain. There can be no doubt that both Courts considered that they were dealing with the whole sale and it is impossible to believe that the defendants were under any contrary impression. The decree as amended is now in accordance with the intention of the Court which passed it, and the rulings above quoted are ample authority for holding that the amendment was competent under section 152 as an error arising in the decree from some accidental slip or omission.

Apart from section 152, the present Code contains section 151, the provisions of which did not appear in the former Code, and I venture to think that in any imaginable case section 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. Thus, it can reasonably be argued that any rulings delivered before the enactment of the present Code, which may appear to restrict the power of amendment are in point of fact out of date.

[Finally, in *Ghasita v. Sultan* (8) this Court declined to interfere on revision with a decree which, though based on an error of law, did substantial justice between the parties, and on the finding that the plaintiffs were entitled to pre-empt the sale, which is now secure from all attack, the decree as amended does such substantial justice, while the unamended decree did not.

For these reasons I dismiss the petition with costs.

W. C. A. *Petition dismissed.*

(8) 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 228 P. L. R. 1911.

(5) 62 Ind. Cas. 652; 14 L. W. 445.

(6) 23 Ind. Cas. 344; 12 A. L. J. 185.

(7) 44 Ind. Cas. 998; 16 A. L. J. 262.

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PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL No. 88-49 OF 1921.

April 12, 1923.

Present.—Mr. Pipon, J. C.

GULMIRAN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

ABDUL RAHIM KHAN, AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 38, 45—Mortgagee—Redemption—Payment to one co-mortgagee, whether discharges mortgage—Specification of shares, effect of—Presumption.

Courts in India have always recognised that equity demands that the redemption of mortgages shall be facilitated. [p. 678, col. 1.]

It has always been regarded as a matter of public policy that the restoration of land to its original owner and the release of land from the burden of incumbrances are in themselves desirable, and an insistence on the proposition that a mortgagor is obliged to satisfy separately every one of a number of co-mortgagees, may operate to effect a clog on the equity of redemption. It would in many cases have the effect of forcing a mortgagor into Court as his only means of ensuring redemption. [p. 687, col. 1.]

At the same time the least fraud between the mortgagor and one of several co-mortgagees with the intention of defeating the rights of the latter would deprive the mortgagor of his right to obtain release by a single payment. This would be a question of fact in each case, and it must be accepted that a principle of equity which allows one of several co-mortgagees to give a valid discharge must be qualified throughout by the equally equitable condition that there has been no attempt to defeat or prejudice the rights of other persons. [p. 687, col. 1.]

The mere specification of shares among the mortgagees themselves does not necessarily affect the mortgagor. For the mortgagor to be affected it must be shown not only that the shares of the mortgagees have been specified, but that the essence of the contract between them and the mortgagor was that he should redeem according to those shares. In the absence of a direct contract to this effect, it must be assumed that the liability of the mortgagor is joint and not several as regards the whole body of co-mortgagees. [p. 687, col. 2.]

Section 38 of the Contract Act applies to an offer which has been accepted as well as to an offer which has been refused; but whether section 38 of the Contract Act applies to payment to one of several joint mortgagees or not, the rule of equity applicable to India is that, in the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee, discharges the mortgagor. The mere specification of the shares held by the mortgagees in a Revenue Record is not sufficient in itself to warrant the assumption that the mortgagor is bound by the division of those shares, and it lies upon the mortgagees to show that a definite contract subsisted

between the parties which recognised this division. [p. 687, col. 2; p. 688, col. 1.]

Barber Maran v. Ramana Goundan, 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327 and *Mannava Annapurnamma v. Uppala Akharyao*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333 (F. B.), approved of. *Mathra Das v. Nizam Din*, 41 Ind. Cas. 921; 68 P. R. 1917; 107 P. L. R. 1917; 81 P. W. R. 1917 (F. B.), dissented from.

Jagat Tarini Dasi v. Naba Gopal Chaki, 34 C. 305; 5 C. L. J. 270, *Sitaram v. Shridhar*, 27 B. 292; 5 Bom. L. R. 91, *Parbhu Ram Pandey v. Jhalo Kuer*, 42 Ind. Cas. 408; 2 P. L. J. 520; (1917) Pat. 258; 4 P. L. W. 57 and *Ram Chandra v. Goswami Rajjan Lal*, 5 Ind. Cas. 129; 32 A. 164; 7 A. L. J. 99, considered.

Further appeal from the judgment and decree passed by the Divisional Judge, Derajat, dated the 1st August 1921, whereby the judgment and decree passed by the District Judge, Bannu, dated the 14th April 1921, was set aside.

Mr. Saaddudin Khan, K. S., for the Appellants.

Kazi Ahmad Khan for the Respondents.

JUDGMENT.—This suit relates to an area of 143 kanals 17 marlas situated in the village of Adamzai in the Bannu District. It had been mortgaged in 1918 by Gulmiran and others to the descendants of Dostai Khan for Rs. 1192. On the 26th of May 1919 a mutation was attested showing the land as redeemed from the mortgagees. The mortgagees, on the 8th of February 1921, instituted the present suit for two alternative reliefs, (1) a declaration that the mortgage was still subsisting and had not been redeemed, and (2) for possession of the land in suit in the capacity of mortgagees. The Trial Court found that the mortgage-debt had been paid to Kalu Khan, one of the mortgagees, and that such payment was a valid discharge of the mortgage-debt as against the other mortgagees, and on these findings dismissed the suit. The Divisional Judge, on appeal, remanded the case for further inquiry on the fact of the alleged payment of the mortgage-debt to Kalu Khan. After a return to the order of remand had been made, the Divisional Judge found (1) that the defendants had failed to prove that the money had been paid to Kalu Khan, and (2) that even if the money had been so paid, the payment to one of several joint mortgagees did not con-

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stitute a valid redemption of the mortgage. On these findings he granted the plaintiffs a decree for possession as mortgagees of the land in suit. The defendants-mortgagors have lodged a further appeal in this Court.

The first ground of appeal appears to be based on a misconception. The validity of the decree for possession is attacked on the ground that the suit was one for a declaration only. This, however, is not correct. In the plaint the two alternative reliefs, declaration and possession, were clearly sued for, and there was no legal bar against the passing of a decree for possession.

There are two questions to be dealt with on this appeal; (1) the question of fact as to whether or not the money was paid by the mortgagors to Kalu Khan, and (2) the question of law as to whether such payment, if proved, was a valid discharge of the mortgage-debt.

1. As against the Revenue Record showing the mortgage to have been redeemed, it lies upon the plaintiffs to show that no redemption took place. The proceedings taken on mutation are important in this case. On the 17th of January 1919 the *patwari* entered up a report showing that one of the mortgagors Gulmiran reported that the money had been paid over to the mortgagees. This report was signed by Allahdad Khan, one of the present plaintiffs, and also by a *Lambardar*, Saudad Khan. The mutation came up for attestation before the *Tahsildar* on the 26th of May 1919. On that occasion Kazi Khan, one of the mortgagees, was shown to have appeared and denied that he and his brothers had received the mortgage-money. The order of the *Tahsildar* continues that the proprietor Gulmiran had, nevertheless, paid the money to Kalu Khan. It is a question in dispute between the parties as to whether the *Tahsildar* in making this remark was recording a fact which he had ascertained from other sources, or whether he was recording the statement made to him by Kazi Khan. However this may be, he concluding his order by saying that the question as to the effect of this payment was one to be decided between the mortgagees themselves and that the land was actually redeemed. He accordingly accept-

ed mutation and entered up redemption. Now, it is clear that the signature of Allahdad Khan upon the original report carries very great weight. It is objected that Allahdad Khan was not himself at the time one of the mortgagees as his father Saiwar Khan was then alive. I am unable to see, however, that this in any way detracts from the value of the inference to be drawn from his signature. It is not a question of one of the mortgagees being estopped by his own action, but a question of evidence as to facts. Whether or not Allahdad Khan was himself one of the mortgagees at the time, he was vitally interested in the transaction. He would have succeeded to the rights of his father as mortgagee, and he actually has succeeded since that date. Further, he is a literate man, and the entry is attested not by his thumb impression, but by his signature. He has, again, in his statement, while denying that he intended to verify the entry of redemption, admitted that he read over that entry before he signed it. As against this, his explanation is, to my mind, most unconvincing. He alleges that another mutation was simultaneously put before him in which a certain land was redeemed from one Zober, and that he signed the report with which this suit is concerned on the impression that it related to the other mortgage with which this suit is not concerned. It seems to me impossible to accept this explanation. As he had himself read over the report, I fail to understand how he could have been duped in such an obvious manner as has been alleged. The report was also verified by a *Lambardar*, Saudad Khan, who has, as a witness, attested his verification. He is no doubt hostile to the plaintiffs, but it is perfectly clear that both he and Allahdad Khan actually verified that report. The explanation now put forward by the plaintiff involved the assumption that there was an elaborate plot concocted to enter up a false mutation of redemption. The Divisional Judge appears to think that this is what actually occurred. I cannot, however, agree with this view. There appears to me everything to show that the report was a genuine one, and that it was verified by Allahdad Khan, one of the present plaintiffs, with full knowledge of its import. We next comes to the proceedings before

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the *Tahsildar* on the 26th of May 1919. I have mentioned above that the interpretation of the wording of that order is in dispute. I can myself only read it as implying that it was Kazi Khan who stated to the *Tahsildar* that Gulmiran had paid the money to Kalu Khan. Kazi Khan was clearly present at the time, as shown by the order itself. The wording of the order implies, to my mind, beyond a shadow of doubt that the *Tahsildar* was recording a fact which Kazi Khan had stated to him. Here, again, I am unable to accept the very far fetched explanation that there was again an elaborate plot concocted to which the attesting officer allowed himself to become a party either by collusion or by carelessness. There appears to me to have been a distinct and a public admission that the money had been paid over to Kalu Khan. This view is, again, corroborated by the fact that the mortgagees, in spite of the entry against their, never appealed against the mutation either to the Collector or to the Revenue Commissioner. In view of the large sum of money involved and of the great prejudice to their rights by the existence of the mutation which they allege now to have been fraudulent and unwarranted, it is inconceivable that they should have omitted to press their rights on appeal with a view to getting that mutation annulled. There is, indeed, only one explanation, to my mind, of their conduct, and that is that they believed, at the time that as Kalu Khan had actually received the money, they had no case to resist redemption as against the mortgagors, and that they then considered that the dispute was one to be settled as against Kalu Khan himself. They did not even come into Court with a suit until nearly two years after the date of the mutation, and the obvious inference is that they have done so now because they have been since advised that payment to one of several mortgagees does not constitute a valid redemption. There is, again, the important fact that possession of the land in suit appears to have changed hands since the mutation. It is admitted that the mortgagors, and not the mortgagees, are now paying the revenue. Two explanations of this fact have been put forward by the plaintiffs. One is, that the payment of re-

venue by the mortgagors arises out of an agreement made by Gulmiran in 1918 and recorded in mutation under which, on redemption of one-sixth of the land, he contracted to pay the revenue in future. I have examined that mutation and I am unable to see that it in any way bears the construction alleged. It does not show that Gulmiran undertook the payment of revenue at all; on the contrary, it lays down that the revenue will be paid by the mortgagees who are to pay Gulmiran one-sixth of the grain produced by the land. The explanation seems to me far fetched and unsound. The alternative explanation put forward is that, once the mutation of redemption had been attested, the Village Revenue Officers were obliged to recover the revenue from the persons shown to be in possession, and could no longer demand it from the mortgagees. But we find that, apart from the attested mutation, the mortgagors are now shown in possession in the *khasra girdwari* and this is extremely strong evidence to show that their possession was actual and not merely nominal. The explanation, again, is not consistent with the first one which I have dealt with. I hold that possession was actually transferred and that this is an additional and cogent reason for holding that redemption actually took place. On the question of fact I must disagree with the finding of the Divisional Court, and I hold that the mortgagee debt of Rs. 1192 has been paid by the mortgagors to Kalu Khan, one of the mortgagees.

(2) The question of law to be decided is whether this payment to one mortgagee only is binding upon the other mortgagees and has the effect of redeeming the mortgage. The question is one of considerable importance and by no means free from difficulty. The Trial Court, in holding that the payment constituted a valid discharge of the mortgage, followed the well-known Madras ruling in the case of *Barber Maran v. Ramanna Goundan* (1) passed in 1897 and published as *Barber Maran v. Ramana Coundan* (1). The Divisional

(1) 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327.

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Judge has pointed out that this ruling has not been followed by other Courts and has quoted *Mathra Das v. Nizam Din* (2) as confirming the view that payment to one of several joint mortgagees does not discharge the debt. The views which have been taken from time to time by different High Courts of India upon this subject are interesting and, to a large extent, conflicting. The conclusion arrived at by the High Court of Madras in the ruling quoted above was based principally upon the interpretation of section 38 of the Contract Act. The tenor of that section is that when a promisor has made an offer of performance to one of several joint promisees, such an offer has the same legal consequences as an offer to all of them. The view taken in that case was that an offer which has been accepted cannot be distinguished, so far as regards its legal consequences, from an offer which has been refused. Section 38 distinctly refers in its first paragraph to an offer which has not been accepted. The concluding words of this section, however, do not qualify the word "offer" by any condition of non-acceptance and run as follows:—"An offer to one of several joint promisees has the same legal consequences as an offer to all of them." That view is *prima facie* a perfectly logical one. It may be said that if a mere offer discharges from liability, an accepted offer *a fortiori* operates in the same manner. The same question came again before a Full Bench of the Madras High Court in the case published as *Mannava Annapurnamma v. Uppala Akkayya* (3) where the majority of the Judges composing the Full Bench upheld the decision of *Barber Maran v. Ramana Goundan* (1). The Chief Justice, Sir Arnold White, however, dissented. It is noticeable that, in his judgment, he admitted that the last paragraph of section 38 of the Contract Act was general and was not restricted to an offer which had not been accepted. This point is of interest as the Punjab Chief Court in the later rulings which upheld the conclusions then arrived at by Sir Arnold White have based their findings primarily upon the argument

that section 38 throughout can only refer to an offer which has not been accepted, and that it has no application to a payment actually made. The position with regard to section 38 of the Contract Act is well expressed in the judgment of Sankaran Nair, J., who was one of the majority composing the Full Bench in the Madras ruling now under consideration. He said that: "It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees, which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment, therefore, must be treated as a complete discharge." A somewhat similar question came before the Calcutta High Court in *Jagat Tarini Dasi v. Naba Gopal Chaki* (4) a ruling of 1907. That ruling however, is by no means conclusive, as it dealt primarily with the question as to whether the heirs of a deceased promisee were themselves joint promisees within the meaning of section 38 of the Contract Act. The view taken was that heirs constituted one corporate heir and were connected together with unity of interest and unity of title. The Bombay High Court in a ruling of 1903, published as *Sitaram v. Shridhar* (5), doubted the correctness of *Barber Maran v. Ramana Goundan* (1). The learned Judges, however, stated that it was not necessary for them to express any opinion on the correctness of that decision as they were dealing with the question of the rights of heirs. They held that heirs were not joint promisees, and that one heir could not enforce a mortgage without the concurrence of the rest so as to give a valid discharge to the mortgagor. I think that this ruling can only be regarded as leaving undisturbed the general principle enunciated in *Barber Maran v. Ramana Goundan* (1) while holding that that principle is inapplicable to heirs. The Punjab Chief Court, however, has been more definite in its complete divergence from the views held by the Madras

(2) 41 Ind. Cas. 921; 68 P. R. 1917 107 P. L. R. 1917 81 P. W. R. 1917 (F. B.).

(3) 19 Ind. Cas. 121; 36 M. 544; 13 M. L. T. (1913) M. W. N. 328; 24 M. L. J. 333 (F. B.).

(4) 34 C. 3051 5 C. L. J. 270.

(5) 27 B. 2921 5 Bom. L. R. 91.

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High Court. The chief authority in this respect quoted from the Punjab is *Mathra Das v. Nizam Din* (2). The learned Judges adduced two reasons for differing from the Madras view. One was that section 38 of the Contract Act could not apply because it referred to an offer refused only, and not to an offer accepted, and the second was the view that the case was governed by section 45 of the Contract Act. Now, with all due respect to the learned Judges, I think that the view that section 38 can only apply where the offer is not accepted, is one which involves a severe strain upon the language of the Code and also an illogical chain of reasoning. Further, I have already remarked that the learned Chief Justice of the Madras High Court, in dissenting from the view that payment to one of several joint promisees constituted a valid discharge for all; himself admitted that the concluding paragraph of section 38 was of general application and must refer to an offer accepted as well as to an offer refused. Again, the learned Counsel for the respondents before me, while attacking the principle enunciated by the Madras High Court and supporting the conclusion arrived at by the Punjab Chief Court, has also admitted very frankly that he cannot agree with the view taken by the latter regarding section 38. He argues that we must exclude section 38 from consideration altogether, and rely upon the principles of equity, a point with which I shall deal later. As regards the application of section 45 of the Contract Act, Sir Arnold White similarly excluded that section from the grounds on which he based his view. He says in his judgment: "section 45 which deals with the devolution of rights where a person has made a promise to two or more persons jointly, throws very little, if any, light on the question we have to decide. The section prescribes the way in which the rights are to devolve, but says nothing as to how these rights are affected by a transaction between the promisor and one of the promisees." It appears to me that this is the only tenable view, and that section 45 does not assist us at all in arriving at a decision on the question as to whether payment to one of several promisees has the same effect as payment

to all. It would seem, therefore, that the conclusion arrived at in *Mathra Das v. Nizam Din* (2) rests upon very slender foundation. The view taken by the Patna High Court is of a particular interest in the present case, as Counsel on both sides would seem to admit that the view taken by the learned Judges of that Court is really the soundest, inasmuch as it refers the question at issue solely to the test of equity. I have been referred by Counsel for the appellants to the ruling of 1917 published as *Parbhu Ram Pandey v. Jhalo Kuer* (6). If we are to exclude altogether, as a basis for determination, the provisions of sections 38 and section 45 of the Contract Act, it is argued by the learned Counsel for the respondents that the rule of equity applicable in England is that one of joint creditors cannot give a valid discharge. The learned Counsel argues that there has, on this point, been a conflict between Common Law and Equity in England, the Common Law principle being that there is a valid release by a single creditor unless fraud is proved, and the equity principle being that tenants-in-common can claim in equity that one of them cannot, destroy the right of others by releasing a debtor to a tenancy-in-common. It is contended, and no doubt rightly, that co-mortgagees constitute not a joint tenancy, but a tenancy-in-common. If, however, we are to decide the present question on the principles of equity, I am much inclined to doubt if the principle enunciated as the equitable principle accepted in England necessarily applies in India, and necessarily applies to the case of a mortgage of agricultural land such as that with which we are now dealing. In the first place, it is stated categorically in the judgment published as *Parbhu Ram Pandey v. Jhalo Kuer* (6), "the law is that one joint creditor in equity can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors." It was, therefore, conceded by that High Court that the equitable principle applicable in India was not that which has been put forward by the learned Counsel for the

(6) 42 Ind. Cas. 408; 2 P. L. J. 520; (1917) Pat. 258; 41 P. L. W. 57.

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respondents. Further, there cannot be the least doubt that Courts in India have always recognised that equity demands that the redemption of mortgages shall be facilitated. An illustration of this principle may be found in the doctrine that contracts arrived at between parties to a mortgage which constitute an inequitable clog upon redemption, may be set aside by Courts. It has always been regarded as a matter of public policy that the restoration of land to its original owner and the release of land from the burden of incumbrances are in themselves desirable. It is tolerably clear that an insistence upon the proposition that a mortgagor is obliged to satisfy separately every one of a number of co-mortgagees, may operate to effect a clog on the equity of redemption. It would certainly allow the mortgagees in many cases to force a mortgagor into Court as his only method of ensuring redemption. There is no doubt, at the same time, that the least fraud between the mortgagor and one of the several co-mortgagees with the intention of defeating the rights of the latter at once deprives the mortgagor of his right to obtain release by a single payment. This would be a question of fact in each particular case, and it must be accepted that a principle of equity which allows one of several mortgagees to give a valid discharge must be qualified throughout by the equally equitable condition that there has been no attempt to defeat or prejudice the rights of other persons.

I have also to consider, however, another position taken up by the respondents, and that is that there can in no case be a valid discharge by payment to one of several mortgagees when the separate shares of such mortgagees have been specified. This argument is based upon the principle laid down by the Allahabad High Court in *Ram Chandra v. Goswami Rajjan Lal* (7). In the present case there is no deed of mortgage, but the contract is embodied in the mutation attested by the Revenue Authorities. That mutation gives specific shares of each mortgagee. Now, it appears to me that the principle enunciated by the Allahabad High Court had been expressed in considerably too wide terms. I am unable to see that the mere

specification of shares among the mortgagees necessarily affects the mortgagor at all. For the mortgagor to be affected it must be shown not only that the shares of the mortgagees have been specified, but that the essence of the contract between them and the mortgagor was that he should redeem according to those shares. It is indeed a little difficult to distinguish the position of co-mortgagees on specified shares from a contract made in severalty with a number of mortgagees. Now, if there was a mortgage-deed which definitely showed that the mortgagor had entered into a contract recognising the specification of the mortgagees' share, and implying any separate liability to each, there would be much force in the respondents' contention that payment in the present case to one of them would not constitute a valid discharge as against all. When, however, we are dealing with a mortgage the terms of which have been embodied only in the mutation proceedings, there is nothing whatever to show that the mortgagor himself was any party to the method by which the mortgagees allotted their respective rights *inter se*. There is no doubt that this question would be regarded by the Revenue Authorities as one which concerned the mortgagees alone, and that they would be allowed to specify such shares without any reference to the mortgagor's acceptance of each, and that all that would be necessary for the admission of the mortgage to the Revenue Record would be the acknowledgment of the mortgagor of his liability for the total amount. In fact, I would go so far as to say that, in the absence of a direct contract to the contrary, it must be assumed that the liability of the mortgagor is joint and not several as regards the whole body of co-mortgagees. I am, therefore, unable in the present case to accept the contention that, if we once accept the general principle that payment to one mortgagee constitutes a valid discharge of the debt, that principle is affected merely because the shares of the mortgagees in the debt are specified in the Revenue Record.

It is now possible to sum up the conclusions arrived at. I hold that section 38 of the Contract Act applies to an offer which has been accepted as well as to an offer which has been refused; further, that, whe-

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ther section 38 of the Contract Act applies to payment to one of several joint mortgagees or not, the rule of equity applicable in India is that, in the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. I hold, further that the mere specification of shares held by the mortgagees in a Revenue Record is not sufficient in itself to warrant the assumption that the mortgagor is bound by the division of those shares, and that it lies upon mortgagees to show that a definite contract subsisted between the parties which recognised such division. I must, therefore, disagree with the findings arrived at by the Divisional Court on both the points for determination in this case. I hold that the mortgage-debt was duly paid to one of the mortgagees Kalu Khan and that the effect of the payment was to redeem the mortgage from all. I, therefore, accept this appeal and, restoring the order of the First Court, dismiss the suit with costs. The plaintiffs will pay the defendants' costs on this appeal.

Z. K.

Appeal allowed.

Appeal against the judgment and decree of the District Judge, Gonda, dated the 8th August 1922, upholding the judgment and decree of the Assistant Collector, First Class, Gonda, dated the 11th July 1921.

Mr. Moti Lal Saksena, for the Appellant.

JUDGMENT.—This is an appeal in a suit for profits under section 108 (15) of the Oudh Rent Act. The only substantial plea is that the parties were members of a joint family and, therefore, no suit for profits lies. This fact I am asked to decide purely on the basis of the presumption under the Hindu Law, in spite of the fact that the defendant's witnesses said nothing about it, but, on the contrary, gave evidence to show that the plaintiff had received a part of her profits. Even, however, if the fact were established I am of opinion that this is not a good answer to the suit. My attention is drawn to an old ruling of the Allahabad High Court that a suit for profits under section 93 of the Rent Act of 1881 did not lie by one member of a joint Hindu family against another *Chandi Prasad v. Jwala Prasad* (1). Whatever may have been the case under the N.-W. P. Rent Act I am of opinion that the same rule does not apply to the Oudh Rent Act. Section 108 is only concerned with the question whether the parties are recorded co-sharers. If the plaintiff is a recorded co-sharer, recorded in respect of a specific share as is the case here, she is entitled to maintain a suit for profits. I accordingly dismiss the appeal under O. XII, r. II.

W. C. A.

Appeal dismissed.

(1) A. W. N. (1899) 206.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 8 OF 1922.

December 22, 1922.

Present:—Mr. Daniels A. J. C.

Mussammat SOHBAT KUAR, AND

ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat RAJ DEVI—PLAINTIFF

—RESPONDENT

*Oudh Rent Act (XXII of 1886), s. 108 (15)—
Suit by member of joint Hindu family against another for profits, whether maintainable.*

*A suit, for profits under section 108 (15) of the Oudh Rent Act, brought by one member of a joint Hindu family against another is maintainable, if the plaintiff is a recorded co-sharer, recorded in respect of a specific share.

EMPEROR . INAYAT.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1011 OF 1922.

January 23, 1923.

Present:—Mr. Justice Zafar Ali.

EMPEROR—PETITIONER

VERSUS

INAYAT—ACCUSED—RESPONDENT.

Press and Registration of Books Act (XXV of 1867), ss. 4, 14—False statement in making declaration, what constitutes.

A false statement in a declaration which is not made and subscribed before a Magistrate as provided by section 4 of the Press and Registration of Books Act, cannot be said to have been made "in making a declaration" within the meaning of section 14 of the Act. [p. 690, cols. 1 & 2.]

The mere presentation of a declaration to a Magistrate is not equivalent to making it before him within the meaning of section 4 of the Act. Therefore, it is no offence to merely present a false written statement or declaration to a Magistrate. [p. 690, col. 2.]

Case reported by the District Magistrate, Lahore, with his No. 2150, dated the 18th May 1922.

FACTS.—The accused in this case filed a set of three declarations under section 4 of the Indian Press Act, No. XXV of 1867.

In these declarations, marked Exhibits P B, C and D on the file, he stated that he had a Press for printing at Lahore called the Naqqash Press.

On an enquiry it was found that the statements in the declarations as to accused's having any such Press as the Naqqash Press were false.

A complaint against him was lodged in the Court of the Additional District Magistrate, who, after a comprehensive trial under section 14 of the Act, found the accused guilty of making a false statement in the declarations, convicted and sentenced him to imprisonment till the rising of the Court and to fine of Rs. 100 only.

GROUND.—1. The punishment awarded is manifestly inadequate and meagre, it is only nominal and does not meet the ends of justice.

2. The accused actually committed a triple offence under section 4 read with section 14 of the Press Act by making palpably false statements in the declarations which he never believed to be true.

3. The punishment provided and contemplated by the Legislature for a single offence

of the kind is up to Rs. 5,000 fine coupled with imprisonment up to two years.

4. The action of the accused in thus making false declaration was deliberate and was intended to save him from the operation of the penal provisions of the Press Act. The security of Rs. 2,000 of the Press with which he was connected and which printed the *Siasat* newspaper had recently been forfeited by Government. The Press Act provided for the enhancement of that security up to Rs. 10,000. To avoid having to deposit enhanced security and the chance of that enhanced security being forfeited together with the machines of the old Press on the occasion of a possible further order of confiscation by the Local Government, the accused with full deliberation filed a false declaration which, if duly accepted, would allow the District Magistrate to demand only Rs. 2,000 security. The fact that the Press Act has since been repealed cannot be taken into consideration.

The inadequacy and impropriety of the sentence being noticed on my examination of the record of the case under section 435 of the Criminal Procedure Code, it is forwarded under section 438, Criminal Procedure Code, for the orders of the High Court with a recommendation for the enhancement of the sentence such as their Lordships may think fit in the interests of justice.

Kanwar Dalip Singh, for the Petitioner.

Mr. Ghulam Mohi-ud-Din, for the Respondent.

ORDER.—Syed Inayat was convicted under section 14 of the Press Act (XXV of 1867, as modified up to the 1st of July 1890) of making a false statement; and sentenced to simple imprisonment till rising of the Court, and Rs. 100 fine which was paid. The District Magistrate has made a reference to this Court under section 438, Criminal Procedure Code, for enhancement of sentence, while the convict applies for revision on the ground that no offence under section 14 read with section 4 was proved to have been committed by him.

It is admitted that though the accused filed a written declaration in triplicate with a letter in the Court of the District Magistrate he did not make nor subscribe it before him. It is contended;

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therefore, that even if it be conceded that his statement in the said declaration that he had a printing press was not true, he could not be said to have made this false statement in making a declaration; because he never made the declaration before a Magistrate. The Magistrate who tried the accused got over this objection in the following way:—

"It is now to be seen whether the accused by putting in a declaration form in which he stated 'I have a printing press for printing entitled the Naqqas Press situate in Lahore' while he had no such press in his possession, did commit an offence under section 14 of Act XXV of 1867. The section reads as follows:—"Any person who shall, in making any declaration under the authority of this Act, make a statement which is false, and which he either knows or believes to be false, or does not believe to be true, shall on conviction before a Magistrate, etc., etc." The section does not contemplate that the declaration should be complete before a prosecution is lodged, for it must be admitted that the declaration, Exhibits P. B., P. C., and P. D., were not attested or completed before the District Magistrate. It has a wider scope and any false or untrue statement made in the course of making a declaration is made punishable under the section. The forms, Exhibits P. B., P. C., and P. D., duly filled in and presented by the accused amounted to a written statement; and the accused appeared before Mr. Keough, Additional District Magistrate, on the 25th January last and gave particulars of his new Press, whereupon a security of Rs. 2,000 was recommended (*vide* Exhibit P. H.). Hence I am of opinion that the putting in of a declaration form duly filled in amounts to making a statement while making a declaration; under the Act."

[Now it is obvious; that this interpretation of section 14 outskips its scope, and it is contended that this argument is fallacious, and exception was taken to it in grounds Nos. 7 and 8 of the appeal presented to the learned Sessions Judge; but it appears that the point was not argued before him, as it is not dealt with in his judgment. The only question for determination is whether a false statement in a declaration which is not made and subscribed before

a Magistrate as provided by section 4, can be said to have been made 'in making a declaration.' It is quite clear that it is no offence to merely present a false written statement or declaration to a Magistrate, and as admitted by the Magistrate to present a written declaration to a Magistrate is not equivalent to making it before him. As the petitioner made no declaration before a Magistrate it cannot possibly be said that he made a false statement in the course of making a declaration before a Magistrate. Section 14 contemplates a false statement made in making a declaration which may consist of several statements as in the present case. Therefore, if no declaration is made and subscribed at all before a Magistrate, it cannot be said that the accused made a false statement in making a declaration before him. I am, therefore, of opinion, that the accused petitioner committed no offence under section 14 of the said Act and could not be convicted. It may be remarked here that there is nothing on the record to show that the petitioner made a statement before the Additional District Magistrate or gave him any particulars of his new press. No particulars of the press are given in the form Exhibit P. H., which was filled up by the Additional District Magistrate.

[Therefore, I accept the petition and set aside the conviction. The fine will be refunded. This disposes of the reference also made by the learned District Magistrate.

Petition accepted;

Conviction set aside.

Z. F.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 162 OF 1923.

April 13, 1923.

Present:—Mr. Justice Daniels.

SITA RAM AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 476—Magistrate ordering prosecution under

EMPEROR v. SARWAN SINGH.

s. 476—Revision by District Magistrate—Jurisdiction.

Where an order to prosecute a person is passed by a Magistrate under section 476, Criminal Procedure Code, the District Magistrate has no jurisdiction to interfere, it is only when sanction to prosecute has been granted under section 195, that the District Magistrate has such powers.

Criminal revision against an order of the District Magistrate, Etawah, dated the 31st January 1923.

Mr. N. C. Vaish, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision of an order passed under section 476 directing the prosecution of the accused under section 205 of the Indian Penal Code. The application has been pressed on the facts only, but there is no doubt on the Magistrate's order that a *prima facie* case is made out against the applicants. It appears that the complainant had filed a list of witnesses and the case had been adjourned for their evidence. On the adjourned date the two applicants, Sita Ram and Ram Lal, appeared as witnesses, and in their evidence gave their names as Radha Kishen and Pershadi Lal, respectively, these being the two witnesses for whose evidence the case had been adjourned. The Trying Magistrate took action under section 476 of the Indian Penal Code. The case came before the District Magistrate who passed an order purporting to uphold the Trying Magistrate's order but to alter the charge from one under section 193 of the Indian Penal Code to one under section 205 of the Indian Penal Code, on an application for revision presented by the accused. If the Trial Court had granted sanction under section 195 of the Code of Criminal Procedure it would, no doubt, have been within the power of the District Magistrate, as the Court to which appeals would ordinarily lie, to uphold or modify that sanction, but where an order has been passed under section 476 the District Magistrate has no power to alter it. The order of the District Magistrate was, therefore, *ultra vires* and I set it aside and restore the order passed by the District Magistrate. It will, however, be open to the Court which tries the case to frame a charge under section 205 of the Indian Penal Code

if the evidence discloses an offence under that section.

M. A. A.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 633 OF 1922.

November 9, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

EMPEROR—APPELLANT

versus

SARWAN SINGH AND OTHERS—ACCUSED
—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 216, offence under, when complete—"Harbour," meaning of.

There is no time limit for the completion of an offence under section 216 of the Penal Code, which is complete as soon as it is committed, and it is immaterial whether the evasion of apprehension of the offender lasts six hours or six years. [p. 691, col. 2; p. 693, col. 1.]

The word "harbour" in section 216 of the Penal Code includes "the assisting of a person in any way to evade apprehension," and is not confined to providing shelter, food and clothing. [p. 692, cols. 1 & 2.]

Appeal from the order of the Sessions Judge, Ludhiana, dated the 18th May 1922, reversing that of the Magistrate First Class, Ludhiana, dated the 10th April 1922.

The Government Pleader, for the Appellant.

Mr. B. N. Kapur, for the Respondents.

JUDGMENT.—Five men, Hardit Singh, Sarwan Singh, Dewa Singh, Partap Singh and Santa Singh, were convicted by a First Class Magistrate under section 216, Indian Penal Code, of harbouring one Sham Singh, an offender whose apprehension had been ordered, by assisting him to evade that apprehension, and also under section 353, Indian Penal Code, of using criminal force to deter public servants, namely, the Police Officers who were endeavouring to arrest Sham Singh, from the discharge of their duties. They were also ordered on release from jail to execute bonds under section 106, Criminal Procedure Code.

They appealed to the Sessions Judge of Ludhiana and their appeals were accepted.

EMPEROR V. SARWAN SINGH.

and from that order accepting the appeals the Government Advocate has presented an appeal to this Court asking to have it set aside and the order of conviction restored.

Now, it is clearly established that on the 21st March 1922, between 10 and 11 o'clock a party of Police went to the village Manoki to arrest this man Sham Singh against whom a warrant had been issued under section 17 (2) of the Criminal Law Amendment Act (XIV of 1908). When they arrived in the village it was discovered that he was in the house of one Sucha Singh and they proceeded there, the Sub-Inspector, Umar Bakhsh, staying outside the house with some of his men and sending in two Head Constables, Balwant Singh and Kirpal Singh. They found the five accused surrounding Sham Singh in an inner *kothri* all being armed with *lathis*. Balwant Singh called out that he had come to arrest Sham Singh and that he had a warrant, whereupon these five men replied that they would not allow the arrest to take place, and came out of the house guarding and surrounding Sham Singh, and in order to intimidate the Police they raised their *lathis* in a threatening manner. When they came out of the street the Police made another unsuccessful effort to arrest Sham Singh, and a large body-guard then joined the accused, consisting of some 20 men who came from a *Diwan* which was in progress at the time, and these men, who were armed with *kirpans* and *lathis*, together with the original five, escorted Sham Singh to the *Diwan*. The Deputy Commissioner, Mr. Hilton, was in the village at the time, and he called up Hardit Singh who appears to have been the ring-leader amongst the accused. On the Deputy Commissioner ordering him to allow Sham Singh to be arrested he replied that they would not do so until the *Diwan* had been completed and that then, after 4 o'clock, the accused would be given up and as a matter of fact the accused was given up.

On these facts it is perfectly clear that the accused have committed the offence described in section 216, Indian Penal Code, of harbouring an offender, for the word "harbour" does not only mean to provide shelter, food and clothing but includes "the assisting of a person in any way to evade

apprehension," and it cannot seriously be contended that, on these facts, the accused did not commit this offence. We are of opinion, however, that what the accused did in guarding Sham Singh, in threatening the Police and in preventing his arrest was all one and the same transaction and cannot be split up. This being so, and as the Government Advocate does not press for a further conviction under section 353, it is unnecessary to consider whether this offence has or has not been committed. We, therefore, accept the appeal in so far as to restore the order of the Trying Magistrate, which is absolutely correct, under section 216 and maintain the sentences passed under that section of three months' rigorous imprisonment. The remainder of his order which concerns section 354 and the giving of security under section 106, Criminal Procedure Code, which does not apply after a conviction under section 216 only, will not be carried out.

We think it right to point out that the judgment of the Sessions Judge is perverse and does not represent the facts correctly. The whole impression conveyed by this judgment is that two high contracting parties, the Deputy Commissioner and spokesman of the accused, discussed the question of the handing over of Sham Singh; that the Deputy Commissioner came to terms with this spokesman and agreed that the arrest should be delayed; that each high contracting party conceded a certain portion of its demands or, rather, to be accurate, that the Crown made a concession and agreed to delay the arrest until it suited the convenience of the person against whom the warrant had been issued, to give himself up and until it suited his friends to agree to his doing so. In fact, the judgment states clearly in two places that it was "agreed" that the arrest should be delayed. What actually happened was that the Deputy Commissioner called upon this ringleader to cease breaking the law and to use his influence to prevent his friends doing the same, and, on their defying him, thought it wiser not to try and enforce the order with the wholly inadequate Police force at his command. There can be no sort of doubt that the accused assisted Sham Singh to evade apprehension, and it is nowhere laid down

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that there is any time limit for the duration of this offence, which is complete as soon as it is committed. It is, therefore, immaterial whether the evasion lasts six hours or six years. We have allowed the fact that the accused peacefully gave up Sham Singh later in the evening to affect the question of sentence, and this is the only effect which it can possibly be allowed to have.

W. C. A.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 141 OF 1922.

January 9, 1923.

Present:—Mr. Simpson, A. J. C.
NAGESHAR PRASAD AND OTHERS—
ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT.

*Criminal Procedure Code (Act V of 1898), s. 342—
Failure to examine accused—Grave irregularity—Re-trial.*

The failure by a Magistrate to examine an accused person for the purpose of section 342 of the Criminal Procedure Code is a grave irregularity and might, in a suitable case, be in itself a sufficient ground for setting aside a conviction. The fact that the accused was examined and cross-examined as a prosecution witness in a cross-case would not relieve the Magistrate of the duty imposed on him by the above section or lessen the gravity of the irregularity. Where, however, the irregularity is not such as to prevent the Magistrate from arriving at a correct view of the facts and the accused has said all he has had to say in the capacity of a prosecution witness, and no unfair use has been made of any admission made by him as a witness, the High Court will not order a re-trial. [p. 694, cols. 1 & 2.]

Application against the order of the Sessions Judge, Fyzabad, dated the 11th November 1922, upholding the order of the Magistrate, First Class, Fyzabad, dated the 17th October 1922.

Mr. Bindeshri Prasad, for the Applicants.

The Government Pleader and Mr. K. P. Singh, for the Crown.

JUDGMENT.—This is an application in revision. It is not free from difficulty.

The learned Magistrate had before him two cross-cases of riots, and he was ill-advised to mix them up and to dispose of them in a single judgment. Nevertheless, I come to the conclusion that the present applicants had a fair trial and their conviction ought to be sustained. It is not necessary, in dealing with this reference, to go into the facts at all. It is sufficient to say that a *lathi* fight between two bodies of men took place, and two different versions of the facts were put forward. The Police *challenged* the present applicants and others. This is one case. The present applicants filed a complaint. This is the other. The learned Magistrate proceeded to hear all the evidence produced for the prosecution and for the defence in both cases, and he then disposed of them both in a single judgment.

I do not think that the fact that he wrote only one judgment is of much consequence. He acquitted them in one case and that case is not before me. He convicted them in the *challan* case, and the judgment contains a full discussion of the evidence, and is, in every respect, a proper judgment giving reasons for the convictions. But the learned Magistrate fell into two errors, such as are hardly avoidable when two cross-cases are disposed of in the same judgment. The first is, that he has used the evidence of Mohan, *Chaukidar*, who was examined as D.W. No. 2 in the complaint case, as if he had been a prosecution witness in the *challan* case. If Mohan had been an important witness this error would have vitiated the whole trial. I have referred to the record and have read the examination of this witness. He said nothing to the point, except that he denied that he himself had taken a lease of the grove which, according to the prosecution, was the scene and object of the riot. The reason this question was put was that Nageshwar, accused, one of the applicants, asserted that Mohan had done so. The only point in his evidence, therefore, was to destroy the effect of this assertion of Nageshwar's. But if Mohan's evidence is cut out, Nageshwar's statement, as an accused person, is still insufficient to prove such a fact, specially when all he said was that "this Ganga Baggal's grove was let, so far as I know, to Mohan, *Chaukidar*. He

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was looking after it. I was not at auction." In the judgment it is said that Baldeo's story is only corroborated, as far as the letting of the grove is concerned, by D. W. No. 2. This is an error. Mohan merely denies that he himself took the grove; he has nothing else to say about it. The admission of this evidence, therefore, does not vitiate the convictions. The Magistrate and the Judge would have reached the same conclusions, if they had disregarded Mohan's evidence. It is of no real importance to the prosecution case.

The next point is one of procedure. The learned Magistrate was bound, under section 312, to question the accused generally on the case after the witnesses for the prosecution had been examined, for the purpose of enabling them to explain any circumstances appearing in the evidence against them. All the present applicants had been examined and cross-examined as prosecution witnesses in the cross-cases, and the Magistrate recorded their examination in this form:—

"My sworn evidence in cross-case is correct. I have no more to say."

It is on this point that I feel some difficulty. This procedure is irregular. An accused person ought to be questioned only in the way and for the purpose described in section 312. When he appears in the cross-case as a prosecution witness he is questioned for a different purpose, namely, to establish the guilt of the opposite party, and he is cross-examined with full freedom of putting any question whatever to him. He is not free to refuse to answer any question, which privilege he possesses as an accused person. I desire to state, as strongly as possible, that the procedure followed by the learned Magistrate was utterly wrong and that it might, in a suitable case, be in itself a sufficient ground for setting aside a conviction. In the present case no harm had been done. The accused has said all that he had to say in the capacity of a prosecution witness. No necessary question has been pointed out to me which was not put to the accused. No unfair use has been made of any admission made by the accused person as a witness. The accused themselves did not seem to have considered that they had any grievance. In the original grounds of appeal this point is not taken at all. Even

in the subsequent grounds of appeal it is not mentioned explicitly, and evidently it was not brought to the notice of the learned Sessions Judge. Of course, it is a point of law and can be raised at any time. But, on the whole, I do not think I should be justified in ordering a re-trial. The case was tried at considerable length and with great care on the part of the Magistrate. This irregularity was not such as to prevent him from arriving at a correct view of the facts. He had before him, in the shape of depositions a very much fuller statement by each of the accused than a Magistrate usually possesses. The appeal has been carefully considered and has been rejected by the learned Sessions Judge. Therefore, I dismiss the application in revision. But I must not be understood to say that the provisions of section 342 have been properly complied with in this case, or that the procedure followed is anything short of a grave irregularity.

W. C. A.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 606 OF 1922.

November 30, 1922.

*Present:—*Mr. Justice Stuart.

RAM CHANDAR—APPLICANT

versus

EMPEROR—RESPONDENT.

Practice—Criminal appeal—Absence of appellant—Procedure.

When once a criminal appeal has been admitted and a date fixed for its hearing, the Appellate Court is bound to peruse the record and to decide the appeal judicially. It cannot dismiss it for default of appearance.

Queen-Empress v. Poonji, 13 A. 171; A. W. N. (1891) 48; 7 Ind. Dec. (N. S.) 107 (F. B.), followed.

Criminal reference made by the Sessions Judge, Aligarh.

FACTS appear from the following

REFERRING ORDER.—"This is an application for revision of the order of Maulvi Muhammad Habibullah Khan, Magistrate of the First Class, dismissing an appeal filed by one Ram Chaudar against the judgment of the Bench of Honorary Magistrates of

ALLAH DIN V. EMPEROR.

Hathras. The order passed by the learned Deputy Magistrate is as follows:—'Both the appellant and his Pleader absent. File in default.'

This order of dismissal of an appeal in default is apparently illegal, because there is no provision in the Code of Criminal Procedure for the dismissal of an appeal on account of the non-appearance of the appellant or his Pleader. Having admitted the appeal and fixed a date for its hearing, the Appellate Court is bound to peruse the record and to decide the appeal judicially; *Queen-Empress v. Pohpi* (1). Under the circumstances, I am bound to report this case for the orders of the Hon'ble High Court with the recommendation that the illegal order passed by the learned Deputy Magistrate be set aside and that he be directed to dispose of the appeal according to law. The Magistrate's explanation, if any, will accompany the record."

JUDGMENT.—I agree with the view taken by the learned Sessions Judge, set aside the order dismissing the appeal and return the appeal to the learned Deputy Magistrate who decided it, or his successor, with directions to dispose of the same according to law.

W. C. A.

Order set aside.

(1) 13 A. 171; A. W. N. (1891) 48; 7 Ind. Dec. (N. S.) 107 (F. B.).

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 945 OF 1922.

January 18, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

ALLAH DIN—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, Exception I; 326—Death caused by single thrust of pen-knife without premeditation—Offence—Grave and sudden provocation.

In connection with the marriage of accused with one *Musammal I*, a certain ceremony was to be performed on a certain date. On the day so fixed, the

accused found one *Musammal N* taking *Musammal I* away from her village, and when he remonstrated with her she told him that the ceremony would not take place on that day and abused him. The accused thereupon attacked the women with a pen-knife and inflicted one injury on each in the abdomen, as the result of which *Musammal N* died, but *Musammal I* survived:

Held, (1) that the conduct of *Musammal N* amounted to the giving of grave and sudden provocation within the meaning of Exception I to section 300 of the Penal Code; [p. 696, col. 1.]

(2) that having regard to the facts that the accused acted without premeditation, used only a pen-knife and inflicted each woman only one injury, there was a very strong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death; [p. 696, col. 1.]

(3) that, however, it must be presumed that the accused intended to cause grievous hurt to the women and was, therefore, guilty of an offence under section 326 of the Penal Code. [p. 696, col. 1.]

Appeal from an order of the Sessions Judge, Jhelum, dated the 5th October 1922.

JUDGMENT.—Allah Din has been convicted by the Sessions Judge of Jhelum of the murder of *Musammal Nek Bakht* and of the attempted murder of *Musammal Imam Bibi* and has been sentenced for the former offence to transportation for life and for the latter to ten years' transportation, the sentences to run concurrently. Appeals were presented to this Court by Counsel who, however, has not attended to argue. We have perused the record. The facts are fully and clearly stated in the judgment of the learned Sessions Judge and need not be repeated.

In our opinion the questions which arise are the following:—

1. Whether Allah Din, appellant, intended to cause the death of *Musammal Nek Bakht* or, as found by the Sessions Judge, intended to cause such injury as he knew to be likely to cause death.

2. Whether he received such grave and sudden provocation as would reduce the offence from one of murder to one of culpable homicide not amounting to murder.

3. Whether he attempted to murder *Musammal Imam Bibi*.

Having regard to the facts that Allah Din acted without premeditation, used only a pen-knife and gave each woman only one injury, we think there is a very strong presumption that he neither intended

DOUGLAS DONALD, *In the matter of.*

to cause death nor such bodily injury as he knew to be likely to cause death. Upon the second question the learned Sessions Judge admits that there was an altercation between the appellant and the women, that abuse was exchanged, and that provocation was certainly given, but holds that the provocation was not so grave and sudden as to bring the appellant within the first exception in section 300, Indian Penal Code. Now Allah Din had been married to *Musammât* Imam Bibi and it has been found by the Court below that the ceremony of *tabdil parchat* was to have taken place on the day of the occurrence in Chakwal. The appellant found *Musammât* Nek Bakht taking the girl away from Chakwal and when he remonstrated with her, she told him that the girl would not be married to him that day and abused him. Even if she did not say to him that if he wanted to marry anybody he could go and marry his mother, we still think that, under all the circumstances, the provocation given to him was sufficiently grave and sudden to bring him within the first exception in section 300 of the Indian Penal Code. These being our findings, it is clear that the conviction for murder cannot be maintained, nor can the conviction for the attempted murder of *Musammât* Imam Bibi be maintained. At the same time, we have no difficulty in holding that when Allah Din wounded the women in the abdomen with a pen-knife he certainly intended to cause them grievous hurt, and we, therefore, accept the appeals and, setting aside the convictions and sentences, convict him instead of two offences of voluntarily causing grievous hurt under section 326, Indian Penal Code. Though he had undoubtedly grave provocation, it was a very serious offence for him to stab helpless women in the abdomen with a knife. We consider it necessary to impose a severe sentence, and we sentence him to seven years' rigorous imprisonment including three months solitary confinement for each offence, and direct that the sentences shall run concurrently.

Z. K. & N. H.

Sentences altered.

LAHORE HIGH COURT.

CRIMINAL, MISCELLANEOUS APPLICATION

No. 41 of 1922.

June 13, 1922.

Present.—Mr. Justice Harrison and

Mr. Justice Abdul Raoof.

In the matter of MR. DOUGLAS DONALD.

Lunacy Act (IV of 1912), s. 14—Civil Procedure Code (Act V of 1908), ss. 115, 151—Letters Patent (Lahore), cl. 12—Order by District Magistrate under s. 14—Revision—Remedy.

The Lunacy Act deals specifically and under separate headings with the two branches of proceedings, executive and judicial. [p. 699, col. 2.]

An order passed by a District Magistrate under Part II of the Lunacy Act is a purely executive order and cannot form the subject-matter of a revision application to the High Court, nor has the High Court the power to interfere with such an order under clause 12 of the Letters Patent or in the exercise of its powers of superintendence. [p. 699, col. 2.]

Umes Chandra Gupta v. Emperor, 10 C. W. N. 322; 3 Cr. L. J. 256, referred to.

Any person considering himself aggrieved by an executive order passed by the District Magistrate under section 14, Part II of the Lunacy Act may apply under Part III of the Act for a regular inquiry conducted by a judicial officer. The result of such inquiry is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. [p. 699, col. 1.]

Application to set aside the order of the District Magistrate, Lahore, dated the 30th March 1922.

ORDER OF REFERENCE.

Abdul Raoof, J.—(May 18, 1922).—

This is an application presented by Mr. W. B. O'Connor, Barrister-at-Law, on behalf of Mr. Douglas Donald, and Mr. William Henry Donald under the circumstances summarised below, invoking the powers of revision and superintendence possessed by the High Court under the Civil and Criminal Law and under the Charter Act:—

Mr. Douglas Donald is married to the daughter of one Mrs. Mercer. The husband and wife have been living separately for many years. Mr. Douglas Donald has, however, been making an allowance for his wife's maintenance through Mr. Alexander Mercer of Lahore, which he is said to have stopped lately. He is under the impression that his wife is dead, and that this fact is being kept concealed from him by Mr. and Mrs. Mercer. On the 23rd of

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March 1922, he wrote a threatening letter to Mr. Mercer, and this letter was sent by the latter to Major Fernar, District Magistrate of Lahore, with a covering letter, dated the 26th March 1922, complaining of the behaviour of Mr. Douglas Donald towards him and his wife, expressing apprehension of violence from him and asking for protection. The matter was at once placed in the hands of Lieutenant-Colonel Gregson, Senior Superintendent of Police, Lahore, who, after taking necessary steps, the details of which need not be given, took action under section 13 of the Lunacy Act, IV of 1912, and, believing Mr. Douglas Donald to be a dangerous person by reason of lunacy, produced him before Major Fernar, the District Magistrate of Lahore. The District Magistrate on the 30th March 1922 proceeded to deal with the matter under section 14 of the Lunacy Act, IV of 1912. He examined Mr. Douglas Donald and being of opinion that there were grounds for proceeding further, caused him to be examined by Major Cox, Superintendent of the Lunatic Asylum, Lahore. Being satisfied that Mr. Douglas Donald was a dangerous lunatic and a proper person to be detained, he obtained a certificate from Major Cox, and was prepared to make an order for the admission for Mr. Douglas Donald in the Lunatic Asylum, when Mr. William Henry Donald, the brother of the alleged lunatic, entered into a bond undertaking that the lunatic shall be properly taken care of, and shall be prevented from doing injury to himself or to others. The Magistrate, instead of making a reception order, made over Mr. Douglas Donald to the care of his brother. Three medical certificates testifying to the lunacy of Mr. Douglas Donald have been placed on the record: (1) one dated the 30th March 1922, given by Major Cox, (2) another certificate by the same medical gentleman dated the 31st March 1922, and (3) a certificate dated the 31st March 1922, by Lieutenant-Colonel S. M. Davidson, Civil Surgeon, Lahore.

Against the order of the District Magistrate, dated the 30th March 1922, the present petition has been presented. On the petition being called on for hearing Mr. Jai Lal, the learned Government Advocate appearing on behalf of the Crown, raised a

preliminary objection to the hearing of the petition on the ground that the proceeding taken by the learned District Magistrate was not a judicial proceeding, and that the order passed being of a purely executive character an application for its revision cannot be entertained by the High Court.

The Act is divided into four parts. Part I deals with "*Preliminary matters.*" Part II deals with "*Reception, Care and Treatment of Lunatics.*" Chapter II in this part deals with "*Reception of Lunatics,*" and Chapter III provides for the "*Care and Treatment.*" Part III provides for "*Judicial Inquisition as to lunacy.*" Chapter IV in this part lays down "*Rules for the conduct of proceedings in lunacy in Presidency towns.*" Under this Chapter is laid down the procedure relating to the "*inquisition*" and "*rules for the exercise of judicial powers over person and estates of lunatics, management and administration of such estates, etc., etc.*" Chapter V lays down the "*proceedings in lunacy outside Presidency towns.*" Part IV deals with certain miscellaneous matters.

From the above summary of the provisions of the Act, it appears that the Legislature intended to make a clear distinction between the proceedings which are of a judicial character, and those of a purely executive nature. The order passed by the District Magistrate in this case, therefore, *prima facie*, does not appear to be of a judicial character. It is, therefore, doubtful whether the High Court can interfere with it in the exercise of its revisional powers. Mr. O'Connor has vehemently contended that where there is a wrong there ought to be a remedy for it, and that this High Court, being the highest Court in this Province, must be possessed of some authority to remedy the wrong done to his clients. He has relied on the provisions of section 151 of the Civil Procedure Code and has contended that under this section the High Court has full powers to entertain this petition for revision. It is clear, however, that this section does not empower the High Court to deal with an order passed by a Magistrate.

The learned Counsel has, in the alternative, contended that the High Court can deal with this matter on its Original Side, and can institute a judicial inquisition

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as to the alleged lunacy of the petitioner, Douglas Donald, under section 12 of the Letters Patent. The said section provides as follows:—

"And we do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents."

The learned Counsel, however, has failed to show that the Chief Court of the Punjab used to exercise original jurisdiction in matters of lunacy. In any case, it cannot be conceived that the Chief Court could have exercised or this High Court can exercise such power and authority in disregard of the provisions of the Lunacy Act. Section 12 of the Letters Patent relating to the Allahabad High Court lays down almost a similar rule on the subject, but it was held in *Jaundha Kuar v. Court of Wards* (1), that the High Court had not, under section 12 of the Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India. The learned Judges of the Division Bench, who decided the case, refrained from expressing any opinion respecting their jurisdiction over persons and estates of lunatics who were European British subjects. The section, as it stands, however, does not profess to make any distinction in this respect between the cases of persons who are natives of India, and those who may be European British subjects. It was laid down in that case that under Act XXXV of 1858, the principal Civil Court in the District had jurisdiction to deal with such matters. Under the present Act only the High Court in the Presidency towns are empowered to exercise original jurisdiction in matter of lunacy (see Chapter IV of the Act), and proceedings in lunacy outside Presidency towns under Chapter V of the Act are provided to be taken in District Courts. Section 83 of the Act gives a right of appeal to a High Court from an

order made by District Courts under Chapter III. Clause (2) of section 65 provides that—

"Upon the completion of the inquisition, the Court shall determine whether the alleged lunatic is of unsound mind and incapable of managing himself and his affairs, or may come to a special finding that such alleged lunatic is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others."

This is exactly what the petitioners want this Court to hold. Mr. William Henry Donald may present this application to the District Judge within whose jurisdiction Mr. Douglas Donald, the alleged lunatic resides and ask him to hold a judicial inquisition under Chapter V. He can then apply for the discharge of the lunatic under section 34, which provides that—

"If any lunatic detained in an asylum on a reception order made under sections 7, 10, 14, 15 or 17 is subsequently found on an inquisition under Chapter IV or Chapter V not to be of unsound mind and incapable of managing himself and his affairs, the person in charge of the asylum shall forthwith, on the production of a certified copy of such finding, discharge the alleged lunatic from the asylum."

I take it that the same rule will apply to a case where a lunatic is placed in charge of a friend or a relative under the provisions of section 14 of the Act. The proper course to adopt in this case is to return the petition of Mr. O'Connor so that he may present it to the proper Court. The other alternative which suggests itself to me is that I should refer this case to a larger Bench for decision as the questions raised are of great importance and their decision may have a far reaching effect on the practice of this Court. Having regard to the fact that there appears to be no decided case on this point, I adopt the later course and direct that the papers be laid before the learned Chief Justice with a view that a Bench be constituted to hear the case.

Mr. O'Connor, for the Petitioner.

Mr. Jal Lal, R. B., Government Advocate, for the Respondent.

JUDGMENT.—After hearing Mr.

(1) 4 A. 159; A. W. N. (1881) 172; 2 Ind. Dec. (N. S.) 770.

EMPEROR V. PURAN SINGH.

O'Connor for the petitioner and Rai Babadur Jai Lal, Government Advocate, for the Crown, I entirely agree with the view taken by my learned brother in his order of reference. The Act, as pointed out in that order, deals specifically and under separate headings with the two branches of proceedings, executive and judicial. Any person considering himself aggrieved by an executive order passed by the District Magistrate may apply under Part III for a regular inquisition conducted by a judicial officer. The result of such inquisition is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. This being so, it is impossible to contend, as has been done, that no remedy is provided against an incorrect or improper executive order, and the position is made even clear by section 2 of the Act which expressly provides that nothing in Part II, *i.e.*, that portion which deals with executive orders, shall be deemed to affect the powers of the High Court under Part III. Had the High Court any power of revision of the orders passed under Part II this section would be wholly meaningless and superfluous. Mr. O'Connor has relied on the analogy of the English Law on the subject and has referred us to Halsbury's Laws of England, Volume XIX, (*passim*). In the English Act on which the Indian is based, the executive authority is described as the judicial authority, an even more unfortunate title than that of District Magistrate for designating an Executive Officer. This 'judicial authority' is a Justice of the Peace and it is his duty to exercise powers similar to those entrusted in this country to the District Magistrate. The machinery for a judicial inquisition is provided in exactly the same way as in the Indian Act and provision is made for quashing a finding on an inquisition just as an appeal to the High Court is allowed from an order passed by a District Judge in India, but as in India, so in England, no provision is made for any sort of appeal or revision to the High Court from an executive or summary order. Beyond showing, therefore, that the executive authority is as unsuitably described in England as in India the English Act assists the petitioner not at all.

It might appear at first sight that all acts of a District Magistrate as such must be open to the revision of the High Court and that when it is desired to exclude such jurisdiction the officer in question would be described as "Collector" or as "Deputy Commissioner" in a Non-Regulation Province. This, however, is not the general practice as is shown by the Police Act, the Arms Act, Explosives Act and many others, and the position with regard to the Police Act is explained in *Umes Chandra Gupta v. Emperor* (2). Under this Act also the orders passed by the District Magistrate under Part II are purely executive and cannot form the subject-matter of a revision application to this Court. The petition is, therefore, dismissed and the petitioner is directed to seek his remedy, if he wishes to do so, by application to the District Judge under Part III.

Z. K.

Petition dismissed.

(2) 10 C. W. N. 322; 3 Cr. L. J. 256.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 632 OF 1922.

September 19, 1922.

Present:—Mr. Justice Broadway and
Mr. Justice Martineau.

EMPEROR—APPELLANT

versus

PURAN SINGH—RESPONDENT.

Punjab Excise Act (I of 1914), s. 24 (3)—Excise Manual, Vol. I, s. 407—Possession of country liquor outside licensed premises—License-holder, right of.

Section 407 of Vol. I of the Excise Manual does not override the provisions of section 24 (3) of the Excise Act. It empowers a license-holder to possess country liquor to any extent on the licensed premises, but does not entitle him to possess more than the ordinary prescribed amount of one seer elsewhere [p. 700, cols. 1 & 2.]

Gokal Chand v. Emperor, 39 Ind. Cas. 489; 16 P. R. 1917 Cr.; 18 Cr. L. J. 521, referred to.

Appeal from an order of the Sessions Judge, Jhelum, dated the 23rd May 1922.

Mr. D. C. Ralli, for the Appellant.

Mr. B. N. Kapur, for the Respondent.

JUDGMENT.—One Puran Singh, son of Ganga Singh, a licensed retail vendor of country liquor, was, on the evening

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of the 19th July 1921, found in possession of a wooden case containing 8 bottles of country liquor at Dhudial Railway Station. His home is at Dhudial but his licensed liquor shop is at Said Kasran. He was convicted of an offence under section 61 of the Excise Act and sentenced to pay a fine of Rs. 500, or in default undergo 6 months' imprisonment.

An appeal by him to the Sessions Court proved successful. The learned Sessions Judge did not apparently come to any definite decision on the merits of the case, but accepted the appeal on the ground that as Puran Singh was a licensed vendor of country liquor, he was entitled to be in possession of such liquor at any place without any limit as to quantity. This conclusion he arrived at on the provisions of section 407 of Volume I of the Excise Manual.

The Government has appealed against the acquittal on the ground that the view taken by the learned Sessions Judge of the law applicable to the case is erroneous. In our opinion, the appeal must succeed. Section 407 of Volume I of the Excise Manual can not, and does not, override the provisions of the Excise Act and the learned Sessions Judge has entirely overlooked the provisions of section 24 (3), which are as follows :—

"A licensed vendor shall not have in his possession at any place, other than that authorised by his license, any quantity of any excisable article in excess of such quantity as the Local Government has under section 5 declared to be the limit of sale by retail except under a permit granted by the Collector in that behalf."

In the case of country liquor this quantity has been fixed by the Local Government at one seer by Punjab Government Notification No. 141-A., dated 1st February 1914. Admittedly, if Puran Singh can be held to have been in possession of the case of 8 bottles, he has exceeded this limit and has committed the offence of which he was convicted. We would note that *Gokal Chand v. Emperor* (1) was applicable to this case and the learned Sessions Judge should have followed it.

(1) 39 Ind. Cas. 489; 16 P. R. 1917 Cr. 18 Cr. L. J. 521.

Section 407 aforesaid would empower a license-holder to possess country liquor to any extent on the licensed premises, but does not entitle him to possess more than the prescribed amount elsewhere.

We, therefore, accept the appeal and setting aside the order of the learned Sessions Judge return the appeal to him for a decision on the merits.

M. D. J.

Appeal accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1044 OF 1922.

October 27, 1922.

Present :—Mr. Justice Harrison.

Musammat HAMIRI—PETITIONER

versus

EMPEROR—RESPONDENT.

Opium Act (I of 1878), s. 9—Punjab Excise Manual, r. 37 (d)—"Preparation" and "admixture," meaning of—Opium mixture in process of preparation, possession of—Total weight exceeding prescribed limit—Offence.

The word "preparation" in rule 37 (d) of the Punjab Excise Manual designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used. In the same way the word "admixture" refers also to a completed article and can only be applied to a thing after the mixing has been finished, and not earlier [p. 701, col. 2.]

In the intermediate stages of a preparation of opium an offence is committed only if the amount of opium used in the manufacture is more than that permitted by law. [p. 701, col. 2.]

Case reported by the Sessions Judge, Karnal, with his No. 1325 of 12th July 1922.

FACTS.—Musammat Hamiri has been convicted under section 9 of the Opium Act (of 1878) and sentenced to Rs. 25 fine. She was found in possession of a solution of opium in water weighing 5 *tolas* and the Magistrate has found that this is a "preparation" of opium. As the weight exceeds the permitted limit of 2 *tolas*, it amounts in his opinion to a breach of rule 37 (d) * of the Rules framed under the Act.

* Page 39 of the Punjab Excise Manual.

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There is complete agreement as to the facts. *Musammam* Hamiri was making a preparation of opium called *madhak* which is made by placing a small quantity of opium together with barley husks in water and causing the water to evaporate. The *madhak* when dried is smoked. The quantity of opium in the water was very small, according to *Musammam* Hamiri as much as would go on a two anna bit, while the Magistrate says 4 or 5 *rattis*. Admittedly, the amount of opium, of which Hamiri was found in possession was within the legal limit and equally the *madhak* when prepared would have also been within the legal limit. The conviction is based upon the fact that the weight of the solution exceeds the legal limit of a preparation of opium.

GROUND.—The rule runs as follows:

"37—Any person may without a license at any one time have in his possession—

"(d) preparations or admixtures of pure opium, other than those used for smoking, in any quantity not exceeding in the aggregate two *tolas*."

The word "preparation" has two meanings (1) abstract, the act of preparing, (2) concrete, the thing prepared. It is in the latter sense that the word is used in rule 37 (d). The substance prepared or preparation in this case is the *madhak* and the stage at which the mixture of opium, barley husks and water was seized is not a preparation, *i.e.*, not the finished article, but something in course of preparation, not yet prepared.

The word "admixtures" does not help because what was found was a solution. If the weight of the water be excluded, the weight of the admixture is well within the legal limit.

If it is not an offence to possess a certain quantity of opium, it is hard to see why it is an offence to possess the same quantity dissolved in water.

The Public Prosecutor referred by way of analogy to paragraph 139 of the Punjab Excise Manual, which says: "It is possible that the decoctions made from two seers of poppy-heads would be more than three *tolas*. Thus a man would be guilty of illegal possession of *post* made from poppy-heads legally possessed. As, however, the *post* would probably be drunk as soon as

it was made, the anomaly is in practice negligible."

As to this the *post* is the completed preparation or decoction from the poppy-heads, and the point I am considering does not arise that the legal limit of possession is only exceeded at an intermediate stage when the opium cannot possibly be consumed.

I, therefore, recommend that the conviction be set aside.

In case it be held that the solution comes within the wording of the rule, I think the fine should be reduced to a nominal one. The Magistrate was of opinion that it was doubtful whether the term preparation or admixture would apply to the solution.

If he were doubtful he should have given the accused the benefit of the doubt. He also said quite correctly that the case was merely a technical one. He ought not to have inflicted a substantial fine.

Mr. *Dalip Singh*, for the Government Advocate, for the Respondent.

JUDGMENT.—Mr. *Dalip Singh* has put both sides of the case before me and has discussed the various meanings which can be put on the words "preparation" and "admixture."

As to the word "preparation" I agree with the view taken by the learned Sessions Judge, and hold that here it designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used.

So also the word "admixture," in my opinion, refers only to a completed article and can only be applied after the mixing has been finished, and not earlier. It is unnecessary to define the precise difference between an "admixture" and a "preparation." There is a difference, but the articles designated by both words only come within the scope of their respective definitions when they have been prepared or mixed, as the case may be. In the intermediate stages an offence has only been committed if the amount of opium used in the manufacture is more than that permitted by law. I, therefore, accept the application for revision and acquit.

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Musaminat Hamiri. The fine will be refunded.

M. D. J.

Revision accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 651 OF 1922.

November 29, 1922.

Present:—Mr. Justice Broadway.

CHUNI LAL—PETITIONER

versus

ISHAR DAS—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 438, 523—Enquiry under s. 523, nature of—Revision.

It is not incumbent upon the Magistrate to hold a judicial enquiry upon oath, for the purpose of passing an order under section 523 of the Criminal Procedure Code. The section itself does not make any magisterial enquiry imperative. The Magistrate has to satisfy himself, on such material as is before him, who is entitled to possession of the property concerned, and can pass an order on Police reports and papers alone. [p. 703, col. 2.]

In re Ratanlal Rangildas, 17 B. 748; 9 Ind. Dec. (N. S.) 491, *Asi v. Emperor*, 9 Ind. Cas. 634, *Husensha v. Mashaksha*, 5 Ind. Cas. 972; 12 Bom. L. R. 232; 11 Cr. L. J. 339, *Queen-Empress v. Tribhovan*, 9 B. 131; 5 Ind. Dec. (N. S.) 88 and *Ma Thein Nu v. Ma The Hnit*, 57 Ind. Cas. 81; 12 Bur. L. T. 266; 10 L. B. R. 156; 21 Cr. L. J. 561, referred to.

A High Court has jurisdiction to revise orders passed under section 523, Criminal Procedure Code, where a proper case is made out. [p. 704, col. 1.]

Ma Thein Nu v. Ma The Hnit, 57 Ind. Cas. 81; 12 Bur. L. T. 266; 10 L. B. R. 156; 21 Cr. L. J. 561, followed.

Case reported by the Sessions Judge, Jhelum, with his No. 320 of 24th April 1922.

FACTS.—On 27th July 1921, Chuni Lal, goldsmith, of Pind Dadan Khan, reported to the Police that he had been beaten by Lala Ishar Das, Municipal Commissioner, and five servants of the latter, and robbed of Rs. 1,000. The Police investigated the case and found that it was false, and that the report had been made with the object of depriving Lala

Ishar Das of certain gold which he had entrusted to Chuni Lal, to be converted into ornaments. The case was struck off as false on 12th October 1921 by the Sub-Divisional Magistrate, who by a separate order of the same date made over to Ishar Das certain gold and ornaments under section 523, Code of Criminal Procedure, directing him "not to change the appearance of the ornaments for six months at least, as Chuni Lal may possibly bring a civil suit."

The gold and ornaments had been recovered from the possession of Chuni Lal during the investigation of the case instituted by him against Ishar Das and others.

Chuni Lal was subsequently prosecuted under section 182, Indian Penal Code, for making a false report and the case is understood to be still pending.

On 3rd November 1921, Chuni Lal filed a complaint against Ishar Das and other under section 395—section 323, Indian Penal Code. The complaint was dismissed after preliminary enquiry on 3rd February 1922, and Chuni Lal's application for revision was dismissed by me in Case No. 19 of 1922, decided on 22nd March 1922.

GROUND.—Chuni Lal has filed an application for revision of the order passed by the Sub-Divisional Magistrate under section 523, Code of Criminal Procedure, on 12th October 1921, on the ground that the gold and ornaments should not have been made over to Ishar Das, as they belonged partly to himself and partly to one of his customers.

I issued notice twice to Ishar Das, directing him to produce the gold and ornaments for my inspection. The notices have not been served, and Chuni Lal alleges that Ishar Das, who is an influential man, is evading service.

It does not appear that the notice is legally necessary before a case is reported to the High Court under section 438, Code of Criminal Procedure. It is clear that the order under section 523, Code of Criminal Procedure, was passed without any independent enquiry, the Magistrate having acted merely on the material contained in the proceedings of the Police. This Court cannot interfere with the order under section 523, Code of Criminal Procedure,

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nor can it recover the gold and ornaments made over to Ishar Das. In my opinion, the order under revision was passed on insufficient grounds, and should be set aside, the gold and ornaments being made over to Chuni Lal, from whose possession, they were taken, and Lala Ishar Das being left to file a civil suit for their recovery if he wishes to do so. An alternative course would be to direct the Magistrate to make further enquiry into the case, and take such action under section 523, Code of Criminal Procedure, or otherwise as may appear to be justified by the results of the enquiry.

The records of the case are accordingly submitted to the High Court under section 438, Code of Criminal Procedure, with the recommendation that action may be taken as indicated above.

Mr. Arjan Das, for the Petitioner.

Mr. Nand Lal, for the Respondent.

JUDGMENT.—On the 27th July 1921, Chuni Lal, a goldsmith of Pind Dadan Khan, reported to the Police that he had been beaten by Lala Ishar Das, Municipal Commissioner, and some servants of his and had been robbed of Rs. 1,000.

On investigation the Police came to the conclusion that the charge laid was false and that it had been brought with the object of depriving Ishar Das of certain gold which he had made over to Chuni Lal to be converted into ornaments. During the investigation made by the Police Ishar Das had brought this allegation forward and had given a description of certain ornaments which led the Police to take possession of the said ornaments from Chuni Lal's custody. On the 1st October 1921, Chuni Lal applied to the Court asking that the said ornaments be made over to him alleging that some of them belonged to clients of his who were agitating for their return and that the others belonged to him. On the 3rd October 1921 Ishar Das filed an application before the same Magistrate alleging that the articles were his and had been entrusted to Chuni Lal and that in order to be able to misappropriate them Chuni Lal had brought a false case of assault and robbery against him. On the 12th October 1921, on a report

made by a Police to the Magistrate stating the facts and giving expression to their opinion that the case brought by Chuni Lal was false, and asking for orders *qua* the property, the Magistrate, purporting to act under section 523, Criminal Procedure Code, recorded an order directing that the property should be made over to Ishar Das as in the Magistrate's opinion the ornaments belonged to that person. Chuni Lal, being at liberty to take such action in the Civil Court as he considered necessary. On the 3rd November 1921 Chuni Lal filed a complaint against Ishar Das and others under sections 395 and 323, Indian Penal Code, which complaint was dismissed, and an application for revision by him likewise proved ineffectual. He then moved the Sessions Judge attacking the correctness of the order under section 523, Criminal Procedure Code, dated the 12th October 1921. The Sessions Judge came to the conclusion that the order complained against was wrong and had been made without due enquiry. He accordingly reported the matter to this Court under section 438, Criminal Procedure Code.

Before me, Mr. Arjan Das has supported the recommendation of the learned Sessions Judge on behalf of Chuni Lal, while Mr. Nand Lal has endeavoured to support the order of the Magistrate. It was contended first, that an order under section 523 could only be passed after a proper enquiry, whereas the order in the present case was passed on the Police report and papers, and *In re Ratanlal Rangildas* (1) was cited in support, an authority which was differed from in a case reported as *Asi v. Emperor* (2). The section itself does not make any magisterial enquiry imperative. It appears that the Magistrate has to satisfy himself, on such material as is before him, who is entitled to possession of the property concerned, *Husensha v. Mashaksha* (3), and in *Queen-Empress v. Tribhovan* (4) it appears to have been laid down that the Magistrate would be justified in proceeding on the Police papers, while in *Ma Thein Nu v. Ma The*

(1) 17 B. 748; 9 Ind. Dec. (N. S.) 491.

(2) 9 Ind. Cas. 634.

(3) 5 Ind. Cas. 972; 12 Bom. L. R. 232; 11 Cr. L. J. 339.

(4) 9 B. 131; 5 Ind. Dec. (N. S.) 88

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Hmit (5) it is laid down by Rutledge, J., that it was not incumbent upon the Magistrate to hold a judicial enquiry upon oath. The weight of authority, therefore, appears to be against the contention advanced by Mr. Arjan Das that the order of the Magistrate was wrong as being passed on the Police papers alone and not on any enquiry made by him.

The next question is, whether this Court has jurisdiction to interfere with the order in revision, it being contended by Mr. Nand Lal that no such power existed. The authority already cited, *i.e.*, *Ma Thein Nu v. Ma The Hnit* (5), and which was referred to by Mr. Nand Lal is, however, opposed to this contention, and I have no doubt that, on a proper case being made out, a High Court has jurisdiction to examine orders passed under section 523, Criminal Procedure Code.

Turning to the case itself, it appears that the Police obtained possession of the property in question in the course of an investigation into an offence which in no way related to this property. Chuni Lal is a goldsmith and admittedly Ishar Das had had dealings with him. There would thus be nothing extraordinary in Ishar Das being able to describe ornaments which could be found in Chuni Lal's shop. The property was not taken possession of by the Police under section 51, nor, under section 54 (4) as urged by Mr. Nand Lal. The property was not taken possession of by the Police under the suspicion of its being stolen property nor at that stage, at any rate, had Chuni Lal been charged with having committed any offence with reference to it. All that had been urged was that he intended at some future date to misappropriate these articles and that he had falsely charged Ishar Das with a criminal offence in order to facilitate the crime contemplated by him.

In these circumstances, I am of opinion that the learned Sessions Judge is right in his view that the property ought not to have been made over to Ishar Das even on the material which was before the Magis-

trate. The mere fact that Ishar Das was admitted by Chuni Lal to be the owner of one of the bracelets did not necessarily mean that Ishar Das was entitled to possession of the same, for admittedly Ishar Das had given this bracelet to Chuni Lal for certain definite purposes and it is not unlikely that Chuni Lal could claim to retain possession of any articles belonging to Ishar Das until such time as he was paid for work done in connection with them. As, however, Chuni Lal definitely admitted before the Magistrate that one of the bracelets was the property of Ishar Das I maintain the order of the Magistrate *qua* that bracelet, but direct that the remaining ornaments and gold be forthwith made over to Chuni Lal. In making this order I have not lost sight of Mr. Nand Lal's contention that Chuni Lal has a right to go to the Civil Court to establish his claim to this property. I do not see any reason, however, to place him in the position of having to prove his title, a matter with which these proceedings are not concerned.

M. D. J.

Revision accepted.

(5) 57 Ind. Cas. 81; 12 Bnr. L. T. 266; 10 L. B. R. 156; 21 Cr. L. J. 561

SHANCHI KHAN V. KARAM CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2245 OF 1921.

July 25, 1922.

Present.—Mr. Justice Martineau.

SHANCHI KHAN—PLAINTIFF

—APPELLANT

versus

KARAM CHAND AND ANOTHER—

DEFENDANTS — RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—General Clauses Act (X of 1897), s. 3 (25)—Materials of standing house, transfer of—Suit for possession—Limitation—Civil Procedure Code (Act V of 1908), s. 11—Suit dismissed as barred by limitation—Res judicata—Provincial Insolvency Act (V of 1920), s. 68—Application to Court against Receiver, dismissal of—Regular suit, maintainability of.

A transfer of the materials of a standing house is a transfer of immoveable property and a suit for possession of such materials is governed by Art. 144 of Sch. I to the Limitation Act. [p. 705, col. 2; p. 706, col. 1.]

For a decision to operate as *res judicata* in a subsequent suit, it must be one on the merits; the dismissal of a suit because it was barred by limitation, without considering the merits, would not operate as *res judicata*. [p. 706, col. 1.]

A person who claims rights to property, taken possession of by the Official Receiver as belonging to an insolvent, and whose claim is disallowed by the Insolvency Court, may bring a regular suit to establish his rights. [p. 706, col. 1.]

Duni Chand v. Muhammad Hussain, 40 Ind. Cas. 220; 22 P. R. 1917; 14 P. W. R. 1917, followed.

Appeal from the decree of the District Judge, Attock, dated the 14th June 1921.

Mr. M. S. Bhagat, for the Appellant.

Mr. Sundar Das, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of a house which belonged to Amar Das, a non-proprietary resident of Ghurghashti in the Attock District. He was adjudicated an insolvent and on the 23rd December 1913, the materials of the house were sold by the Receiver. They were bought by Bishen Das who, on the 5th December 1914, sold them to the plaintiff. The claim was not disputed by Bishen Das, but was resisted by Amar Das. The Munsif dismissed the suit finding,—

(1) that the real purchaser from Bishen Das was not the plaintiff, but one Ram Saran;

(2) that the suit was barred by limitation, being governed by Art. 120 of the first Schedule to the Limitation Act, as the

property sold was not immoveable property;

(3) that it was also barred under section 11, Civil Procedure Code, as an application by the plaintiff to the Insolvency Court to be put into possession of the house had been dismissed on the 8th July 1918, as time-barred, and

(4) that the plaintiff, having once elected to seek his remedy in the Insolvency Court, and having failed in that Court, was not entitled to bring a suit for possession.

The District Judge on appeal found that the purchaser of the house from Bishen Das was the plaintiff and not Ram Saran, but he agreed with the Munsif that the suit was barred by limitation as well as by the rule of *res judicata* and he, therefore, dismissed the appeal. The plaintiff has presented a second appeal to this Court.

I am unable to agree with the view of the Courts below that the property sold is moveable property. The lower Appellate Court has referred to *Muhammad Ismail v. Shams-ud-din* (1) in which it was held that the temporary rights of a tenant-at-will to take produce of certain trees were not immoveable property. I do not see any analogy between that case and the present one, as a non-proprietor is the owner of the materials of his house, and his rights in them are not temporary rights such as those which a tenant possesses in respect of trees on the land in his tenancy.

The argument for the respondent is that the materials of the house are the bricks, stones, timber, etc., of which the house is built and that these things are moveable, but this is not the right way of looking at the matter. The property is not to be regarded as split up into its component parts, but it is its existing condition which has to be considered. What was sold was a structure and not a quantity of debris. The materials are attached to the earth, and things attached to the earth are included in the definition of immoveable property given in the General Clauses Act. I hold, therefore, that the property sold to the plaintiff was immoveable property, that the period of limitation is,

(1) 58 Ind. Cas. 321; 1 L. 567; 2 U. P. L. R. (L) 164; 2 L. L. J. 684.

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twelve years, and that the suit is within time.

The Courts below are clearly wrong in thinking that the District Judge's order, dated the 8th July 1918, dismissing the plaintiff's application for being put into possession of the house, operates as *res judicata*, as the application was dismissed only because it was barred by limitation, and not on the merits, which were not considered.

The only other question is whether the plaintiff, having sought his remedy in the Insolvency Court and having been unsuccessful there, is competent to bring a suit for possession. The Courts below have relied on some rulings of the Allahabad High Court, which are against the plaintiff but the matter is settled so far as this Court is concerned by *Duni Chand v. Muhammad Hussain* (2) in which it was held that a person who claims rights to property taken possession of by the Official Receiver as belonging to an insolvent and whose claim has been disallowed by the Insolvency Court, may bring a regular suit to establish his rights.

I accordingly accept the appeal, reverse the decrees of the Courts below, and give the plaintiff a decree for possession of the property in suit. The respondents will pay the plaintiff's costs throughout.

W. C. A. & N. H. *Appeal accepted.*

(2) 40 Ind. Cas. 220; 22 P. R. 1917; 14 P. W. R. 1917.

CALCUTTA HIGH COURT.

CIVIL REVISION CASES NOS. 1, 2 AND 91
OF 1920.

March 9, 1920.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Walmsley.

AMJAD ALI—PETITIONER

versus

SURESH RANJAN PAL AND OTHERS—
OPPOSITE PARTY.

Practice—Notes of arguments by Pleaders—
Court, duty of.

When a case has been fully argued before a Judge, it ought not to be necessary for the Pleaders to submit notes of their arguments. It is the duty of the Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary, as in some exceptional case it may become necessary, for the Judge either to require or to receive notes of the Pleader's arguments, such notes ought not to be submitted to the Judge by the Pleader on one side, without first submitting the notes to the Pleader on the other side. If in any case a Pleader desires to submit to the Court the notes of his arguments or of any further argument, which he thinks in the interest of his clients ought to be put before the Court, he should submit them to the Pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof. But in no case should the arguments be submitted in the form of a draft judgment. [p. 707, col. 2; p. 708, col. 1.]

Civil revision against the orders of the District Judge, Sylhet, under sections 195 and 476 of the Code of Criminal Procedure.

Babus M. N. Mukherjee and P. C. Chatterjee, Messrs. A. K. Fazlul Huq and A. S. M. Akram, for the Petitioner in Rule No. 1.

Babu Hemendra Kumar Das, for the Opposite Party.

Babus Dasarathi Sanyal, M. N. Mukherjee and P. C. Chatterjee, Messrs. A. K. Fazlul Huq and A. S. M. Akram, for the Petitioner in Rule No. 2.

Mr. Orr, for the Crown.

Babus M. N. Mukherjee and Benoyendra Nath Palit, for the Petitioner in Rule No. 91.

Babus Atulya Charan Bose and Hemendra Kumar Das, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—In this matter there are three Rules which were obtained by Mr. Amjad Ali, who is a Pleader, and who has been practising in the District Court of Sylhet and the Courts subordinate thereto since the year 1901. The Rule with which I intend to deal first is No. 2 of 1920. That Rule was granted to show cause why an order, dated the 17th of December 1919, made by the learned District Judge directing the prosecution of Mr. Amjad Ali under section 193 of the Indian Penal Code should not be set aside. The order

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for the prosecution arose in this way: It appears that there was an appeal pending before the learned Additional Sessions Judge by a man called Kailash Chandra Chaudhuri who had been convicted of some offence. Mr. Suresh Ranjan Pal, a learned Pleader, was appearing for the appellant, and Mr. Amjad Ali was appearing on behalf of the Crown. The appeal had been heard and the arguments had been concluded, and, as I understand the facts, these two learned gentlemen asked the learned Additional Sessions Judge to be allowed to submit notes of their arguments: at all events, it does not matter much how it came to pass, it was arranged that these two learned gentlemen should submit notes of their arguments to the learned Additional Sessions Judge. It appears that Mr. Amjad Ali submitted his so-called notes to the learned Additional Sessions Judge without showing them to the learned Pleader on the other side. Then, Mr. Suresh Ranjan Pal proceeded to prepare the so-called notes of his arguments for the learned Sessions Judge; and he appears to have done so in the Bar Library, more or less publicly. The learned District Judge has come to the conclusion that those notes were made but were not in fact submitted. Personally, I have not much doubt that they were prepared for the purpose of submission. I do not suppose that any body would contend that the so-called notes of Mr. Suresh Ranjan Pal were really notes; they were in the form of a judgment which would have been completed by the learned Additional Sessions Judge attaching his signature thereto. To state the matter quite shortly, without going into detail of what occurred, Mr. Amjad Ali went to the learned District Judge and informed him that Mr. Suresh Ranjan Pal wanted or had attempted to hand to the learned Additional Sessions Judge something in the nature of the draft of a judgment, that he (Amjad Ali) had intervened and prevented that from being done. The learned District Judge after making some enquiries directed proceedings to be taken against Mr. Suresh Ranjan Pal under the Legal Practitioners Act. He held an enquiry and came to the conclusion that Mr. Suresh Ranjan Pal should be acquitted

of the charge of professional misconduct which was the basis of those proceedings. He then made the order to which I have referred, namely, the order of the 17th of December 1919, that Mr. Amjad Ali should be prosecuted under section 193 of the Indian Penal Code in respect of certain statements which Mr. Amjad Ali had made during the course of the enquiry under the Legal Practitioners Act against Mr. Suresh Ranjan Pal which the learned Judge, to say the least, thought were not correct. The learned Vakil who has appeared for Mr. Amjad Ali has stated this morning in open Court that he could not defend the conduct of Mr. Amjad Ali and on behalf of his client expressed contrition in respect thereof. In view of that expression by the learned Vakil on behalf of Mr. Amjad Ali, and in view of the fact that in consequence of these proceedings Mr. Amjad Ali has been in effect debarred from practising since the middle of December last, and in view of the publicity which has been given by reason of these proceedings, my learned brother and I are of opinion that it is not necessary for the ends of justice that this criminal prosecution under section 193 of the Indian Penal Code should proceed: consequently, we make this Rule absolute and set aside the order.

But before parting with this matter my learned brother and I feel that we ought to express our disapproval of the conduct of Mr. Amjad Ali which I have already mentioned, the learned Vakil appearing for him to-day has not attempted to defend.

With regard to the question of submitting the notes to the learned Additional Sessions Judge, we are of opinion that, when a case has been fully argued, as it was in this case, before a learned Judge, it ought not to be necessary for the learned Pleaders to submit notes of their arguments. It is the duty of the learned Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary,

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as in some exceptional case it may become necessary, for the learned Judge either to require or to receive notes of the learned Pleader's arguments, such notes ought not to be submitted to the learned Judge by the learned Pleader on one side, without first submitting the notes to the learned Pleader on the other side. If in any case a learned Pleader desires to submit to the Court, the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the Pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof.

As regards the form of the notes, the learned Vakil, Mr. Sanyal, with his great experience at the Bar, has admitted that the form of the notes presented by Mr. Amjad Ali could not be defended; although it might be said that the so-called notes which he submitted were not perhaps quite such a complete draft of a judgment as the notes which were made by Mr. Suresh Ranjan Pal, in my judgment, there is very little difference between the two—both were objectionable and I desire to make it clear that the submission of "notes" in the form of a draft judgment, as in this case, must not be done again. I confess I am somewhat surprised that the learned Judge when he received the so-called notes from Mr. Amjad Ali, if he read them, did not at once return them to the learned Pleader on the ground that they were in a form which should not have been put before a learned Judge.

So much for Rule No. 2.

The next Rule with which I desire to deal is No. 1 of 1920. In that case sanction has been granted to Mr. Suresh Ranjan Pal to prosecute Mr. Amjad Ali, the allegation being that he had laid false information before the learned District Judge with regard to the conduct of Mr. Suresh Ranjan Pal in relation to the so-called notes which Mr. Suresh Ranjan Pal had prepared. That the two learned Pleaders should fall out in the way they did and that it should be thought necessary by one learned Pleader to ask for sanction to prosecute the other learned Pleader in respect of

the allegations which he had made before the learned Judge, to my mind, is lamentable. Such proceedings are derogatory to the learned Pleaders themselves and to the honourable profession to which they belong. Such matters as these, if unfortunately they do occur, ordinarily ought not to be the subject-matter of criminal proceedings. They relate to professional conduct and should be settled by some tribunal or person capable of dealing with such matters. In this case Mr. Manmatha Nath Mukherjee appearing on behalf of Mr. Amjad Ali has associated himself with everything, that Mr. Sanyal has said, and the learned Vakil appearing on behalf of Mr. Suresh Ranjan Pal has accepted what Mr. Manmatha Nath Mukherjee said, and he intimates that his client did not want to be vindictive. I was glad to hear that statement. The result is, that this Rule is made absolute.

As regards the last Rule, that was a Rule obtained by Mr. Amjad Ali in connection with proceedings taken against him by Mr. Radha Benode Das, another learned Pleader, who occupied the position of Public Prosecutor: and the main statement complained of by Mr. Radha Benode Das was to the effect that Mr. Amjad Ali had seen Mr. Radha Benode Das whispering to the learned Additional Sessions Judge and the suggestion was, that it was done with a view to influence the learned Judge as to his decision in the appeal by Kailash which was then pending before him. I do not suppose that there is a word of truth in the suggestion and in fact Mr. Manmatha Nath Mukherjee appearing on behalf of Mr. Amjad Ali has withdrawn the suggestion in an unqualified way and more than that he has apologized on behalf of Mr. Amjad Ali in open Court to Mr. Radha Benode Das for having made such suggestion; Mr. Bose appearing on behalf of Mr. Radha Benode Das has, I am glad to say, accepted that withdrawal and apology. In respect of this matter also, although the suggestion which was made against Mr. Radha Benode Das must have been very annoying to a professional gentleman of his position, I really do not think that a Criminal Court is a tribunal to settle a matter of this kind. Surely in a District like Sylhet there must be some tribunal or person capable of

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settling or dealing with a dispute of this kind without one learned Pleader bringing the other learned Pleader into a Criminal Court. The Rule in this case is also made absolute.

There is only one other matter to which I need refer and that is that Mr. Snayal, the learned Vakil appearing for Mr. Amjad Ali, urged before us that his client had been actuated by no improper motive in what he did. He said that his client had been hasty and had been too anxious to obtain a successful issue in the appeal on behalf of his client. Having regard to the fact that he was appearing on behalf of the Crown in a criminal case, I can only say that, in my judgment, Mr. Amjad Ali did not display that discretion which I should expect to find on the part of a learned Pleader of his standing. I do not think it necessary to say anything more than that, especially having regard to what has already fallen from the learned Vakil, who has appeared for him in this Court, and who has expressed on his behalf contrition for the course which he adopted.

In conclusion, my learned brother and I hope that there will now be an end of these unpleasant matters and that these learned gentlemen will resume their practice and maintain such amicable relations as ought always to exist between the members of an honourable profession.

Walmsley, J.—I agree.

N. H.

Rules made absolute.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1406 OF 1922.

January 26, 1923.

Present.—Mr. Justice Abdul Raouf.

KUNDAN LAL—PLAINTIFF—APPELLANT
versus

Bawa ANAND SARUP—DEFENDANT—
RESPONDENT.

Court-Fees Act (VII of 1870), s. 7 (x) (a)—Contract of sale—Contract of exchange—Suit for specific performance—Court-fee payable.

Defendant agreed to transfer certain land to the plaintiff in return for certain land belonging to the plaintiff and Rs. 600 in cash. The defendant failed to carry out the agreement and plaintiff sued for specific performance of the contract or in the alternative for return of the money paid by him to the defendant with interest:

Held, (1) that the contract between the parties was one of sale inasmuch as part of the consideration to be paid by the plaintiff was a sum of money;

Samaratmal Ullamchand v. Govind, 25 B. 696; 3 Bom. L. R. 384, referred to.

(2) that the suit fell within section 7 (x) (a) of the Court-Fees Act and Court-fees were payable on the land, *plus* Rs. 600, which the plaintiff had agreed to pay to the defendant in exchange for the defendant's land.

Semle:—A suit for the specific performance of a contract of exchange falls under section 7 (x) (a) of the Court-Fees Act.

Second appeal from an order of the District Judge, Ambala, dated the 9th March 1922, reversing that of the Junior Subordinate Judge, Second, Class, Ambala, dated the 20th December 1921.

Mr. Shamair Chand for Mr. Sagar Chand, for the Appellant.

JUDGMENT.—This first appeal from an order of remand has arisen out of a suit for the specific performance of a contract of exchange or in the alternative, for money paid to defendant with interest. The following facts will disclose the nature of the question to be decided in this appeal:—

The defendant promised to transfer the property in dispute to the plaintiff in consideration of some land belonging to the plaintiff and Rs. 600 in cash—Rs. 150 were given as earnest-money to the defendant. The defendant failed to carry out his promise. Thereupon the plaintiff instituted the present suit. He paid the Court-fee on Rs. 230 principal and interest the amount which he claims in the alternative. An objection was taken to the insufficiency of the Court-fee paid on the ground that the plaintiff having assessed the value of the

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defendant's land at Rs. 1,500, he ought to have further paid the Court-fee on that amount according to section 7 clause (x) (a) of the Court-Fees Act. This objection was given effect to by Mr. Niamat Khan, Subordinate Judge, First Class, Ambala, and the plaintiff was directed to make up the deficiency in the Court-fee by the 23rd November 1921. The plaintiff, however, failed to deposit the Court-fee demanded and his plaint was rejected on the 20th December 1921 by Lala Sant Ram, Junior Subordinate Judge, Second Class.

The plaintiff preferred an appeal to the lower Appellate Court on the ground that the highest Court-fee of Rs. 17-4 had been paid by him on the alternative relief relating to Rs. 230 and that it was not necessary to pay any more Court-fee. His argument was that the suit was not for the specific performance of a contract of sale as contemplated by section 7, clause (x) of the Court-Fees Act and that it was practically a suit for possession of land. The lower Appellate Court held that two reliefs were separately claimed in the plaint and a Court-fee ought to have been paid separately for each of them. It agreed with the Trial Court as to the amount of Court-fee payable in respect of the claim for the specific performance of the contract of exchange. It, however, held that an exchange was not a sale and that, therefore, section 7, clause (x) was inapplicable. As to the rejection of the plaint the opinion of the lower Appellate Court was that in spite of the non-payment of Court-fee in respect of the first relief, the plaint ought not to have been rejected in respect of the relief claiming Rs. 230, as sufficient Court-fee had been paid on this latter relief. In the result the lower Appellate Court made an order of remand under O. XLI, r. 23 and directed the Trial Court to try the claim in respect of the earnest-money. Against this order of remand the present appeal has been preferred.

The argument put forward before me is that there were two alternative reliefs claimed in the plaint, and that the first relief as to the specific performance of an exchange was really one claiming possession of land and that, therefore, the Court-fee in respect of that relief should be ten times of the *jama*

which would be less than the Court-fee already paid. The revenue assessed on the land claimed is Rs. 14-7 and ten times of this *jama* would be Rs. 144-6. The fee payable on this amount according to the table given in Schedule I of the Court-Fees Act is Rs. 11-4 which is less than the fee paid on the alternative relief. The learned Vakil has relied on the case of *Kashinath Narayan v. Gorinda* (1), and it is contended that where a plaintiff sues in the alternative for one of two reliefs the larger of the two reliefs sought determines the amount of the stamp. This ruling certainly does support the contention of the learned Vakil for the plaintiff-appellant, but I am not prepared to accept his contention that the suit is one for possession of land and the Court-fee ought to be paid on ten times of the *jama*, I cannot agree with the learned Judge of Court below that section 7 (x) of the said Act is not applicable to the present claim. The learned Judge says that the clause (x) (a) of the said section speaks of specific performance of a contract of sale and that an exchange is not a sale. It is, however, clear from the facts above stated that the consideration for the transfer of the land now in dispute was land *plus* Rs. 600 cash. The transaction, therefore, to the extent of Rs. 600 clearly comes under the definition of sale. A sale according to section 54 of the Transfer of Property Act is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Even if "price" necessarily means "money" which I am not prepared to hold in this case at least Rs. 600 is the price of part of the land promised to be transferred to the plaintiff. In the case of *Samaratmal Uttamchand v. Govind* (2) Mr. Justice Chaudharykar remarked that "the word 'price' is capable of being understood either as money or any other recompense." The subject of exchanges is dealt with in Chapter VI of the Transfer of Property Act and an examination of the provisions of sections 118, 119 and 120 shows that the Legislature has

(1) 15 B. 82; 8 Ind. Dec. (N. S.) 56

(2) 25 B. 696; 3 Bom. L. R. 384.

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put an exchange on the same footing with a sale in almost every respect. For example "a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale." According to section 120 each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes. Apparently the framers of clause (x) of section 7 of the Court-Fees Act contemplated that for the purposes of Court-fee under this clause an exchange also would be dealt with as a sale; for otherwise there is no reason why separate provision should not have been made relating to exchange in this clause seeing that separate provisions have been made relating to contract of sale, contract of mortgage, contract of lease and an award. According to sub-clause (a) section 7 (x), Court-fees payable in suits for the specific performance of a contract of sale will be levied according to the amount of the consideration. The amount of consideration in the present suit is the land plus Rs. 600 which the plaintiff has agreed to pay to the defendant in exchange for the defendant's land. Now as the plaintiff himself has estimated the amount of consideration at Rs. 1,500, he ought to have paid the Court-fee as provided in sub-clause (a) of section 7 (x). I must, therefore, dismiss the appeal, but without costs as the respondent is not represented.

While dismissing the appeal I direct the Court to accept the required Court-fee if paid by the plaintiff and to try the whole suit. In case the plaintiff does not pay the additional Court-fee the Court will try the claim relating to the earnest-money as directed by the Appellate Court.

Z. K. & N. H.

*Appeal dismissed.***PESHAWAR JUDICIAL COMMISSIONER'S COURT.**

CIVIL REVISION PETITIONS NOS. 137 AND 138 OF 1921.

April 23, 1923.

Present:—Mr. Papon, J. C.GHULAM HAIDAR AND OTHERS—
PETITIONERS*versus*MANAGER, COMMITTEE SAMADH BABA
PHULA SINGH—RESPONDENTS.

Trusts Act (I of 1882), ss. 1, 64—Transfer of Property Act (I V of 1882), s. 41, applicability of, to manager of religious endowment—Mahant, whether trustee—Ostensible owner, whether includes Mahant.

A transferee of a property belonging to a charitable religious endowment cannot seek the protection of section 64 of the Trusts Act, inasmuch as (a) the Act has, by virtue of the provisions of section 1, no application to a charitable religious endowment, and (b) the word "trustee" in its restricted and technical sense does not include the manager of a charitable religious endowment. [p. 714, col. 2; p. 715, col. 1.]

Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar, 65 Ind. Cas. 161; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537 (P. C.), referred to.

Section 41 of the Transfer of Property Act, in protecting a transferee in good faith from an ostensible owner, lays down the condition precedent that the persons interested in the property must have given their consent, express or implied, to the transfer. [p. 715, col. 2.]

Section 41 of the Transfer of Property Act was intended to apply primarily to cases where an ostensible owner has acquired a title *benami*. The section cannot have any applicability to the case of a religious endowment where the real owner is the shrine itself, and where it cannot be said that any particular human being has the power to give any consent, express or implied. [p. 715, col. 2.]

Where, therefore, property is vested in a shrine, it is *ipso facto* excluded from the operation of section 41 of the Transfer of Property Act, because in such a case, there cannot, in the nature of things, be in existence persons interested in the property, within the meaning of the section who have any legal title to consent to its alienation. [p. 716, col. 1.]

Petitions for revision of an order of the Additional Divisional Judge, Peshawar, dated the 10th May 1921, reversing an

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order of the Munsif, First Class, Nowshera, dated the 26th October 1920.

Mr. *Hansraj Bhandari*, for the Petitioners.

Sardar *Raja Singh*, for the Respondents.

JUDGMENT.—This order will dispose of the two Revisions Nos. 137 and 138. It will be as well to explain briefly the circumstances which have led to the present proceedings. The land in suit in both the cases under revision is a portion of certain land situated in the village of Pir Sabak in the Nowshera Tahsil which was assigned by Maharaja Ranjit Singh for the upkeep of a Sikh Religious Institution. It has been shown that the Maharaja on that occasion expropriated the original proprietors and, to commemorate the death of his General Phula Singh, appropriated no less than two-thirds of the whole village property to a Sikh Religious Institution. A *jagir* of the revenue of this property was conferred upon the manager of the shrine, and proprietary rights in the land were, so far as the Revenue Record of the Peshawar Settlement made by the British Authorities are concerned, recorded in the name of the manager for the time being. The first manager was Khud Singh, who was succeeded on his death by his disciple Sham Singh. Sham Singh was succeeded by Sobha Singh, one out of his several sons. Sobha Singh was again succeeded by Harnam Singh, who was one of the several sons of Sobha Singh. Harnam Singh made various alienations of the property in question and encumbered the shrine with a considerable volume of debt. On the 13th of April 1916 certain prominent members of the Sikh community instituted a suit praying for the removal of Harnam Singh and the appointment of a committee empowered to deal with the funds of the institution and to nominate a *Mahant* or manager. The suit was resisted, *inter alia*, by Harnam Singh on the ground that he had a personal proprietary right in the estate. After protracted proceedings, the case was settled by the Judicial Commissioner's appellate order of the 20th December 1918. By that order Harnam Singh was removed from his position as *Mahant* and manager of the property, and a committee of five persons was appointed

to manage the funds of the institution and to nominate a *Mahant* subject to certain conditions. At the end of 1919 and the beginning of 1920 the committee so appointed through their agent Bhag Singh (who had been one of the plaintiffs in the suit referred to above) instituted three suits for possession of land sold by Harnam Singh prior to the order of the 20th December 1918 removing him from his position. The three suits were dismissed by the Court of first instance. On appeals by the plaintiffs to the Divisional Court the plaintiffs were granted a decree in each of the three suits. In the case of three of the suits, those brought against Ahmad and Majidgul, the Divisional Judge allowed the transferees compensation for improvements: in the third suit, that brought against Muhammad Yakub and Ghulam Haidar, he disallowed the claim to compensation on the ground that the sale to them had been made not only after the institution of the suit for the removal of Harnam Singh, which impugned his title to alienate, but also after the issue of an interlocutory order prohibiting him from alienation. In two of these cases the defendants have applied for revision to this Court. There has been no petition by Ahmad in respect of the suit against him which related to a sale of 21 *kanals* and in which the defendant was granted compensation to the extent of Rs. 645. Petitions are lodged by Majidgul and others who have been granted Rs. 100 compensation and by Muhammad Yakub and Ghulam Haidar whose claim to compensation was disallowed.

I have entertained the applications for revision on one point only which is referred to in my order of the 26th of January 1922 at the preliminary hearing, and that is that the defendants-vendees are transferees in good faith without notice of the trust, and that they, therefore, acquired a valid title from the moment of transfer and that they cannot now be ousted. This ground was the only one which was argued before me at the preliminary hearing by the Counsel for the petitioners.

Various other grounds were urged in the memorandum of revision and some attempt has been made to re-open these at the full hearing. I must decline, however, to allow these grounds to be re-opened both because

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they were definitely abandoned by the petitioners' Counsel at the preliminary hearing and also because they do not in themselves furnish any justifiable reason for interference on revision. For instance, it was conceded at the first hearing that Art. 134 of the Limitation Act was applicable to the present suits and that they were within time. I must, therefore, decline to re-open the question of limitation. Again, the petitioners, Ghulam Haidar and Muhammad Yukub, in their memorandum of revision, raised the question that their claim to compensation for improvements should not have been disallowed. This point, however, was not one argued at the preliminary hearing and it is, in any case, one which I am not prepared to take up. I may note, however, in passing, that there is actually an error in the order of the Divisional Judge on this question. The sale to Ghulam Haidar and Muhammad Yakub was made on the 12th of November 1916, and the learned Divisional Judge alludes to the prohibitory order as having been issued on the 7th of July 1916. There has been, what must be, a clerical mistake in the year. The prohibitory order was, as a matter of fact, issued in July 1917. Apart from this, however, I entirely agree with the view of the learned Divisional Judge that the transferees in that case had ample notice that the suit had been instituted. It was instituted on the 13th of April 1916, or seven months before the sale. Further than this, the plaintiffs had obtained a certificate from the Collector for the institution of the suit on the 18th of September 1914. Now, I cannot possibly believe the contention urged by the petitioners' Counsel that this permission was applied for secretly and that the object of the plaintiffs in that case was to prevent the proprietors of the village being aware of their proceedings. On the contrary, the fact that a suit was threatened and that the whole position and title of Harnam Singh to, encumber the property of the Institution was being impugned, must have been notorious ever since 1914. Proceedings of this nature could not possibly have been kept in the dark. They must have been preceded by considerable discussion and also, it may be assumed, by considerable local feeling.

The original proprietors of the land and the transferees, who had benefited by Harnam Singh's action, were Muhammadans. It is clear from the record of the suit that they had always very naturally resented the expropriation of the Muhammadan proprietors by the Sikh Rulers, and that they had, on one occasion, endeavoured to set this aside. There was, therefore, not only ordinary local feeling, but a certain amount of religious and racial feeling involved in the case. I should, therefore, in any case, fully agree with the learned Divisional Judge in rejecting the claims of Ghulam Haidar and Muhammad Yakub to compensation, and I have mentioned the reasons for my view in some detail, because the point is also material when considering their claim to resist the present suit as transferees in good faith without notice of the trust.

Another point raised by the petitioners is that the Divisional Judge was not justified in treating the status of Harnam Singh as *res judicata* by reason of the Judicial Commissioner's order of the 20th December 1918. The present petitioners were not parties to that suit and section 11, Civil Procedure Code, it is argued, would not apply as the title which they derived from Harnam Singh was acquired not subsequently, but prior, to the institution of the suits. There is this much force in the petitioner's contention that section 11, Civil Procedure Code does not apply to persons who hold under a party to a suit in virtue of a transaction made before the decision of that suit. It is no doubt an accepted principle of law that a person cannot, in subsequent litigation, prejudice a title which he has already conferred merely because he himself fails in that litigation to establish his right to make the transfer. At the same time, the question of *res judicata* was not urged before me at the preliminary hearing, and in any case the point is not really material to the decision of the suit. Whether the question of Harnam Singh's proprietary title is or is not *res judicata*, it is one which has been made so abundantly clear by evidence and by the circumstances of the case that there is only one finding possible on the point. It has been established beyond any shadow of doubt that Harnam Singh never had

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any kind or sort of proprietary title in the land in suit.

I now turn to the only point which I am prepared to consider on this revision. Counsel for the respondents meets the argument of the petitioners in the first instance by contending that the petitioners are not transferees in good faith. As against this, the petitioner's point to the finding of the Divisional Judge, that they are transferees in good faith, and to the fact that their good faith is stated in the order of the Divisional Court to have been admitted. I am constrained, however, to think that the Divisional Judge, in referring to the defendants as transferees in good faith, must have had in his mind only the cases of Ahmad and Majidgul. It would be very difficult to reconcile his own view that Ghulam Haidar and Muhammad Yakub had full notice of the institution of the suit against Harnam Singh and of the fact that his incompetency to alienate had been challenged, with the finding that they were, nevertheless, transferees in good faith. So far as their position is concerned, I fail to see how it can be argued that by any principle of law or equity they are entitled to resist the present suit.

The general contention that the defendants in both these cases are transferees in good faith without notice of the trust, is supported by the learned Counsel for the petitioners by a number of considerations. The fact that Harnam Singh was recorded as full owner in the Revenue Record has been emphasized. As against this, various facts are cited, on the other side, such as that the "*riwaj-i-am*" of the village states that the *Mahant* has no right to alienate except for building necessity; that he is only a "*sajjada nashin*," and that the "*jagir*" was sanctioned "*ta qiyam samadh*". So far as this question is concerned, the Revenue Record must be taken as in favour of the defendants rather than of the plaintiffs as a person who wished to corroborate a particular proprietary title, would refer rather to the *jamabandi* than to the "*riwaj-i-am*" or the list of pensions. Another point quoted in favour of the defendants is the litigation which took place in 1908 between one Waziri Mal and Harnam Singh. In that case Harnam Singh attempted to

repudiate a mortgage on the ground that the property was "*jagir*" and inalienable, but it was found by the District Judge that the land was the private property of Sobha Singh and his heir Harnam Singh and was not "*jagir*" from Government. A general consideration of the evidence, coupled with the fact that the alienation to Majidgul was made some years before the institution of the suit to remove Harnam Singh, tends to show that in his case at least the alienees were acting in good faith and without notice of a trust.

It is, however, for the petitioners to support their contention that in a case where a transferee holds from an ostensible owner in good faith without notice, he has acquired a title from which he cannot be dispossessed by the real owner. In support of this contention the learned Counsel for the petitioners has quoted a ruling of the Madras High Court of 1911 published as *Prasanna Venkatachella v. Collector of Trichinopoly* (1). He contends that the case is one relating to a public charity and is very parallel to the present suits. It was there held that a transferee was protected by section 64 of the Trusts Act, II of 1882. But I have considerable difficulty in understanding why, in that case, no allusion is made in the judgment to the fact that the Trusts Act, II of 1882, does not refer to public or private religious or charitable endowments. Yet section 1 of the Act is perfectly clear on this point. The exclusion of religious endowments from the operation of the Trusts Act is particularly referred to in the Privy Council ruling *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (2) to which allusion will be made below. The wording of section 1 of the Trusts Act is so clear and unequivocal, that it appears to me impossible to argue that a transferee of property belonging to a charitable and religious endowment (such as that which undoubtedly owns the property now in suit) can possibly seek the protection of section 64 of the Act. Further, the word "trustee" is not to be applied to the case

(1) 33 Ind. Cas. 45; 38 M. 1064.

(2) 65 Ind. Cas. 161; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123.

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of a *Mahant* holding the position which was held by Harnam Singh. The whole question of the applicability of the word "trustee" in its restricted and technical sense to the *Mahant* of a shrine, is dealt with in a comprehensive and instructive manner in the Privy Council ruling cited above. It was, therefore, pointed out that there was no connection between the position of a trust, as known to English Law, and that of a *Mahant* or manager. That ruling shows that the word 'trustee', when applied to the position of such persons, is used in a colloquial and loose sense and does not bring them under the operation of the law relating to trusts. Their Lordships pointed out as one of their reasons for this view that Religious Institutions were specifically and intentionally excluded from the operation of the Trusts Act, II of 1882. The view there taken overruled various decisions on this question which are alluded to in the judgment, and must also be taken as overruling the view of the Punjab Chief Court in *Herr Gian Deo v. Baldeo Das* (3). It may be admitted that this view is, to some extent, inconsistent with the application of Art. 134 of the Limitation Act to a suit of the present nature. The question, however, as to whether Art. 134 does, or does not, apply is not one which I am considering in this revision, and does not affect the finding as to the position which was held by Harnam Singh, in the present case. It may also be remarked that the word used to describe his position in various records is consistent with the view that he must be described as a *Mahant* and manager, rather than a trustee. In one place his predecessor, Khud Singh, is described, as "*mohtamim*" and in another as "*sajjada nashin*." Again, the applicability of section 64 of the Trusts Act is based principally upon the consideration that trust property vests in the trustee. As pointed out in the Privy Council ruling already cited, there is no question in the case of a *Mahant* of the property having vested in him. The argument put forward by the petitioners that a valid title from a trustee in whom the property was vested, accrued to them from the moment of the

transfer cannot, therefore, be entertained.

It is contended, however, for the petitioners that, in any case, the principles of section 41 of the Transfer of Property Act apply to the present case. The Punjab High Court have held [*Basso v. Mir Muhammad* (4)] that the principles of section 41 of the Transfer of Property Act are consistent with equity and are applicable to cases in the Punjab. This general principle is also to be assumed from various judgments of the Judicial Commissioner of this Province. The weakness of this argument, however, arises from the fact that section 41 of the Transfer of Property Act in protecting a transferee in good faith from an ostensible owner, lays down the condition precedent that the persons interested in the property must have given their consent express or implied. It is argued by the learned Counsel for the petitioners that the plaintiffs in the present case, as members of the Sikh public, gave an implied consent to the transfers by Harnam Singh by their long inaction. He would call them persons interested in the property. Now, this argument appears to me essentially fallacious. There is no reasonable doubt that section 41 of the Transfer of Property Act was intended primarily to apply to cases where an ostensible owner has acquired a title *benami*. Various rulings have been quoted to show that section 41 protects a transferee in all cases where the real owner has allowed the world at large to think that some one other than himself was the owner of the property, *vide*, *Veerappa Chetti v. Ramaswami Chetti* (5); *Aziz-un-nisa v. Ashan Ashraf* (6); *Lalsing v. Parashram* (7) and *Annada Mohan Roy v. Nilphamari Loan Office Ltd.* (8). But all these rulings apply to cases where there has been something in the nature of a *benami* transaction which the real owner has allowed the transferee and the public at large to treat as conferring a genuine title. I cannot see that

(4) 20 Ind. Cas. 291; 278 P. L. R. 1913; 239 P. W. R. 1913.

(5) 53 Ind. Cas. 579; 43 M. 135; 26 M. L. T. 271; 37 M. L. J. 442; 11 L. W. 232.

(6) 53 Ind. Cas. 970; 22 O. C. 243.

(7) 68 Ind. Cas. 332; (1922) A. I. R. (N.) 226.

(8) 65 Ind. Cas. 245; 26 C. W. N. 436.

(3) 127 P. R. 1908; 23 P. W. R. 1908 (F. B.).

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they have any applicability to the case of a religious endowment where the real owner is the shrine itself and where it cannot possibly be said that any particular human being has the power to give any consent express or implied. The learned Counsel for the petitioners meets this objection by saying that the corollary to such a view is to exclude religious endowments altogether from the operation of section 41. This objection itself seems to me to expose very clearly the inherent weakness of the learned Counsel's position. It is perfectly clear that religious endowments are actually protected from the operation of section 41 and for a very good reason. It is surely clear that no particular member of the public which has an interest as a whole in a Religious Institution, could possibly validate any act of the manager by giving his individual consent. Such an argument has only to be stated to be rejected. It follows *a fortiori* that no member of the public, if he cannot give an express consent, can give an implied consent. Further, I fail to understand how the present plaintiffs can be given any such position of responsibility towards the institution as the argument of the learned Counsel for the petitioners would seem to assign to them. They are not, as a matter of fact, the same persons who sued in 1916 for the removal of Harnam Singh, though their agent in the present case was one of the plaintiffs in that suit. Even if they were the same persons, their title to sue in 1916 was derived solely from the operation of section 92, Civil Procedure Code. For the purposes of the suit they were persons interested in the endowment. It could not, by any stretch of reasoning, be inferred from this that they are, thereby, the persons interested in the property within the meaning of section 41 of the Transfer of Property Act whose consent would protect the transferees from dispossession by the real owner. The real owner, if the word "ownership" can be applied at all to the property in suit, is the shrine itself. I can see nothing illogical in holding that when property is vested in a shrine, it is *ipso facto* excluded from the operation of section 41, because there are not in existence persons interested in the property within the meaning of that section who have any legal title to consent to its alienation.

I am unable to hold, therefore, that any principle of equity or law in the present case protects the defendants from being ousted at the instance of the managers of the shrine, and I must concur in the conclusions arrived at by the Divisional Judge. These petitions are dismissed with costs.

Z. K. & N. H.

Petitions dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO.
1363 OF 1922.

JANUARY 16, 1923.

Present.—Mr. Justice Abdul Raoof.

Musammam AMIR BIBI—JUDGMENT—
DEBTOR—APPELLANT

versus

NUR MUHAMMAD—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 33—Restitution of conjugal rights, decree for—Direction about wife not being sent to jail in execution—Marriage during minority—Enmity.

The tendency of modern legislation is against sending women to jail in civil matters, and the power of sending women to jail in civil matters should, therefore, be sparingly exercised. [p. 717, col. 2.]

A woman who disobeys a decree for the restitution of conjugal rights loses her right to claim maintenance from her husband and this ought, ordinarily, to be considered sufficient punishment for her disobedience. [p. 717, col. 2.]

Bai Parwati v. Mansukh Jetha, 59 Ind. Cas. 361; 44 B. 972; 22 Bom. L. R. 1097, relied on.

Where it was found that a woman against whom a decree had been passed for restitution of conjugal rights had been married while she was still a minor, that her husband had neglected to maintain her for 18 or 19 years, and that there was bitter enmity between the parties:

Held, that this was a fit case in which the Court ought to exercise the power vested in it by O. XXI, r. 33 of the Civil Procedure Code by directing that the wife shall not be sent to jail in execution of the decree. [p. 717, col. 2.]

Miscellaneous second appeal from an order of the District Judge, Jullundur, dated the 4th March 1922, affirming that of the Munsif, First Class, Jullundur, dated the 14th February 1922.

Dr. Shuja-ud-Din, for the Appellant,

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JUDGMENT.—These two second appeals have arisen out of proceedings in execution of a decree for the restitution of conjugal rights. The following facts will disclose the nature of the suit and of the question arising for consideration in these appeals:—

Musammat Amir Bibi and *Musammat Aziz Bibi* are two sisters. They were married to two brothers *Nur Muhammad* and *Ghulam Mohammad*, respectively, about 18 or 19 years ago when they were minors. It appears that on their attaining puberty their parents refused to send them to their husbands and they themselves refused to live as the wives of their husbands. Two suits were, therefore, instituted for the restitution of conjugal rights against the two ladies and for an injunction against their father. The suit was resisted on the ground that the plaintiffs had neglected their duties as husbands, that they had not supported their wives, and that bitterness existed between the parties. The suits were, however, decreed and the decision was upheld by the Appellate Court on the 6th November 1920.

The successful plaintiffs put their decrees into execution. The judgment-debtors filed objections to the effect that the decree-holders were in debt, that they were too poor to maintain their wives and that enmity existed between the parties. The Execution Court overruled the objections and made an order directing the judgment-debtors to comply with the decrees within two months. Appeals were preferred to the First Appellate Court and to the High Court; but they were dismissed. The judgment-debtors still persisted in disobeying the decrees passed against them and preferred to go to Jail rather than to go to their husbands. The Munsif accordingly ordered that both *Musammat Amir Bibi* and *Musammat Aziz Bibi* be sent to Jail for a period of six months and directed the decree-holders to pay Rs. 15 monthly on account of diet money for each of them. The judgment-debtors appealed. Their appeals have been dismissed. They have consequently come up to this Court in second appeal and Mr. Shuja-ud-Din on their behalf has put forward the following facts for the consideration of the Court and has requested that this Court should exercise the power given under O. XXI, r. 33, Civil Procedure Code, and should

order the release of the appellants:—

(1) that the appellants were married while they were minors and had not the marriage been brought about by their father they would have had the right of repudiation on attaining puberty;

(2) that undoubtedly there is enmity between the parties;

(3) that for 18 or 19 years the husbands have been neglecting their wives and have not maintained them;

(4) that the feelings were so bitter that the appellants preferred to go to Jail rather than consent to live with their husbands, and

(5) that they have already been in Jail and this circumstance must have added to the already existing bitterness existing between the parties.

Under ordinary circumstances, this Court would refuse to listen to the objections raised by wives married according to law; but, having regard to the special circumstances of this particular case and the fact that the tendency of modern legislation is against sending women to jail in civil matters, I am prepared to exercise the discretion vested in the Court under O. XXI, r. 33, Civil Procedure Code. Having disobeyed the decree the appellants shall have to maintain themselves and shall not be entitled to make claim against the husbands for maintenance. This, as observed in the case of *Bai Parwati v. Mansukh Jetha* (1) will be sufficient punishment. Though I am not prepared to go to the length to which the learned Judges who decided the above cited case went, I must hold that according to the tendency of the present times the power of sending women to Jail should be sparingly exercised.

I accordingly accept the appeals and setting aside the decrees of the Court below disallow the prayer of the decree-holders to send the appellants to Jail. I understand that the appellants have already been released from Jail. It is not, therefore, necessary to make any further order in this respect. Having regard to the particular circumstances of this case I direct that the parties should bear their own costs.

Z. K.

Appeal accepted.

(1) 59 Ind. Cas. 361; 44 B. 972; 22 Bom. L. R., 1097.

SUPERINTENDANT OF STAMPS *v.* CHIMANLAL LALBHAI.**BOMBAY HIGH COURT.**

CIVIL REFERENCE NO. 7 OF 1922.

September 26, 1922.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, Mr. Justice Crump and Mr. Justice Mulla.

THE SUPERINTENDENT OF STAMPS,
BOMBAY—PETITIONER

versus

CHIMANLAL LALBHAI AND OTHERS—
OPPONENTS.

Stamp Act (II of 1899), Sch. I, Art. 45—Hindu joint family—Oral partition—Deed transferring shares—Stamp chargeable.

At the time of an oral partition between three brothers who formed a joint Hindu family, certain shares in a Company, which stood in the name of the eldest brother, were not thrown into the hotch-pot. Subsequently, the eldest brother executed two deeds transferring to each of his younger brothers, the number of shares which fell to each, and the question was as to the Stamp duty leviable on the deeds:

Held, that the deeds were chargeable under Art. 45, Schedule I to the Stamp Act, as instruments of partition. [p. 719, col. 2.]

Civil reference made by the Superintendent of Stamps, Bombay, under section 57 of the Indian Stamp Act, 1899.

Mr. Kanga, Advocate-General (with him Mr. J. C. Bowen, Government Solicitor), for the Petitioner.

Mr. Jinnah (with him Messrs. Manilal and Kher), for Opponent No. 2.

Mr. Thakor (with him Mr. Manilal and Kher), for Opponents Nos. 1 and 3.

JUDGMENT.

Shah, Ag. C. J.:—This is a reference under section 57 of the Stamp Act of 1899. The question referred to us is:—With what stamp-duty is each of the instruments referred to in paragraph 1 of the reference chargeable? The instruments are Exhibits A and B. They are in form transfers of shares, signed by one of the three brothers in favour of each of the other two brothers respectively. Exhibit A is in respect of 960 shares and Exhibit B is in respect of 830 shares. We have heard arguments on this question on behalf of the Crown and on behalf of the parties interested. We are of opinion that these two instruments Exhibits A and B are chargeable under Art. 45 of Schedule I to the Stamp Act, as instruments of partition.

It appears that a partition among these three brothers was effected in November 1918. There was no deed of partition and the shares in question continued in the name of the eldest brother Chimanbhai. They were in his name before the family was divided in interest, and continued in his name after the severance of interest in 1918. It appears that in 1920 the brothers reduced to writing the terms of the partnership, which apparently was formed soon after this partition, and these shares are referred to in that deed as partnership property.

Thereafter, in 1922, by means of the two instruments in question, the eldest brother Chimanbhai, in whose name the shares stood, sought to effect the transfer of the shares assigned to the share of each of the two other brothers. We are not concerned with 130 shares representing the difference between 960 and 830 shares as appearing in these instruments, because it may be that the value of these shares was otherwise made available at the time of the partition to that brother.

On the one hand, it is contended that Chimanbhai was in the position of a trustee, and that when he sought to transfer these shares to his brothers, he did so as a trustee to the respective beneficiaries, and that the instruments are liable to be stamped under Art. 62, clause (e).

On the other hand, it is urged on behalf of the Crown that the position of the three brothers after the oral partition in November 1918 was that of tenants-in-common, that the property with which we are concerned continued in the name of one of the tenants-in-common, that when Chimanbhai executed these instruments with a view to transfer the shares, he really meant to divide the shares and that the two instruments are in substance instruments of partition. In the alternative, it is argued on behalf of the Crown that the instruments are liable to be charged under Art. 62, clause (a), as simple transfers of shares in an incorporated Company, and not transfers by a trustee in favour of the beneficiaries.

We have come to the conclusion that the theory of Chimanbhai being a trustee for his brothers in respect of these shares cannot be accepted. His position was that

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of a tenant-in-common holding the property for the benefit of the other tenants-in-common after the partition of 1918. There is nothing to show that these shares were specifically divided at the time of that partition. It is suggested on behalf of the two brothers, Kasturbhai and Naro-tambhai, that the shares were in fact divided and that their brother Chimanbhai was in effect constituted a trustee in respect of their shares from the date of the partition. This plea is not consistent with the recitals in the instruments themselves. The instruments contain the following recital:—

"Whereas I am not the absolute owner of the said shares but am only the owner of 960 shares out of the said shares and in respect of the remaining shares, I am only a trustee as a separated co-owner (the separation having been effected by taking the dividends on the said shares in three equal parts) as well as a partner on behalf of the other two partners of the firm of Messrs. Lalbhai Dalpatbhai & Co. which was before the said separation a joint family firm."

When we turn to the partnership deed it appears from the schedule attached to that document that there is a list of the shares given which refers to the full number of 2880 shares and in clause 4 of that document there is a provision that the dividend on the shares in question shall be divided in equal shares between the parties. The fact of equal division of the dividends after the partition, is consistent with the theory of tenancy-in-common among the three brothers or of their being partners. But these recitals do not support the theory that the shares were in fact divided at the time of the partition. No authority has been cited for the proposition that the position of a co-tenant or a co-partner holding the property in his own name, is that of a trustee for the other co-owners or co-partners. It may be that he has certain obligations in respect of the property so held by him towards his co-owners or co-partners and that the co-owners or co-partners would have the right to enforce in a proper manner their rights of ownership to that property. But I am unable to hold that Chimanbhai held the shares in his name as a trustee

and that his two brothers were beneficiaries within the meaning of Art. 62, clause (e). In spite of the arguments urged in support of the theory of actual partition of the shares at the date of the partition in 1918 and of the creation of trust in favour of Kasturbhai and his brother, I have no hesitation in rejecting that theory on the facts as appearing in the documents themselves, and on the reference. The next question is as to whether these instruments are properly chargeable under Art. 62, clause (a), or Art. 45. It is by no means easy to decide whether these instruments are properly chargeable under Art. 62 (a) or under Art. 45. In form they are simple transfers and in substance they have the effect of dividing the property which was first a part of the joint family property and thereafter held as property belonging to the tenant-in-common. Having regard to the facts of the case we can treat these instruments fairly as instruments of partition in respect of the shares which were kept in fact undivided at the time of the oral partition between the three brothers.

Crump, J.—I concur.

Mulla, J.—I concur.

W. C. A. & W. H.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 132 OF 1920.

February 5, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fride.

CHINA MAI, AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

GUL AHMAD AND ANOTHER—DEFENDANTS
—RESPONDANTS.

*Transfer of Property Act (I V of 1882), s. 53—
Fraudulent transfer, setting aside of—Creditor,
who is not judgment-creditor, whether can sue.*

There is no warrant for the proposition that a creditor cannot maintain a suit to set aside a deed which is obnoxious to the provisions of section 53 of the Transfer of Property Act, until he es-

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establishes his debt by obtaining a decree from a Court of Law.

As soon as a person who complains of a transfer coming within the purview of section 53 of the Transfer of Property Act proves his debt either by producing a decree in his favour or by any other evidence, oral or documentary, he is entitled to sue, and it is not necessary that he must be a judgment-creditor or should have obtained a lien or charging order on the property transferred by his debtor.

Reese River Silver Mining Company v. Atwell, (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601 and *Ishwar Timappa Hegde v. Devar Venkappa Shanbog*, 27 B. 146; 5 Bom. L. R. 19, relied on.

The only distinction between a judgment-creditor and an ordinary creditor who seeks to set aside a transfer as fraudulent under section 53 of the Transfer of Property Act, is that while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor; the latter should bring an action on behalf of the general body of the creditors.

Second appeal from a decree of the District Judge, Attock, at Campbellpore, dated the 20th October 1919, affirming that of the Senior Subordinate Judge, First Class, Campbellpore, District Attock, dated the 22nd July 1919.

Mr. M. S. Bhagat, for the Appellants.

Mr. Anant Ram, for the Respondents.

JUDGMENT.—On the 1st November 1918, Munanmad Sher, defendant No. 1, executed a deed of gift by which he transferred the whole of his estate consisting of lands and house property to his minor grandson, Said Ahmad. The plaintiffs, who are some of the creditors of the donor, have brought the action which has led to this second appeal, to set aside the conveyance on the ground that it was made with intent to defeat or delay the creditors. The Subordinate Judge finds, and his finding has not been dissented from by the learned District Judge, that the donor was at the time of the gift indebted to all the plaintiffs and several other persons; and that the transfer was made with the intention of defeating the creditors. Indeed, the donor himself admits that he was heavily involved in debt when he transferred the whole of his property to his minor grandson, and he is unable to give any reason for depriving himself of his estate and conveying it to his grandson who was an infant at that time. His evidence also makes it

clear that he has no other property to satisfy the debts of his creditors, and that even after the transfer in question, he himself mortgaged a portion of the property conveyed by the deed in order to discharge the debt due to a creditor. It is, therefore, manifest that he is still the real owner of the estate and that the deed or gift was merely a device for withdrawing the property from the creditors and was intended to be a cloak for retaining the benefit for himself. Now, section 53 of the Transfer of Property Act provides that where the effect of any transfer of immoveable property is to defeat or delay any creditor, and such transfer is made gratuitously, the transfer may be presumed to have been made with intent to defeat or delay the creditor or the transferor. This presumption applies with full force to the transfer which the plaintiffs seek to impeach in the present case.

The Courts below have, however, dismissed the suit on the ground that the creditors have at present no interest in the property, because they are not judgment-creditors and have not attached any of the properties affected by the deed. Now, this view of the law is, in our opinion, erroneous. Section 53 of the Transfer of Property Act does not require that the persons complaining of a transfer coming within the purview of that section should obtain decrees proving their debts before they are entitled to set aside the conveyance. There is no warrant for the position that a creditor cannot maintain a suit to set aside a deed as obnoxious to the provisions of the section until he establishes his debt by obtaining a decree from a Court of Law. As soon as the person who complains, proves his debt either by producing a decree in his favour or by any other evidence, oral or documentary, he is entitled to sue; and it is not necessary that he must be a judgment-creditor or should have obtained a lien or charging order on the property transferred by his debtor. This principle was enunciated by Lord Romilly, M. R., in *Reese River Silver Mining Company v. Atwell* (1), a case decided under the English Statute, 13 Elizabeth, C. 5, on which

(1) (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.

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section 53 is in part based; and the same view has been expressed by a Division Bench of the Bombay High Court in *Ishwar Timappa Hegde v. Devar Venkappa Shantog* (2).

The only distinction between a judgment-creditor and an ordinary creditor, who seeks to set aside an alienation as fraudulent under section 53, appears to be that, while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor, the latter should bring an action on behalf of the general body of the creditors. The English rule on the subject, as stated in Halsbury's Laws England, Vol. XV, page 89, is to the following effect:—

"In an action to set aside an alienation under the Statute a creditor should sue on behalf of himself and all other creditors of the grantor except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts."

We must, therefore, hold that in order to entitle a creditor to bring an action under section 53 of the Transfer of Property Act to set aside a transfer it is not necessary that he should be a judgment-creditor or that he should have any lien or charging order on the property comprised in the deed of transfer, and that the plaintiffs, who have brought the action on behalf of all the creditors of the donor, have established all the requirements of the law.

We accordingly accept the appeal and decree the claim with costs throughout.

Z. K.

Appeal accepted.

(2) 27 B. 146; 5 Bom. L. R. 19.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 151 OF 1922.

May 31, 1923.

Present.—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Kulwant Sahay.
Babu CHANDRIKA PRASHAD SINGH
AND OTHERS—DEFENDANTS—APPELLANTS
versus

Babu HIRA LAL AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIX, r. 3; O. XXXVIII, r. 5—Affidavit, form of—Responsibility for making affidavit—Attachment before judgment—Principles applicable.

Where an affidavit states that the information deposed to is true to the best of the deponent's knowledge, information and belief, it is imperative that the deponent should state how much of the affidavit is sworn to from his own knowledge and how much is merely sworn to from information which he believes to be true. [p. 723, col. 1.]

Padmabati Das v. Rasik Lal Dhar, 6 Ind. Cas. 666; 37 C. 259, relied on.

An affidavit in support of an interlocutory application may be confined to facts which the deponent is able to depose to of his own knowledge, or it may be one in which statements of his belief may also be admitted if the grounds of his belief are given. But if the affidavit swears to certain facts as true and does not state that the facts deposed to are merely within the belief of the deponent, then it must be taken that the statements, in so far as they are statements of facts, are matters within his own knowledge and not merely matters of belief only, and it will be no excuse, if those facts should turn out to be untrue, to say that he did not intend it to be taken that he was swearing things within his own knowledge and that he merely intended to state what had been stated to him. [p. 722, col. 2; p. 723, col. 1.]

The power given to the Courts, by r. 5 of O. XXXVIII of the Civil Procedure Code, to attach a defendant's property before judgment is not meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit which may eventually prove to have been entirely devoid of merit. This power should be exercised only when the Court is satisfied, not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. [p. 724, cols. 1 & 2.]

Once the Court accepts the view that the de-

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endant has no intention of alienating his property, there is no longer any power in the Court to grant an order for attachment before judgment, because in such a case it is quite obvious that the essential condition laid down in r. 5 of O. XXXVIII of the Civil Procedure Code has not been fulfilled. [p. 724, col. i.]

Appeal from an order of the Subordinate Judge, Allahabad, dated the 9th May 1922.

Messrs. *Hasan Iman, A. Sami and P. K. Mukherjee*, for the Appellants.

Messrs. *Jayaswal, S. Dayal and Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the defendants in the suit from an order of the Subordinate Judge of Shahabad ordering attachment before judgment of immoveable property belonging to the defendants. It appears that the plaintiffs sued for recovery back of a deposit of Rs. 1,32,000, or thereabouts, made by them in part performance of a contract to purchase some of the immoveable property of the defendants or in the alternative for specific performance and a conveyance of the property.

The allegations made in the plaint are that there are certain misrepresentations as to incumbrances on the property and that such incumbrances were not disclosed and, therefore, although the plaintiffs are seeking, as an alternative, specific performance, they are really claiming back the deposit made with interest thereon.

The defendants' case is that they are quite willing to transfer the property upon payment of the balance of the purchase price due and they deny the allegations as to the misrepresentations alleged in the plaint. The plaintiffs on the 9th of May of last year applied for attachment before judgment not only of the property in suit but apparently of all the immoveable property belonging to the defendants which is said to have been valued recently by a valuation of the Court at a sum of nearly eight lakhs of rupees.

The evidence necessary in support of an interlocutory application of this sort may be given by affidavit and the only evidence presented on behalf of the plaintiffs on the present application for attachment was an affidavit signed by Har Kishan Das, the *a-mukhtar* of one of the plaintiffs. The affidavit does not state in terms whether

the facts deposed to therein are statements of facts within the deponent's knowledge or whether they are statements made from information and belief. It was contended, in the first place, on behalf of the appellants that an affidavit of this sort was not sufficient for the purposes for which it was required, because there was nothing to show whether the statements made are merely statements on information and belief or whether the deponent swears to the facts mentioned as being within his own knowledge. O. XIX, r. 3, provides that, "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications; on which statements of his belief may be admitted: provided that the grounds thereof are stated." It follows, therefore, that in an application of this sort the affidavits may be confined to facts which the deponent is able to depose to of his own knowledge, or it may be one in which statements of his belief may also be admitted if the grounds of his belief are given. But if the affidavit swears to certain facts as true and does not state that the facts deposed to are merely those within the belief of the deponent, then, I apprehend, it must be taken that the statements, in so far as they are statements of fact, are matters within his own knowledge and not merely matters of belief only. It follows, therefore, that the present affidavit is not necessarily bad on the ground that it does not state in terms whether the facts deposed to are facts within the knowledge of the deponent or merely statements of his belief. The case of *Padmabati Dasi v. Rasik Lal Dhar* (1) was referred to in support of the proposition put forward by the defendants. In that case Sir Lawrence Jenkins, C. J., and Woodroffe, J., stated: "We desire to impress upon those who propose to rely on affidavits that, in future, the provisions of O. XIX, r. 3 must be strictly observed and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief." In that case, however, as appears from the report,

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the affidavit which was sworn was one which is in very common use in this country. After stating the facts it continued, "I the defendant-respondent, above-named solemnly affirm and say that what is stated in the foregoing petition is true to the best of my knowledge, information and belief." It must be borne in mind that in making the observations which I have just quoted from their judgment, the learned Judges were dealing with a case where the affidavit states that the information deposed to is true to the best of the deponent's knowledge, information and belief without stating specifically which parts of it are true to his knowledge and which parts are merely stated as his belief from information obtained by him. In such a case it is clearly desirable and imperative that the deponent should state how much of the affidavit is sworn to from his own knowledge, and how much is merely sworn to from information which he believes to be true; but if the affidavit contains no such statement as that to which I have referred but merely alleges certain facts and is signed by the deponent who swears to them, it must, I think, be taken that the statements made by him are represented as statements true to his knowledge. I, therefore, think that in the present case no exception can be taken to the form of the affidavit on that ground. At the same time, I should like to issue a note of warning against litigants, and those who swear affidavits on their behalf that, if they solemnly affirm, as this affidavit does, that certain facts are true without stating that those facts are true only to the best of their information and belief, it will be taken that they are swearing to facts deposed to as being facts within their own knowledge, and it will be no excuse if those facts should turn out untrue to say, "I did not intend it to be taken that I was swearing things within my own knowledge, I merely intended to state what had been stated to me."

The learned Subordinate Judge, when the application came before him, had the affidavit of Hari Kishen Das before him on behalf of the plaintiffs and that was the only evidence he had in support of the application. He granted the application, and the defendants contend that the learned Subordinate Judge was not justified upon

the evidence before him and in the view he took of the evidence in ordering an attachment of the property before judgment, because, even if one accepts the findings, they are not in themselves sufficient to bring the case within the provisions of O. XXXVIII, r. 5. That rule provides that, "Where at any stage of a suit, the Court is satisfied by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security."

I turn now to the evidence in support of the application which was before the learned Subordinate Judge. The affidavit in which that evidence was contained reads thus: "I solemnly affirm as follows:—That with a dishonest motive and with a view to deprive the plaintiffs of their dues as well as to obstruct the realization of the decree that may be passed in favour of the plaintiffs the defendants want to dispose of their properties specified in the petition. That in case the properties are disposed of there will be considerable difficulty in realizing the decretal amount, rather the realization would be impossible. An attachment before judgment of the defendants' properties is, therefore, necessary."

That was the whole of the evidence on behalf of the plaintiffs before the learned Subordinate Judge when he had to come to a conclusion whether he should grant an order for attachment before judgment or not. The defendants, on the other hand, put in a petition, verified by an affidavit, in which they stated that it was absolutely untrue that they had any intention of disposing of any portion of their family property, that is to say, the property which it

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was sought to attach, and that the statement to the contrary made in the affidavit of Har Kishen Das was absolutely malicious. Let us see how the learned Judge dealt with the matter. His judgment is short and it is to this effect: "The learned Counsel for the defendant in support of his petition objects to furnishing security or to attachment of the properties mainly on the ground that there is no intention on the part of the defendant to alienate any portion of the property sought to remain under attachment. This explanation, however, is not sufficient. The main object of the rule aforesaid is to enable the plaintiff to realise the amount of the decree in the event of his obtaining a decree in the suit. The plaintiffs seek for a decree of about 1½ lacs of rupees in the suit. It is to be a money-decree. On behalf of the defendant it is not made out how this decree can be realised if steps are not taken to keep the defendants' property under attachment as contemplated by the above rule." The above rule is O. XXXVIII, r. 5, which is stated at the head of the order. "Nor is it attempted to be shown how the defendant will be prejudiced if his properties remain under attachment when there is no intention on his part to alienate the properties. In this view of the case the rule issued on the defendant will be confirmed and the properties will remain under attachment *pendente lite*."

With great respect to the learned Subordinate Judge, it seems to me that he entirely misapprehended the scope and effect of O. XXXVIII, r. 5. The power given to the Court to attach a defendant's property before judgment was never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit which may eventually prove to have been entirely devoid of merit. Such a power is only given when the Court is satisfied, not only that the defendant is only about to dispose of his property or to remove it from the jurisdiction of the Court, but also that

his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. In the present case the learned Subordinate Judge has not stated that he does not believe the defendants when they say that they have no intention of alienating any portion of their property under attachment. All he says is, that this explanation is not sufficient. It seems to me that once you accept the view that the defendants have no intention of alienating their property there is no longer any power in the Court to grant an order for attachment before judgment, because in such a case it is quite obvious that the conditions of O. XXXVIII, r. 5, which require the Court to be satisfied that the defendants are about to dispose of their property with intent to obstruct or delay the execution of any decree that may be passed against them have not been fulfilled. But the learned Judge goes on and gives as a reason for passing the order in question, that it is not made out by the defendants how the decree can be realised if steps are not taken to keep the defendants' property under attachment and further that no attempt has been made to show how the defendants will be prejudiced if their property did remain under attachment when, as they say, there was no intention of parting with it. It was only in this view of the case that the learned Subordinate Judge passed the order. It is perfectly clear that the reasons given by the learned Subordinate Judge for ordering the attachment cannot stand. We might, if we thought fit, refer the case back to him again with certain directions as to the scope and meaning of O. XXXVIII, r. 5; but the evidence is before us and we are competent as a Court of First Appeal to deal with the question raised. To my mind in a matter of this sort the affidavit put forward on behalf of the plaintiffs, contradicted as it is by the defendants, is entirely insufficient to satisfy any Court that the defendants are about to dispose of their property or remove it out of the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed against them. The affidavit

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is couched in the most vague and general terms. The deponent says that with a dishonest motive the defendants want to dispose of their property, and then says that in case the properties are disposed of there will be considerable difficulty in realising the decretal amount. That is all. No particulars of any sort are given as to the defendants having attempted to alienate their property on any occasion, and it is not suggested that anything took place which would lead one to suspect that the defendants had any intention of removing their property from the jurisdiction or putting it out of the power of the Court. Not a word is said as to how the deponent came by his knowledge of the facts which he affirms, and as evidence the affidavit when contradicted appears to me to be practically worthless. The property attached in this case is said to be valued at something like eight lacs of rupees: in fact, it is the whole of the immoveable property of the defendants, whereas the plaintiff's claim is only for something under a lakh and a-half of rupees. This in itself is to my mind a matter which raises some suspicion as to the *bona fides* of the plaintiffs in the matter, and is a consideration which ought to lead the Court to scrutinise somewhat carefully the evidence upon which the application is based. The defendants, on the other hand, have repudiated entirely any intention of alienating their property or removing it out of the jurisdiction of the Court. The learned Subordinate Judge does not appear to have disbelieved them; but, even assuming that they had no such intention, he has nevertheless ordered the property to be attached. The evidence in the present case entirely fails to satisfy me that any case has been made out for taking what after all is a very drastic step, namely, attaching the property before the plaintiffs have shown any right to succeed in the suit.

In my opinion this appeal should be allowed, the order of the learned Subordinate Judge set aside, and the property released from attachment.

The appellants are entitled to the costs of the petition before the learned Subordinate Judge and the appeal to this Court.

Let the record be sent down at once to the lower Court.

Kulwant Sahay, J.—I agree.

Z. K. & N. H.

Appeal allowed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 137 OF 1922.

January 2, 1923.

Present :—Sir Shadi Lal, Kt.,
Chief Justice, and Mr. Justice Fforde.
Nawab ABUL HASAN KHAN
—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE OF
DELHI—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 3 (13) (a), 189, 193—Street—"Accessible to the public," meaning of—Sanction to build—Condition regulating line of frontage, when can be imposed.

The expression "accessible to the public" in section 3 (13) (a) of the Punjab Municipal Act, means open to all the public in fact, whether by right or permission. [p. 726, col. 2.]

The power to restrict the right of free building by private owners upon private land is conferred upon Municipalities by section 189 of the Punjab Municipal Act. [p. 726, col. 1.]

Under that section a Municipal Committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street. [p. 726, col. 2.]

Under section 193 of the Punjab Municipal Act, a Municipal Committee may refuse permission to build at all; but if permission is granted it can only impose such conditions as are provided for in sub-section (3) of section 189 of the Act. [p. 727, col. 1.]

Letters Patent Appeal against an order of Mr. Justice Broadway, dated the 15th May 1922, in Civil Appeal No. 2394 of 1921; published as 71 Ind. Cas., 775.

Lala Sardha Ram, for the Appellant.

Mr. Dalip Singh, for the Respondent.

JUDGMENT.—The appellant, Abul Hassan Khan, applied to the Municipal Committee of Delhi for permission to erect a dwelling house upon certain land of his within the Municipal area.

Permission to build was granted, but was coupled with a condition that the building should be erected "four feet away

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from the middle of the road." The term "road" is here used to denote a portion of land belonging to one Benarsi Das, separated by a low wall from the land on which appellant desired to build.

If the appellant had built in accordance with this condition, his structure would have stood a foot or so behind this wall. In point of fact the house was built in contact with the wall and, therefore, in violation of the condition imposed by the Municipality.

The question for our determination is whether or not the Municipal Committee had power to impose this condition. The power to restrict the right of free building by private land owners upon private land is conferred by the Punjab Municipal Act, 1911. Section 189 (1) of the Act provides that no person shall erect a building without the sanction of the Committee. Sub-section (3) provides that the Committee may by bye-law prescribe, *inter alia*, the requirements to which the building must conform in respect of:—

(i) free passage or way in front of the building;

(ii) space to be left about the building to secure free circulation of air and facilitate scavenging and for the prevention of fire;

(iii) ventilation and the provision and position of drains, privies, latrines, urinals or cesspools;

(iv) level and width of foundation, level of lowest floor, and the stability of the structure; and

(v) the line of frontage with neighbouring buildings, if the building abuts on a street.

The stipulation imposed by the Committee in giving the sanction to build is now impeached on the ground that it is not authorised by the bye-law framed under the provisions of this sub-section.

It has been contended throughout on behalf of the Committee that this restriction does come within the scope of the sub-section; that is to say, that it was imposed for the purpose of regulating the line of frontage with neighbouring buildings which, of course, assumes that the building in question "abuts on a street."

The appellant has throughout maintained that the building does not in fact abut on a street, and that, therefore, the restriction

is not within this sub-section and is accordingly invalid. To determine these issues between the contending parties the following questions were framed in the Court of first instance:

(1) Whether the order of the Municipal Committee is *ultra vires*?

(2) Whether the adjoining open space is not a street?

Section 3 sub-section (13) (a) of the Municipal Act defines "street" as "any road, foot-way, square, Court, alley or passage accessible, whether permanently or temporarily, to the public, whether a thoroughfare or not." The second portion of this sub-section (a) includes a vacant space under certain limitations, but it has been conceded that the ground in question does not come within the description of "vacant space" as thus defined, and accordingly the issue was framed under the first portion of the sub-section.

Now, it is quite clear that the ground in question would come within the definition of street as defined in the first part of section 3 (13) (a) if it could be shown to be "accessible whether permanently or temporarily to the public." "Accessible to the public" means open to all the public in fact, whether by right or permission. The Court of first instance on the evidence before it has found that this ground is not accessible to the public within the meaning of that phrase, and has held accordingly that the ground is not a street. With this decision both the learned Judges on appeal have agreed, and we can see no reason for disturbing this finding of fact. It follows, therefore, that the building does not "abut on a street," and accordingly the condition sought to be imposed is not authorised by sub-section (3) (v) of section 189. The Committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street, and so far, therefore, as that clause in the sub-section is concerned the restriction is *ultra vires*.

It has been urged by Counsel for the Municipality that the condition imposed may still be authorised by (i) or (ii) of sub-section.

(3) That is to say, that the order to erect the building at a distance of four feet from the middle of the road was made for the

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purpose of allowing a free passage or way in front of the building, or a space to secure free circulation of air, facilitate scavenging and prevent fire. We cannot accept this contention. It does not appear to have been seriously relied upon in the Courts below, and it is not consistent with the facts of the case.

It has been further urged on behalf of the respondents that the Committee has power under section 193 of the Act to sanction any condition it may think fit to impose. This view, also, we cannot accept. Section 193 empowers the Committee to refuse sanction to build, or to grant sanction either absolutely or subject to such modification as it may deem fit in respect of all or any of the matters specified in sub-section (3) of section 189. That is to say, the Committee may refuse permission to build at all; but if permission is granted it can only impose such conditions as are provided for in the sub-section.

Holding, as we do, that the condition imposed by the Committee is *ultra vires*, we must allow the appeal with costs, affirming the order of the District Judge.

Z. K.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 252 OF 1921.

May 23, 1922.

Present.—Mr. Simpson, A. J. C., and

Mr. Wazir Hasan, A. J. C.

BALBHADDAR PRASAD TIWARI AND

ANOTHER—DEFENDANTS—APPELLANTS—

versus

HAR NARAYAN DAS—PLAINTIFF—

RESPONDENT.

Riparian owners—Sudden change in course of river—Land belonging to one owner joined with that of another—Ownership, transfer of—Principle applicable—Identity of lands not lost, effect of—Dhardhura, custom of, meaning of—Wajib-ul-arz, construction of—Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4 cl. (2).

Where by a sudden change in the course of a river, a piece of land belonging to one riparian owner is cut off and placed in contiguity to that of another riparian owner, the ownership in it is not changed so long as its identity is not destroyed. [p. 729, col. 1.]

The principle of law stated above is one not merely of English Law, nor a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice, and has been embodied in clause (2) of section 4 of the Bengal Alluvion and Diluvion Regulation, [p. 729, col. 2.]

Where a person sets up a custom in derogation of the aforesaid principle he must prove the same by clear, definite and specific evidence. [p. 733, col. 1.]

It is wholly against all principles to uphold a custom by means of possible inferences or even by probable implications. [p. 731, col. 2.]

The word *dhardhura* is not a term of art signifying necessarily always and under all conditions that the deep stream constitutes a permanent boundary between two estates on the opposite bank of a river. [p. 731, col. 2.]

The *wajib-ul-arz* of a village on one side of a river contained the following entry: "As between our village and the opposite village D, there is an old boundary formed by the main stream of the river, and as up till now the main stream flows below our village the land of the *katri* appertains to village D, but when the main stream shall flow below D, we shall be entitled to the land of the *katri*." The *wajib-ul-arz* of the village on the opposite bank stated, "The river passes by the extremity of this village and, therefore, when any land on this side of the river is washed away to the other side, the same is taken possession of by the Zemindar on whose side the land falls, i.e., the custom of *dhardhura* prevails."

Held, (1) that though the usage of *dhardhura* was expressly mentioned in the *wajib-ul-arz*, yet the condition of things to which it was applicable was stated in words which may merely connote the acquisition of land by gradual accession, and if that were so, the entry would amount to nothing more than a mere recital of the general law; [p. 731, col. 2.]

(2) that there was nothing to show that the entries in the *wajib-ul-arz* were explicitly applicable to a case of a transfer of land from one side of the river to the other by a sudden change of the course of the river. [p. 731, col. 2.]

Appeal from a decree of the Third Additional District Judge, Lucknow, dated the 9th May 1921, confirming the decree of the Subordinate Judge, Unao, dated the 15th April 1921.

Pandit Gokaran Nath Misra, for the Appellants.

Baba Basudeo Lal, for the Respondent.

JUDGMENT.—This is a second appeal from the decree of the Third Additional District Judge of Lucknow, dated the 9th May 1921, confirming the decree of the Subordinate Judge of Unao, dated the 15th April 1921, by which the suit of the plaintiff-respondent was decreed. The appeal originally came up for hearing before a Single Judge of this Court, who, by his order dated the 13th

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November 1921, certified that the case was fit to be heard and decided by a Bench of two Judges. It has accordingly come before us for decision.

The facts of the case are few and simple, but the question for decision in this appeal is not only of considerable importance but is also difficult of solution. The plaintiff is the owner of the villages Reotapur and Mirzapur, *Pargana* Sikandarpur, in the District of Unao. These two villages are situate on the north side of the river Ganges. The defendants are the proprietors of the villages Keora and Keora Kachar which lie on the south of the river in the Cawnpore District, and under normal conditions the river Ganges forms the boundary between the two estates.

The plaintiff's case is that, by virtue of a custom of *dhardhura*, the deep stream of the river determines the boundary even when that stream has suddenly changed its course and the land is thrown from one side of the river to the other by the action of the shifting of the deep stream. Thus, the land thrown towards the north of the deep stream becomes the property of the plaintiff and the land thrown towards the south and on being attached to the defendants' villages becomes the property of the defendant. Up to October 1915, the entire area in dispute formed part of the defendants' villages but in November of the same year the river suddenly changed its course and the lands in dispute which formerly belonged to the defendants having been thrown by the shifting of the course of the river towards the north, became attached to the plaintiff's villages. On the basis of the custom mentioned above the plaintiff claims title to those lands measuring about 2470 *bighas*. His suit has been decreed by both the Courts below. In appeal before us the question for decision is, whether he has succeeded in establishing a valid custom upon which his title to the lands in dispute could rest.

There was a previous litigation between these parties in which the present plaintiff founded his title to the lands in dispute on the same custom of *dhardhura* on which he relies in the present case. In the first two Courts he was unsuccessful. The finding of those Courts on the question of custom was against him. There was a second

appeal in that case. A learned Judge of this Court came to the conclusion that the custom of *dhardhura* was established. The decisions of the two Courts below were reversed and the suit was remanded to the lower Appellate Court to be re-admitted under its original number and disposed of after taking any additional evidence that it might consider necessary, in accordance with the directions given in that judgment. After having recorded the finding that the custom of *dhardhura* was proved, as stated above, the learned Judge proceeded to determine the question whether that custom could apply to a permanent island situated between two streams of a river, but the materials on the record not being sufficient to enable him to give a finding on that question the whole suit was remanded as indicated above. On the question set forth in the judgment mentioned above, the Courts below gave a finding in favour of the defendants and adversely to the plaintiff. The result of that finding was that both these Courts dismissed the plaintiff's suit. A second appeal was again preferred by the plaintiff from the last mentioned decree of dismissal and the same learned Judge of this Court, who had heard the previous appeal, also heard the appeal on the second occasion. By the order dated the 13th September 1918, that appeal was dismissed. In agreement with the decisions of the lower Courts the learned Judge recorded the finding that the conclusion is irresistible that the *sota* was not fordable but regular though a minor stream formed an island between it and the present main stream of the river. It is difficult to conceive on what ground the title to the island was adjudged in favour of the defendants though the finding recorded was that the channels between the island and the shore on the side of the defendants' villages were not fordable. In such circumstances, the title to the island would seem to vest in the Crown (See clause 3 of section 4 of Regulation XI of 1825). Be that as it may, it is perfectly clear that the learned Judge held that the custom of *dhardhura* as proved in that case was not established to include within it a case in which the defendants' land had formed into a permanent island formed by two streams of the river neither of which was fordable. In fact he recorded his opinion as follows:—“It was held by this Court

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that there was a custom of *dharadhura* prevailing between the villages in question but it was inapplicable to a permanent island situated between two streams of a river none of which was fordable." In giving this finding he obviously took into consideration the peculiar characteristics with which the defendant's land had reappeared after the change in the course of the river. This is an element which has an important bearing on the question of custom which we will discuss hereafter.

It is not disputed in arguments before us that the identity of the defendant's lands is not lost by the change in the course of the river, in spite of the fact that those lands now lie on the north side of the river instead of the south where they had formed part of the defendants' villages. Indeed, this fact is admitted in paragraph 2 of the plaint and that admission is still adhered to. Now, if there were nothing else to control the case, the title to the lands in suit would not vest in the plaintiff although the river had suddenly changed its course and the lands were cut off from the defendant's villages and were joined by the fluvial action to those of the plaintiff's. In the case of *Jaggot Singh v. Brij Nath Kunwar* (1). Lord Robertson in delivering the judgment of the Privy Council observed as follows:—"Now the mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B. And the proposition maintained by the appellant is by several steps nearer than this to paradox; for he contends that if, after temporary aberrations, a river at last leaves the land of A in *status quo ante* it must be held to be an accession to B, his next neighbour. It is superfluous to say that neither the Statute Law of India nor the general principles of Jurisprudence lend the slightest support to such unreasonable conclusions." We are, therefore, clearly of opinion that, on general principles of law, the plaintiff has no right to the lands in suit. We are also of opinion that not only the plaintiff has no such right but that the title to those lands still vests in the defendants as it admittedly

was with them before the change in the course of the river. This would be so according to the law as indicated by Lord Justice James in the case of *Felix Lopez v. Muddan Mohun Thakoor* (2). In enunciating the rule of English law on the subject, his Lordship quoted from Hale de Jure Maris, p. 15:—"If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced yet if by situation and extent of quantity and bounding up on the firm land the same can be known or it be by art or industry re-gained, the subject doth not lose his property." "If the mark remain or continue or the extent can reasonably be certain the case is clear." With reference to these quotations Lord Justice James proceeded to make the following observations:—"This principle is one not merely of English Law, nor a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be, the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner."

The defendants' title to the lands in dispute is not only supported by the general principles of law to which we have already adverted but it is completely covered by the terms of clause 2 of section 4 of Regulation XI of 1825. This Regulation is directly applicable to the case before us for the reason that it was applied to Oudh by the Oudh Laws Act (XVIII of 1876). Clause (1) of section 4 of that Regulation deals with a case where land is gained by gradual accession; but the case before us is admittedly not of gain by gradual accession but is one where the river has suddenly changed its course and the land which before the change lay on the southern bank of the river now lies on the northern bank of it. Clause (2) of that section is as follows:—"The above rule shall not be

(1) 27 C. 768 at p. 772; 27 I. A. 81; 4 C. W. N. 555; 7 Sar. P. C. J. 699; 14 Ind. Dec. (N.S.) 502 (P. C.).

(2) 13 M. I. A. 467 at p. 472; 14 W. R. P. C. 111; 5 B. L. R. 521; 2 Suth. F. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

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considered applicable to cases in which a river by a sudden change of its course may break through and intersect an estate without any gradual encroachment, or may by violence of stream separate a considerable piece of land from one estate and join it to another estate without destroying the identity and preventing the recognition of the land so removed. In such cases the land on being clearly recognised shall remain the property of its original owner." We have already pointed out that on the case of both parties the lands in dispute retained their identity as the lands of the defendants which were attached to their village Keora Kachar previous to the sudden change in the course of the deep stream of the river. But the plaintiff says, "I have proved a custom under the provisions of section 2 of the same Regulation which has the effect of making me the owner of what is admittedly the defendants' property." The question for consideration, therefore, is, "Has the plaintiff succeeded in proving such a custom?"

Before entering into a discussion of the evidence upon which the plaintiff relies in proof of the custom we think it desirable to say that he must establish a custom which should go to the whole length of abrogating the law under which the defendants' claim title to the lands in suit, and unless that is done, the general law must prevail. That law, as has just now been pointed out, is to be found in the terms of clause (2) of section 4 of Regulation XI of 1825. "Where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom." *Ram Nundun Singh v. Janaki Koer* (3). The essence of the custom which the plaintiff must establish by clear, definite and specific evidence lies in the element that the identity of the defendants' lands is not destroyed but that, on the other hand, they are clearly recognised as being the defendants' lands. If, therefore, the custom which the plaintiff has sought to prove in this case does not establish specifically that it relates to a case where by a sudden change of the course of the river

land is separated from one estate and joined to another, though the change has neither destroyed the identity nor prevented the recognition of the lands so proved, he must fail. This, according to our judgment, is key-note of the position.

The evidence of the custom consists solely of a certain number of *wajib-ul-araiz* which will be discussed in detail later on. At present it is enough to say that none of these *wajib-ul-araiz* specifically deals with a case where a sudden change in the course of a river has happened and land is separated from one estate and joined to another thereby "without destroying the identity and preventing the recognition of the land so removed." This conclusion is strengthened by the view taken by the learned Judge of this Court who decided the previous suit between the parties. He held, as previously pointed out, that though the custom of *dhardhura* was established, yet it did not cover the case where the land had appeared in the form of an island between two streams of the river.

In the Province of the Punjab the custom of deep stream boundary is recognised in three separate forms which differ from one another on a cardinal feature of distinction. In the first form, title to lands which by change in the course of the stream, becomes transferred from one side of the stream to another, is also transferred, though the lands remain intact and are identifiable. In the second form, there is no transfer of ownership when the land transferred is identifiable. The third form makes the bed in the river as the permanent boundary, no matter what changes may take place in the deep stream the title to the soil remains the same. The plaintiff, therefore, having failed to prove that the transfer of title to the lands even when they are identifiable is within the custom his suit must be dismissed.

The finding in favour of the custom recorded by the lower Courts is mainly influenced by the decision of this Court, to which reference has repeatedly been made before. The evidence in support of the custom consists of the entries in the *wajib-ul-araiz* of several villages, some on the Unao side and others on the Cawnpore

(3) 29 G. 828 at p. 852; 29 L.A. 178; 7 C. W. N. 57; 178 P. R. 1962; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.).

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side of the river. We now propose to consider these *wajib-ul-araz* severally. Exhibit 51 is the *wajib-ul-arz* of the village Mirzapur. Exhibit 52 is the *wajib-ul-arz* of the village Reotapur. Both these villages are owned by the plaintiff and are on the Unao side of the river. These two *wajib-ul-araz* have a material bearing on the case because they relate to villages to which the defendants' lands have become attached by the change in the course of the river. The entry relied on in Exhibit 51 is as follows:—

"As between our village and the opposite village Dharamput, District Cawnpore, there is an old boundary formed by the main stream of the river, and as up till now the main stream flows below our village, the land of the *katri* appertains to village Dharamput; but when the main stream shall flow below Dharamput we shall be entitled to the land of the *katri*." The entry in Exhibit 52 is word for word the same as in Exhibit 51. The following observations fall to be made in respect of these *wajib-ul-araz*.

(1) The entry in question is a statement made by the proprietors of the village to which the *wajib-ul-arz* relates and clearly indicates an assertion of a claim on the part of the village proprietors with regard to land appertaining to the village on the opposite bank when that land comes to be attached to their village by the change of the course of the main stream. (2) The entry does not expressly state any custom. It may well refer only to a statement of law as enunciated in clause (1) of section 4 of Regulation XI of 1825. (3) The entry does not purport to include a case where the transferred land retains its identity. Except Exhibits 51 and 52 there is no other *wajib-ul-arz* of a village on the Unao side of the river on the record. We have, however, some *wajib-ul-arz* relating to villages on the Cawnpore side. Exhibit 55 is the *wajib-ul-arz* of Keora Kachar. This is the defendants' village and the land in suit admittedly formed part of this village prior to the change in the course of the river in November 1915. Exhibit 56 is the *wajib-ul-arz* of Khushalganj. Exhibit 57 is the *wajib-ul-arz* of Jhura Nawabganj. Exhibit 58 is the *wajib-ul-arz* of Bithoor. Exhibit 59 is the *wajib-ul-arz* of

Dharampur. All these villages are situated on the Cawnpore side of the river. Barring Exhibit 55 which relates to the defendants' village as indicated above, the other *wajib-ul-arz* would seem to be irrelevant to the question of custom which not only by its nature must be local but it must be so as to fall within section 2 read with section 3 of Regulation XI of 1825. They would seem to be more so in the absence of the *wajib-ul-arz* relating to the villages on the opposite bank of the river, that is, on the Unao side. We are, however, not disposed to reject them on the ground of irrelevancy but will proceed to consider their evidentiary value. The entry in Exhibit 55 is as follows:— "Paragraph 11, relating to the mode of settling the matter of alluvion or diluvion so far as it affects the co-sharers in relation to each other. The river Ganges passes by the extremity of this village and, therefore, when any land on this side of the river is added to the village or is washed away to the other side, the same is taken possession of by the Zemindar on whose side the land falls, i.e., the custom of *dhardhura* prevails." The entries in Exhibits 56, 57, 58 and 59 are substantially the same as the entry in Exhibit 55. These entries lend themselves to the following criticism:—(1) That though the usage of *dhardhura* is expressly mentioned in these *wajib-ul-araz*, yet the condition of things to which it is applicable is stated in words which may merely connote the acquisition of land by gradual accession, and if that is true, the entry would amount to nothing more than a mere recital of the general law. (2) In our judgment, it is the duty of the plaintiff to show that the entry on which he relies is explicitly applicable to a case where land is transferred from one side of the river to the other by a sudden change of the course of the river and not otherwise. It would be wholly against all principles to uphold a custom by means of possible inferences or even by probable implications.

We are not satisfied that *dhardhura* is a term of art, signifying necessarily always, and under all conditions, that the deep stream constitutes a permanent boundary between two estates on the opposite

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banks of a river. Indeed, there are reported cases indicating possible variations in the sense of the word *dhardhura*. In the case of *Naseer-ood-deen Ahmed v. Oomedee* (4), Justices Ross and Turner made the following observations:—

"It may well be that *dhardhura* regulates only the rights to land, which may be strictly termed alluvial land, not to land, which is disjoined by a sudden change in the channel of the river, but still preserves its identity; on the other hand, it may be, that the custom will apply to land, which has been so cut off and separated, that, were it not for the operation of the custom, it would remain the property of the original proprietor in accordance with the provisions of the section of Regulation, on which the plaintiffs rely." The decision in the case of *Ranee Katiyane v. Sheikh Mahomed Shurf-ood-deen* (5) goes to the full length of the opinion which we have taken in the present case. The learned Judges in that case made the following observations:—

"So far as has been shown in the course of the argument, there is no well-established definition of the extent of the custom of *dhardhura*. It is contended on behalf of the special appellant that the custom extends only to land which may in the strictest sense be termed alluvial land, that is to say, land which is with more or less continuity subject to fluvial action, being in one year submerged, and in another year thrown up or left by the recess of the flood on the one or the other side of the river. It is on behalf of the special appellant denied that the custom operates when by a sudden change in the course of the stream a large tract of land is severed without undergoing any change of site or surface. . . . The lower Appellate Court has assumed that all disputes among riparian proprietors are to be determined by the custom of *dhardhura* where it is proved to obtain, without considering whether the custom is so extensive as to operate under the circumstances which are alleged by the defendants to exist in this case." In the case of *Isree Singh v. Mirza Shurf-ood-deen* (6) the point for determination

was, whether the custom above-mentioned (*dhardhura*) regulated only the rights to land strictly alluvial, or was so applicable to land disjoined by a sudden change in the channel of the river, but still preserving its identity. In the case of *Sibt Ali v. Munir-ud-din* (7) the question was in regard to a custom of *dhardhura* which would have the effect of passing from one owner to another lands long held and enjoyed and of which the character is in no way altered. The learned Judges in the course of their decision remarked as follows:—

"The question, therefore, in this suit cannot be decided on any general assumption that a custom of *dhardhura* cannot apply to the lands in suit, but it is necessary that the precise nature and extent of the custom as prevailing in the neighbourhood should be determined on evidence. . . . We remand the case in order that the Judge may try and determine the issue, whether the custom of *dhardhura* applies to lands gained by gradual accretion only, or to lands which have been separated from a *mauza* by a sudden change of the stream."

We have already commented that there is no evidence of the custom in question apart from the *wajib-ul-araz* to which reference has been made before. It is not shown that the custom of *dhardhura* has ever been acted upon by the owners of the villages on the Cawnpore side or the Unao side under any conditions, much less in the circumstances which form the special characteristics of the lands in suit in this case.

In the form in which the question of custom arises for decision in the present case there is no doubt that it is a question of mixed law and fact as was in the case of *Palaniappa Chetty v. Sreemath Deivasikamony Pandara Sannadhi* (8). We are, therefore, quite competent to judge as to whether the evidence relied upon in this case in support of the custom establishes all the essentials of a valid custom.

(7) 6 A. 479; A. W. N. (1884) 185; 4 Ind. Dec. (N. S.) 101.

(8) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 L. A. 147 (P. C.).

(4) 3 Agra H. C. R. 1.

(5) 3 Agra H. C. R. 189.

(6) 1 N. W. P. H. C. R. 224;

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As we have pointed out above, the whole fabric of the plaintiff's case rests upon the *wajib-ul-araz* already commented upon but the weight of a *wajib-ul-arz* may be very slight or may be considerable according to circumstances [per Lord Hobhouse in the case of *Muhammad Imam v. Ali Khan v. Husain Khan* (9)]. In the present case the evidence afforded by the *wajib-ul-araz* is not to our mind clear, definite, precise and certain and if these essentials are lacking, we are constrained to hold against the custom which it was the duty of the plaintiff to establish in this case.

We, therefore, allow the appeal, set aside the decisions of the Courts below and dismiss the plaintiff's suit with costs throughout.

N. H. *Appeal allowed.*

(9) 26 C. 81; 25 I. A. 161; 2 C. W. N. 737; 7 Sar. P. C. J. 432; 13 Ind. Dec. (N. S.) 656.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2098 OF 1920.

December 15, 1922.

Present:—Mr. Justice Oldfield and

Mr. Justice Ramesam.

KUPPU REDDI NOOKAYYA (DEAD) AND
OTHERS—APPELLANTS

versus

MANDALUKA BHEEMANNA AND AN-
OTHER—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2), (5), (11), (15)—*Madras Regulation XXV* of 1802, ch. 4—Grant by zemindar free of kattubadi prior to 1802—Pre-settlement inam or "estate"—Assignment of inamdar's interest in holding for term of years for money consideration with proviso for surrender—Mortgage or lease—Thirumanam, mean-
of.

A *sarva dumbala inam* free of kattubadi granted by a landlord prior to his lands being constituted a *zemindari* by a *sannad* issued under Regulation XXV of 1802 is not an "estate" within the meaning of section 3 (2) of the *Madras Estates Land Act*, even though the accounts on which the *peishkush* on the part of the *zemindar* was fixed were those taken by a Circuit Committee prior to the grant of the said *inam*, [p. 735, col. 2; p. 736, col. 1; p. 737, cols. 1 & 2.]

Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards, 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.), *Brahmayya v. Achiraju*, 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; (1922) A. I. R. (M) 373, *Suryanarayana v. Palanna*, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.), *Secretary of State v. Rajah of Venkatagiri*, 73 Ind. Cas. 741 *Infra*; 44 M. 864; 41 M. L. J. 624; (1922) M. W. N. 1; 30 M. L. T. 164; 26 C. W. N. 809; (1922) A. I. R. (P. C.) 168 (P. C.), *Venkatarangayya Appa Row v. Poranki Appalarazu*, 8 Ind. Cas. 546; 20 M. L. J. 728 at p. 734; 8 M. L. J. 429, *Sri Rajah Sobhanadri Appa Rao Bahadur v. Sri Rajah Venkatanarasimha Appa Rao Bahadur*, 26 M. 403 at pp. 404, 409; *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur*, 29 M. 52; 8 Bom. L. R. 1; 10 C. W. N. 161; 3 A. L. J. 55; 3 C. L. J. 1; 1 M. L. T. 3; 16 M. L. J. 1; 33 I. A. 46; 8 Sar. P. C. J. 897 (P. C.), *Rajah Nilmoney Singh v. The Government*, 6 W. R. 121, *Nilmoni Singh v. Bahranath Singh*, 9 I. A. 104 at p. 121; 9 C. 187; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.) and *Secretary of State for India v. Kiribbas Bhupati Harichandan Mahapatra*, 26 Ind. Cas. 676; 42 C. 710 at p. 727; 19 C. W. N. 65; 2 L. W. 11; 17 M. L. T. 1; 21 C. L. J. 31; 17 Bom. L. R. 32; 28 M. L. J. 457; 42 I. A. 20 (P. C.), considered.

Both the *Madras Regulation XXV* of 1802 and the *sannads* issued under it speak from their dates so that all grants of *inam* made by *zemindars* prior to 1802 are *prima facie* excluded from the Permanent Settlement. [p. 737, col. 2.]

Where in the case of an *inam* granted by a *zemindar* prior to 1802 the *inamdar* assigned his interest in his holding to a third person under a document styled "*thirumanam*" by which the latter was placed in possession of the holding for a term of years in consideration of certain money payments and was to pay all dues other than extra taxes levied thereafter and was bound at the end of the term to surrender without any separate relinquishment;

Held, (1) that notwithstanding the absence of any provision for payment of a periodical rent, the document was not a mortgage but a lease, [p. 735, cols. 1 & 2.]

Basanti Lal v. Tapeshri Rai, 3 A. 1; 1 Ind. Dec. (N. S.) 956, *Bengal Indigo Company v. Roghobur Das*, 24 C. 272; 1 C. W. N. 83; 23 I. A. 158; 2 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848 (P. C.) and *Nidha Sah v. Murli Dhar*, 25 A. 115; 30 I. A. 54; 5 Bom. L. R. 111; 7 C. W. N. 289; 8 Sar. P. C. J. 435 (P. C.), relied on.

(2) that the lessee was not a *raiya* holding an "estate" within the meaning of section 3 (2) (15) of the *Madras Estates Land Act* and had, no occupancy rights in the land. [p. 735, col. 2.]

Chidambara Sivaprakasam Pandara Sannadhigal v. Veerama Reddi, 68 Ind. Cas. 538; 45 M. 586; 16 L. W. 102; 31 M. L. T. 54; (1922) M. W. N. 749; 43 M. L. J. 640; (1922) A. I. R. (F. C.) 292; 37 C. L. J. 199; 27 C. W. N. 245 (P. C.), distinguished,

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Per *Oldfield, J.*—The word "payable" in section 3 (11) of the Madras Estates Land Act means "payable according to the terms of the contract between the parties to it," and section 3 (11) and (15) of the Act are applicable whatever the stage or the stages at which those terms, so far as they relate to payment for the use of the land, have to be or have been fulfilled. [p. 735, col. 2.]

Although etymologically a *thirumanam* document is one executed in discharge, the term *thirumanam* has acquired a wider meaning as importing merely a settlement. [p. 734, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 29 of 1919, preferred against a decree of the Court of the Principal District Munsif, Cocanada, in Original Suit No. 496 of 1917.

Messrs. A. Krishnasami Aiyar and N. Rama Rao, for the Appellants.

Messrs. C. V. Ananthakrishna Aiyar and P. Satyanarayana Rao, for the Respondents.

JUDGMENT.

Oldfield, J.—The respondent plaintiff an *inamdar*, holds from second defendant, a *zaminidar*, under the *sannad*, Exhibit A, and has assigned an interest in his holding, to first defendant the appellant under Exhibit V. In 1912 the Revenue Officer engaged in the preparation of a Record of Rights for second defendant's estate under Chapter XI, the Madras Estates Land Act (I of 1908), entered first defendant as occupancy *raiyat* in respect of the holding instead of plaintiff. The question is whether he did so correctly. The answer to this question depends on (1) whether Exhibit V is a mortgage with possession or a lease, (2) whether in the latter alternative first defendant is a *raiyat*, as the term is defined in section 3, clause (15), Estates Land Act, and (3) whether the *inam* is pre-settlement and, therefore, an estate and plaintiff a landholder under section 3, clauses (2) and (5).

Exhibit V dated 20th January 1913 is described as a *thirumanam* document and provides that in accordance with a prior agreement, Exhibit H, the property, which had been placed in first defendant's possession in 1910-11, should remain in it until the end of the year 1917-18 in consideration of a cash payment of Rs. 160

at the date of Exhibit H and other subsequent payments on plaintiff's behalf, in all, Rs. 1,280, that first defendant should pay all dues other than extra taxes, which might be levied hereafter, and should at the end of the term surrender without any separate relinquishment. These, the essential provisions of Exhibit V, are *prima facie* in accordance with the definition of a lease in section 105 of the Transfer of Property Act; the payment referred to being the price paid or premium. Plaintiff, however, argues that those payments must not be so regarded because they were advances, for which either the property, the possession of which was transferred or the right to that possession was the security and that is alleged with reference to the description of the document and the suggestion that advances prior to its execution were in question.

This argument is unsustainable. For, although etymologically a *thirumanam* document may mean one executed in discharge, the term *thirumanam*, as my learned brother with his extensive knowledge of the Telugu District agrees, has acquired a wider meaning, as importing merely a settlement, and, it may be observed, although no details are in evidence, that, as Exhibit H shows, the previous enjoyment of the property was under a document similarly described. There is no evidence of any advances prior to those enumerated in Exhibit V, and it was never alleged in the lower Courts that there were any. Those in Exhibit V, and the cash payment of Rs. 160 were made after and when the agreement, Exhibit H, was executed and the former after possession had been given; and they cannot be regarded as prior debts, which the transfer was intended to secure. There is no power of sale and no provision for accounting. Transfers such as this, for a premium without a periodical rent, are no doubt unusual in this Presidency. But under the description of *zarpeshgi* transactions, they appear to be well-known in North India and are probably what the portions of the Transfer of Property Act definition relating to price paid and to premium, were meant to apply to. That the distinction between transaction of that kind which are leases and those which are

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mortgages will be difficult, is illustrated by the statement in Macpherson's Law of Mortgages, 5th Edition, p 8, adopted in the judgment in *Basant Lal v. Tapeshri Rai* (1) that the mortgage character is established, only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves intended the transaction to be of the nature of a mortgage. Plaintiff relies on the fact that, although no such power was reserved in the documents in *Bengal Indigo Company v. Roghobur Das* (2) the transfers there were regarded by the Privy Council as being "not mere contracts for the cultivation of the land let; but intended also to constitute, and as having constituted a real and valid security to the tenant for the principal sums which he had advanced and the interest thereon. The tenants' possession under those transfers was, in part at least, not that of cultivators only, but that of creditors operating re-payment of the debt due to them by means of their security." But the documents there construed contained what Exhibit V here does not, stipulations for interest on the principal sums paid by the transferees, consistently with those sums being loans there was the judgment, of the High Court shows, "provision about the satisfaction of the money-debt," and in fact, whatever the exact intention, with which these references to security were made, the conclusion against the transferees was not based on the mortgage character of their transfers, but on one section of the Bengal Tenancy Act independently of it. In a later case, *Nidha Sah v. Murlidhar* (3) in which, although the document was described as a mortgage and was given for prior advances its provisions resembled those of Exhibit V more closely, the Privy Council held that there was no mortgage, but "simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances." In accordance with this decision and with section 105 of the Transfer of

Property Act the application of which there is here nothing to conclude, the finding must be that Exhibit V is a lease.

The question is next whether first defendant is a *raiyat*, within the meaning of section 3 (15), Estates Land Act, and as the contention that he holds as mortgagee, not for the purpose of agriculture, has been disallowed, we have to decide first whether the payments in consideration of which Exhibit V was given, were "rent" within the meaning of section 3 (11). The objection taken to their being so is that these provisions refer to the rent as "payable" and to *raiyat* as holding "on condition of paying" the implication being, it is alleged, that the only payments contemplated are those to be made in future after the beginning of and in the course of the relation between *raiyat* and landholder. No authority has been adduced in support of this construction and it is neither reasonable nor convenient. For it entails; even in the ordinary cases in which rent is payable periodically, that, if it has been paid on the due date, nothing more being payable for the remainder of the year, the relation of *raiyat* and landholder will be suspended until more rent falls due. The preferable construction and that by which such anomaly can be avoided, is that "payable" means payable according to the terms of the contract between the parties to it, and that section 3, clauses (11) and (15), are applicable, whatever the stage or stages at which those terms, so far as they relate to payment for the use of the land, have to be or have been fulfilled.

The remaining matter in dispute in connection with the application of section 3 (15) is whether plaintiff's *inam* is an estate within the meaning of section 3 (2) and plaintiff is a landholder under section 3 (5) of the Estates Land Act. This, it is not disputed in this Court, depends on whether the *inam* was created before or after the Permanent Settlement in 1802.

The grant, as Exhibits A and B show, was in 1800, and as I agree with my learned brother's treatment of this part of the case, I need say only that no other year is suggested as that, in which the grant was really made, and that, in the absence of any such special consideration as those arising from the terms of the grant or *zemindar's sannad*.

(1) 3 A. I. 1 Ind. Dec. (N. S.) 956.

(2) 24 C. 272; 1 C. W. N. 83; 23 I. A. 153; 2 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848 (P. C.).

(3) 25 A. 115; 30 I. A. 51; 5 B. M. L. R. 111; 7 C. W. N. 289; 8 Sar. P. C. J. 435 (P. C.).

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in *Secretary of State v. Rajah of Venkata-giri* (4), there is no reason for refusing effect to section 4, Regulation XXV of 1802, and in view of its unqualified terms no relevancy in the enquiry whether the *inam* was in fact included in the assets of the *zemindari*, on which the *peshkush* was fixed with regard to the Circuit Committee's accounts prepared before 1786.

As the *inam* is not an estate and first defendant is, therefore, not a *raiyat*, the second appeal fails and is dismissed with costs on that ground.

Ramesam, J.—The respondent-plaintiff, an *inamdar* within the ambit of the Pittapur estate, sues for declaration that the first defendant is not an occupancy tenant of his *inam*. The *zemindari* of Pittapur was constituted a *zemindari* by a *sannad* issued in 1802 under the Regulation XXV of 1802 see *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards* (5). The grant of the suit *inam* to the plaintiff's ancestors was made by the then *zemindar* of Pittapur under a *sannad* (Exhibit A) and a *chekunama* (Exhibit B) dated the 22nd June 1800. It was made free of *kattubadi* and, therefore, purported to be *sarva dumbala* or absolute.

The first question that arises for decision is whether the Estates Land Act applies to the *inam*. If the *inam* is a part of the Pittapur estate, the Act applies to the *inam*, *Brahmayya v. Achiraju* (6), apart from the question whether the first defendant is a *raiyat*. The Courts below are of the opinion that the land was part of the Pittapur estate and on the question whether the first defendant is a *raiyat* they differed.

On the facts found, I am of opinion that the land is not a part of the Pittapur estate, but a pre-settlement *inam* excluded from

the assets of that *zemindari*. The question turns upon section 4 of Regulation XXV of 1802. That section excludes from the scope of the Permanent Settlement *lakhiraj* land (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents. In respect of these, the Government reserved to itself the entire exercise of discretion in continuing or abolishing them. Mr. A. Krishnaswami Aiyar, who appeared for the appellant, conceded that what was meant by the words in section 4 above quoted is lands in respect of which the *zemindars* purported to make grants either absolute or subject to a small *kattubadi*, though later on, he addressed arguments somewhat inconsistent with this concession and contended that where a grant, though purporting to be absolute, was not binding on the Government, the land was not excluded from the assets of the *zemindar*.

If a grant, whether absolute or subject to a small *kattubadi*, was made under circumstances binding on the Government, there was an end of the matter and there was no meaning in the Government reserving to itself the entire exercise of discretion in continuing or abolishing it. It was because almost all such grants were not binding on Government that they reserved to themselves the exercise of discretion in continuing or abolishing them. This is clear from the preamble to Regulation XXXI of 1802 which was relied on by the appellant but which, on close examination, is really against him. The preamble to Regulation shows that it was meant to deal with lands "alienated by the unauthorised encroachments or the present possessors by the clandestine collusion of local officers, or by other fraudulent means." The preamble then proceeds to say "whereas the Permanent Settlement of land tax has been made exclusive of alienated lands of every description." There can be no better statement of the objects and reasons of the Regulation XXV than this, by the Legislature which enacted both the Regulations in the same year. Remembering that lands granted on the condition of paying rent or heavy *kattubadi* cannot be regarded as alienated at all, it is clear that all alienated lands were intended to be excluded from

(4) 73 Ind. Cas. 741 *Infra*; 44 M. 864; 41 M. L. J. 624; (1922) M. W. N. 11 30 M. L. T. 164; 26 C. W. N. 809; (1922) A. I. R. (P. C.) 168 (P. C.)

(5) 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 11 8 Ind. Dec. (N. S.) 276 (P. C.)

(6) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229. (1922) A. I. R. (M.) 373.

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the scope of the Settlement. Such lands would consist of (1) lands granted on condition of rendering public service hereditary village service *inams*; (2) *saravadumbala inams* (3) *inams* granted on favourable quit rent.

The first class was dealt with by Regulations XXIX of 1802 and VI of 1831 and now by Madras Acts II of 1894 and III of 1895. A portion of the second class was recognised by Regulations XXXI of 1802, i.e., those granted prior to 1768; but their enfranchisement was effected in the Inam Settlement of 1860. The rest of the lands in the second class as well as those in the third class were both recognised and enfranchised in the Inam Settlement of 1860. It is because these were all excluded from the scope of the Settlement that *harnams* were required to keep lists of them with the purposes for which they were granted, *vide* section II of Regulation XXIX of 1802 the second clause of it dealing with the first class above mentioned, the third clause dealing with the second class above mentioned and the eighth and tenth clauses dealing with the third class above mentioned among others. The decision in *Suryanarayana v. Palanna* (7), did not lay down that only *inams* prior to 1768 could be recognised as *inams* and that all *inams* granted after 1768 though before 1802 should be regarded as included in the assets of a *zemindari*. The Judicial Committee referred to Regulation XXXI of 1802 merely for the purpose of narrating the fact which finally led to the preparation of Oakes' Register in which the subject of the grant was described and their Lordships held that grant of the village meant grant of the soil in addition to the revenue. This is also clear from *Secretary of State v. Raja of Venkatagiri* (4) where their Lordships described Regulation XXXI of 1802 as one referring entirely to procedure. The main argument of the appellant that, as the accounts, on which the *peishcush* was fixed were those of the Circuit Committee appointed in 1784, all grants after that date were intended

not to be recognised shows the fallacy of the argument based on the Regulation XXXI of 1802, for if the latter argument is correct what becomes of lands granted between 1768 and 1784?

As to the use of the Circuit Committee accounts, they were the accounts nearest in date, available to the State for the purpose of Settlement. If the lands alienated, when the accounts of the Circuit Committee were prepared, were intended to be excluded from the Settlement, the Regulation would have expressly provided for it. Both the Regulation and the *sinnads* issued under it, as they stand, speak from their dates (1802) and all grants prior to 1802 were *prima facie* excluded from the Permanent Settlement.

Some reference was made by the appellant to *Venkatarangayya Appa Row v. Poranki Appalarazu* (8). That case related to an *inam* granted on condition of rendering private service to the Nuzvid *zemindar*. The lands in the Nuzvid *zemindari* held on condition of rendering private service to the *zemindar* were all dealt with by Mr. Teylor at the Inam Commission and held to be included in the assets of the *zemindari*. See *Sri Rajah Sobhanadri Appa Rao Bahadur v. Sri Rajah Venkatanarasimha Appa Rao Bahadur* (9). It is true that the statement that they were resumable was not acted upon by the Courts *Sri Rajah Sobhanadri Appa Rao v. Sri Rajah Venkatanarasimha Appa Rao Bahadur* (9) affirmed by *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur* (10) but, whether resumable or irresumable that they were included in the assets of the *zemindari* follows from *dictum* of Sir Barnes Peacock in *Rajah Nilmoney Singh v. The Government* (11) approved in *Nilamoni Singh v. Bakranath Singh* (12). It is on these principles that the decision in *Venkata-*

(7) 48 Ind. Cas. 689; 41 M. L. J. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.).

(8) 8 Ind. Cas. 546; 20 M. L. J. 728 at p. 734; 8 M. L. T. 429.

(9) 26 M. 403 at pp. 404, 409.

(10) 29 M. 52; 8 Bom. L. R. 1; 10 C. W. N. 116; 13 A. L. J. 55; 3 C. L. J. 1; 1 M. L. T. 3; 16 M. L. J. 1; 33 I. A. 46; 8 Sar. P. C. J. 897 (P. C.).

(11) 6 W. R. 121.

(12) 9 I. A. 104 at p. 121; 9 C. 187; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.).

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rangayya Appa Row v. Poranki Appalarazu (8) rests. Obviously, the land was not *lakhraj*. I am not able to agree with the other reason given in it for holding that the land was not *lakhraj*. The case in *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (13) merely lays down a presumption regarding land within the ambit of *zemindari* and does not help the appellant where the facts are definitely known and rebut the presumption.

If the land was excluded from the assets of the *zemindari*, it cannot fall under section 3 (2) (d) as it is a not whole village. It cannot be contended that, apart from the Estates Land Act, the defendant has any occupancy rights. Starting with the position that there is no presumption in favour of the *inamdar* [*Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi* (14) or against him *Suryanarayana v. Patanna* (7)] it is impossible that the defendant in this case who was let into the land under Exhibit V on condition that he would give up the land at the end of the term [See *Suryanarayana v. Patanna* (7)] can have the occupancy rights whatever the original grant might be. When the last tenant surrendered the land in 1908, the land came to the possession of the plaintiff who had both *param*s at his disposal and then, the defendant entered on condition of giving up the land at the end of nine years which is a very important condition in all cases not governed by the Estates Land Act [*Suryanarayana v. Patanna* (7)] and *Upadrashta Venkata Sasstrulu v. Divi Seetharamudu* (15). The case in *Chidambara Sivaprakasa Pandarsannadhigal v. Veerama Reddi* (14) was a case where the tenants have been holding the land continuously for over 75 years at unvarying rents; were mortgaging

and selling their holdings, and partitioning them among themselves and where there were no *muchilikas* by tenants stipulating that the land should be surrendered at the end of a particular term, the only *muchilikas* purporting to contain such terms being found to be forgeries and the tenants obtained compensation from Government when the holdings were acquired.

I, therefore, hold that the plaintiff is entitled to the declaration prayed for. In this view it is unnecessary to discuss the other questions arising in the case.

But I may add that I agree with my learned brother's construction of Exhibit V. In my opinion, Exhibit V evidences a loan and a lease. In the sense that a simple method of recovering the loan was also provided by it. It may be said that Exhibit V also furnishes some security to the creditor (lessee). But there is no security either in the sense that Exhibit V amounts to a simple mortgage on which a suit for sale can be maintained or in the sense that Exhibit V amounts to a usufructuary mortgage. Any how, there was certainly a lease. Probably their Lordships were using the word "security" in this sense in *Bengal Indigo Company v. Raghubar Das* (2) the decision in which ultimately turned on a special definition of *raiyyat* in Bengal Tenancy Act.

I agree that the second appeal should be dismissed with cost.

V. N. V.
N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1495 OF 1922.
January 24, 1923.

Present:—Mr. Justice Moti Sagar.

ISHAR AND OTHERS—DEFENDANTS—
APPELLANTS
VERSUS

HUKAM SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Custom — Adoption — Descendants of adopted son, succession to natural family.

Under the Customary Law the descendants of an adopted son who has succeeded to the property of his adoptive father, retain their rights

(13) 26 Ind. Cas. 676; 42 C. 710 at p. 727; 19 C. W. N. 65; 2 L. W. 11; 17 M. L. T. 1; 21 C. L. J. 31; 17 Bom. L. R. 32; 28 M. L. J. 457; 42 I. A. 20 (P. C.).

(14) 68 Ind. Cas. 538; 45 M. 586; 16 L. W. 102; 31 M. L. T. 54; (1922) M. W. N. 749; 43 M. L. J. 640; (1922) A. I. R. (P. C.) 292; 37 C. L. J. 199; 27 C. W. N. 245 (P. C.).

(15) 51 Ind. Cas. 304; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 25; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 4 C. W. N. 129; 46 I. A. 123 (P. C.).

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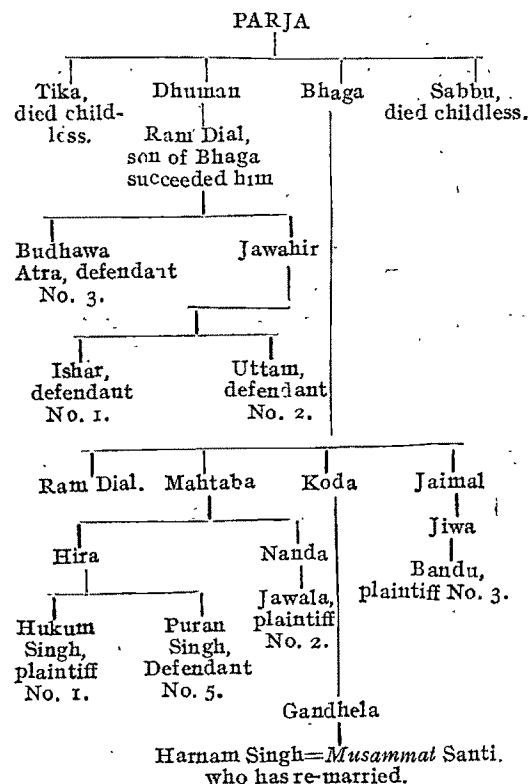
of succession in the natural family of the adoptee in the presence of and along with the other descendants of that family. [p. 740, col. 2]

Mehra v. Mangal Singh, 27 Ind. Cas. 393; 99 P. R. 1914; 71 P. L. R. 1915; 8 P. W. R. 1915, *Mela Singh v. Gurdas*, 68 Ind. Cas. 858; 3 L. 362; (1922) A. I. R. (L.) 433 (F. B.), *Tulsi v. Ram Rakha*, 66 P. R. 1908; 110 P. W. R. 1908, referred to.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 22nd March 1922, reversing that of the Munsif, First Class, Hoshiarpur, dated the 11th November 1921.

Lala Fakir Chand, for the Appellants.

JUDGMENT.—The parties to this case are Hindu Jats of the village Pandori Sohian in the Hoshiarpur Tahsil, and the following pedigree table clearly indicates the dispute which has culminated in this appeal:—



Harnam Singh, son of Ghandela, a childless male proprietor, died some years ago leaving him surviving a widow *Musammal Santi* who has now admittedly re-married. On *Musammal Santi*'s re-marriage the property of Harnam Singh was mutated in the

names of all the descendants of Dhuman and Bhaga. It appears that Ram Dial, the natural son of Bhaga, was adopted by his uncle, Dhuman, whom he succeeded, and the defendants Nos. 1, 2 and 3 are his grandsons. The plaintiffs, who are the descendants of Bhaga, the brother of Dhuman, claim to be entitled to the property on the ground that, as Ram Dial was adopted by Dhuman and succeeded to the latter's property, his descendants have no right to any property which originally descended from his natural father. The defendants denied the *falcum* and the validity of Ram Dial's adoption, and further contended that, even if the adoption did take place, it was the usual customary appointment of an heir, and as it did not result in completely transferring the appointee from his branch of the family to that of his adoptive father the defendants were entitled to succeed to the property of Harnam Singh along with the plaintiffs. Both the Courts have concurred in holding that Ram Dial was validly adopted by Dhuman, and this being a finding of fact the learned Vakil for the appellants has rightly refrained from challenging this finding in his grounds of appeal to this Court. On the second question, however, the Courts have differed, and the plaintiff's suit having been decreed by the lower Appellate Court, the defendants have now come up in second appeal through Mr. Fakir Chand.

The sole question for determination involved in this appeal is, whether the descendants of an adopted son who has succeeded to the property of his adoptive father can succeed in their grandfather's natural family in the presence of the descendants of the latter's natural family.

No direct authority, exactly on all fours with the present case, has been cited before me by the learned Vakil for the appellants, and it is to be regretted that the other side has not thought fit to put in an appearance though served. The Full Bench ruling reported as *Mela Singh v. Gurdas* (1) does not deal with this matter and is on an entirely different point. The two authorities relied on by the learned Vakil for the

(1) 68 Ind. Cas. 858; 3 L. 362; (1922) A. I. R. (L.) 433 (F. B.).

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appellants, namely, *Jhanda Singh v. Kesar Singh* (2) and *Dasaundhi v. Chanda Singh* (3), are also not in point and have no bearing on the question which is now in issue between the parties. It is clear that the question is not free from difficulty and, in the absence of a direct authority on the point, must be decided in accordance with the general principles of the Customary Law.

In *Mehra v. Mangal Singh* (4), it was held that property which comes to an appointed heir as such is not ancestral *qua* the latter's son. It was further held in this case that the customary appointment of an heir was quite different from a ceremonial adoption under the Hindu Law and that such an appointment does not involve the transplanting of a person from one family to another. In the Full Bench ruling, to which reference has already been made, it was observed by the learned Chief Justice, that (1) the customary appointment of an heir in the Punjab is a purely personal relationship resembling the *kritrima* adoption of the Hindu Law, (2) that it affects the parties thereto only, (3) that the appointed heir does not become the grandson of the appointer's father, and (4) that his son does not become the grandson of the appointer.

In *Tulsi v. Ram Rakha* (5) it was laid down that in a case of customary appointment of an heir the appointment is personal to him and does not operate to make all his relatives, or even his existing sons, members of the agnatic family of the adopter. Some of the authorities have gone even so far as to say that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest. If the appointment of an heir resembles in its incidents with the *kritrima* form of adoption under the Hindu Law then it is clear that the appointed son does not lose his rights of inheritance in his natural father's family. In Trevelyan's Hindu Law it is stated that a *kritrima*

adoption does not transfer the subject of it from his natural family. It gives him in addition to his rights in that family rights of inheritance to the person actually adopting him and to no one else. His sons acquire no rights of inheritance to his adoptive father. Again, in Mayne's Hindu Law, 8th Edition, page 268, there is the following passage:—"As regards succession the *kritrima* son loses no rights of inheritance in his natural family. He becomes the son of two fathers to this extent that he takes inheritance of his adoptive father but not that of that father's father or other collateral relations."

These authorities clearly lead to an inference that the relationship created between Ram Dial and Dhuman was a purely personal one and that it did not extend beyond the contracting parties on either side. To use the words of the learned Chief Justice in *Mela Singh v. Gurdas* (1), the tie of kinship with the natural family was not dissolved and the fiction of blood relationship with the members of the new family had no application to the appointed heir. If this is so, Ram Dial's relationship with his natural family was not entirely cut off, and it is obvious that his descendants cannot be excluded from inheritance in his natural father's family. I am not unmindful of the fact, that this conclusion leads to an apparent injustice inasmuch as the appointee and his descendants will be entitled to a double inheritance. But if the appointment of an heir is tantamount to a bequest, and the appointee is merely a legatee of the property, it is clear that the other members of his natural father's family cannot possibly have any cause for grievance. No special custom has been alleged, much less proved, in this case that in the presence of the descendants of an appointee's natural father the descendants of the appointee are excluded from inheritance in his natural father's family simply because he has succeeded to the property of his adoptive father.

I am, therefore, of opinion that the plaintiffs have failed to establish their claim and that they are not entitled to a decree. The result is that the appeal is accepted and the plaintiff's suit is dismissed with costs throughout.

Z. F.

Appeal accepted.

(2) 6 Ind. Cas. 712; 37 P. R. 1910; 62 P. W. R. 1910; 50 P. L. R. 1910.

(3) 13 Ind. Cas. 421; 45 P. R. 1912; 85 P. W. R. 1912; 71 P. L. R. 1912.

(4) 27 Ind. Cas. 393; 99 P. R. 1914; 71 P. L. R. 1915; 8 P. W. R. 1915.

(5) 66 P. R. 1908; 110 P. W. R. 1908.

SECRETARY OF STATE FOR INDIA *v.* RAJAH OF VENKATAGIRI.

PRIVY COUNCIL.

Appeal FROM THE MADRAS HIGH COURT.

July 15, 1921.

Present.—Viscount Cave, Lord Shaw and Mr. Ameer Ali.SECRETARY OF STATE FOR INDIA
IN COUNCIL.—APPELLANT*versus*

RAJAH OF VENKATAGIRI—

RESPONDENT.

Madras Permanent Settlement Regulation (XXV of 1802), ss. 3, 4—Permanently settled zemindaris—Venkatagiri zemindari—Resumption of inam or lakhiraj lands—Government, powers of.

The reversion in respect of *inams* or *lakhiraj* lands situated within the *zemindari* of Venkatagiri belongs to the *zemindar* and the Government is not entitled to resume or assess them to public revenue. [p. 744, col. 1.]

Under the *sanad* granted to the Venkatagiri *zemindari* in 1802, when it first came under the East India Company, the Government fixed a definite specific assessment on the whole *zemindari* irrespective of the particular assesses derived from each particular unit of property within the estate and the *zemindar*, on his side, accepted that arrangement on that special understanding. [p. 746, col. 1.]

In view of section 3 of Regulation XXV of 1802, section 4 of that Regulation has no application to cases of permanently settled *zemindaris* such as the Venkatagiri *zemindari*. [p. 746, col. 2.]

Consolidated Appeals from a judgment and four decrees of the High Court (Sir John Wallis, C. J., and Mr. Justice Phillips) in Appeal Suit No. 62 of 1913, dated March 29, 1915 and published as 35 Ind. Cas., 662, affirming four decrees of the District Court of Nellore, in Original Suit 10 of 1910.

JUDGMENT.

Mr. Ameer Ali.—The facts of this litigation take their origin in the early establishment of British Rule in the Madras Presidency. The Rajah of Venkatagiri holds a *zemindari* of considerable extent in the modern District of Nellore. His ancestors were admittedly in possession of the estate since the Muhammadan times, subject first to the Emperors of Delhi and afterwards on the disruption of the Moghul Empire, to his representatives in the Carnatic, usually styled the Nawabs of Arcot. Besides the payment of a fixed revenue or *peshcush*, they were bound to maintain an armed force for the assistance of Government in times of disorder or rebellion.

In the year 1792 a Treaty was entered into between the East India Company on the one side, and the Nawab of Arcot on the other, under which the administration of the country was assigned to the British. The arrangement, however, was found not to be satisfactory. It had left the Nawab a considerable amount of authority, which soon gave rise to causes of friction between him and the East India Company. Consequently, in 1801, a fresh Treaty was executed under which the entire administration passed into British hands. In both the Treaties the position of the Rajah of Venkatagiri was maintained, and the revenue he became bound to pay to the East India Company continued to be the same as he had all along paid to the Muhammadan Rulers.

In pursuance of the policy laid down by the Board of Directors, Lord Clive, who was at the time the Governor of Madras, proceeded to persuade the Rajah of Venkatagiri and other Palaiyagars, who occupied a similar position, and whose *zemindaris* lay chiefly in the Western Arcot, to abandon the system of maintaining an armed force for the assistance of Government. It was pointed out to them by the Governor-in-Council that the duty of maintaining an army for the service of Government imposed a heavy and costly responsibility; the East India Company would henceforward take over all charges for the preservation of law and order and thus relieve the *zemindars* of an irksome burden. They were, at the same time, assured that their fixed *peshcush* would remain invariable. The *zemindars* were thus induced to consent willingly to this arrangement, and in lieu of maintaining any army, which costs them a considerable amount of money, they undertook to pay an additional revenue on their estates, which was added to their *peshcush*.

Pursuant to this arrangement a *sanad* was issued, on August 24, 1882, to the *zemindar* of Venkatagiri and other *zemindars* occupying a like position, embodying the terms which had been agreed upon. This document is called a '*sanad-i-Milkiyat Istimrar*' or deed of permanent property." The word *istimrar* denotes its character of perpetuity and permanency of revenue. The aggregate *peshcush* was, in the case of

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Venkatagiri, put down as 1,11,058 *star pagodas*.

The clause in the *sanad* which relates to this particular arrangement is in these terms; "In consideration of your relief which your finances will derive from the relinquishment of your military services and and from the discontinuance of the expenses to which you have on that account been liable, in consideration of also charging itself with the entire protection of territories dependent on its power, the British Government has fixed your annual contribution, including equivalent for the military service and the established *peshcush* for every year, at the sum of *star pagodas* 1,11,058, which said amount shall never be liable to changes under any circumstances, and is hereby accordingly declared to be permanent annual demand of Government on your *zemindari*."

The only reservations in respect of the absolute abandonment on the part of Government of all claim to enhance the consolidated *peshcush* is contained in clause 5, which runs thus: "The permanent *peshcush* fixed by this *sanad* in your *zemindari* is exclusive of the revenue derived from the manufacture and sale of salt and saltpetre, exclusive of the sayer or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and the intoxicating drugs, exclusive of all lands and *russums* heretofore appropriated to the support of the Police establishment. The Government reserves to itself the entire exercise of its discretion in continuing or discontinuing temporarily or permanently the articles of all sorts included according to the custom and practice of the country under the several heads above stated."

It is clear, however, that at this time two policies were on foot: one with regard to the powerful *zemindars* who maintained large armies, with whom a settlement was essential on a separate basis; the other a measure of general assessment in accordance with the instructions issued to the Board of Revenue on September 24, 1799. In the carrying out of this latter policy the Government passed Regulation XXV of

1802, which came into force on July 13, 1802. The preamble of this Regulation is important. It declared: "Whereas it is known to the *zemindars*, *mirasidars*, *raiyats*, and cultivators of lands in territories subject to the Government of Fort St. George, that from the earliest until the present period of time the public assessment of the land revenue has never been fixed; but that, according to the practice of Asiatic Governments, the assessment of the land revenue has fluctuated without any fixed principles for the determination of the amount; and without any security to the *zemindars*, or other persons, for the continuance of a moderate land tax; that, on the contrary, frequent enquiries have been instituted by the ruling power, whether Hindu or Muhammadan, for the purpose of augmenting the assessment of the land revenue; that it has been customary to regulate such augmentations by the enquiries and opinions of the local officers appointed by the ruling power for the time being; and that in the attainment of an increased revenue on such foundations it has been usual for the Government to deprive the *zemindars*, and to appoint persons on its own behalf to the management of the *zemindaris*; thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever; And whereas it is obvious to the said *zemindars*, *mirasidars*, *raiyats* and cultivators of land, that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population and wealth; and destructive of the comfort of the individual persons, by diminishing the security of personal freedom, and of private property; Wherefore the British Government, impressed with a deep sense of the injuries arising to the estate, and to its subjects from the operations of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude; to grant to *zemindars* and other land-holders, their heirs and successors, a permanent property in their land in all time to come and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances."

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In section 2 it proceeded to enact that: "In conformity to these principles, an assessment shall be fixed on all lands liable to pay revenue to the Government and in consequence of such assessment, the proprietary right of the soil shall become vested in the *zemindars*, or other proprietors of land and in their heirs and lawful successors for ever."

Section 3 will be referred to later.

Section 4, which forms an important element in the consideration of the present case, is in the following terms:

"The Government having reserved to itself the entire exercise of the discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of salt and saltpetre of the *sayer*, or duties by sea or land; of the *abkary*, or tax on the sale of spirituous liquors and intoxicating drugs; of the excise on articles of consumption; of all taxes personal and professional, as well as those derived from markets, fairs or Bazaars, *lakhiraj* lands (or lands exempt from the payment of public revenue); and of all other lands paying only favourable quit rents; the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

The drafting of this section can by no means be commended for preciseness or lucidity, but it is clear that the reservations in respect of the power of Government are wider than in the *sarads* referred to above.

It appears that the Venkatagiri estate, when it came under British Administration, included a large number of *inam* lands which had been expropriated by the *zemindars* from time to time for charitable or pious purposes, either free of rent or on favourable rent. Some lands had also been granted to people for services to the estate. In respect of the latter the *zemindar* had an absolute right of resumption. As regards the others which came within the category of pious grants, his power appears to have been limited; he could resume them only on specific and apparently valid reason.

In 1816 the Government attempted to enforce its rights against the *zemindar* in respect of some of these alienated lands.

The dispute was as to whether the *zemindar* was entitled to take possession of them without any liability for the payment of additional revenue, or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The dispute was decided in favour of the *zemindar*—namely, that the Government had no such right as it claimed. Matters remained quiescent from the year 1822, when the action was decided in the Provincial Court, until 1897, when the Government again put forward the same claim as they had done in 1816 and attempted, by their Revenue Officers, to investigate into the title of the grantees who held the lands under the *zemindar* and to ascertain whether the grants were valid or not, and if they were not, to assess revenue on them. The Raja of Venkatagiri resisted the Government's claim, and after a good deal of correspondence brought in the Court of the District Judge of Nellore the four suits which form the principal foundation of the present consolidated appeal. The fifth suit which has been made a part of the proceedings, was brought against the Government on similar grounds by another person in the Court of the Subordinate Judge of North Arcot in respect of lands lying in another estate.

In paragraph 10 of the plaint the Raja states the nature of the grants and his rights with reference to the alienated lands, and in paragraph 11 he specifies his grounds of objections to the fresh assessment which the Government proposed to make on him. His ground of action is thus stated in the plaint,—

That the Inam Deputy Collector of Nellore, acting under the orders of Government, gave a notice to the plaintiff that he would proceed to investigate the condition of *davadyam* and *dahmadyam inams* in the Venkatagiri *zemindari* which had been granted prior to the Permanent Settlement, and that in order to enable him to do so, the plaintiff should furnish him with a list of such *inams* containing the particular specified in a statement annexed to the said notice, and that, in spite of the plaintiff's repeated objections to the right of Govern-

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ment to resume such *inams* in the *zemindari* of Venkatagiri or deal with the same under the Inam Rules, the said Deputy Collector is proceeding with the investigation".

He pleaded *res judicata* on the basis of the proceedings in 1816, and alleged further that the Government by their own conduct were estopped from claiming the right of assessment. On these grounds he prayed for a declaration that the Secretary of State had no right to resume or assess to public revenue *inams* or *lakhiraj* lands situate within the *zemindari* of Venkatagiri nor any reversionary right therein, or any such right in the *inams* or *lakhiraj* lands which has already come in the plaintiff's possession. He also asked for a permanent injunction restraining the Secretary of State and his officers from holding any investigation into the nature of and title to *inams* or *lakhiraj* lands within his estate, and from dealing with the same under the Inam Rules sanctioned by the Government on August 9, 1859, or resuming them or assessing them to public revenue.

The Government joined issue with him on the question of the right of Government to resume and assess these expropriated lands; their principal contention being that, under section 4 of Madras Regulation XXV of 1802, the Government had expressly reserved its power and that the provision in the *sanad* do not prejudice it or take it away.

The other objections in the written statement do not appear to their Lordships material for the purposes of the present judgment.

The District Judge states, in their Lordships' opinion, correctly and concisely the question for determination:

"The main question really to be decided in this suit is, whether the reversion in respect of *inams* or *lakhiraj* lands situated within the *zemindari* of Venkatagiri belongs to the Government, or to the *zemindar*, and whether the Government is entitled to resume those *inams* or whether such rights of resumption belongs to the *zemindar*." In a careful review of the facts, he held in substance that the Venkatagiri *zemindari* did not fall within the purview of the Regulation, and that consequently the contention of the Government was not

maintainable; and he accordingly in the four suits before him made a declaration in favour of the plaintiff's right and granted an injunction as asked for. On appeal to the High Court his decrees have been maintained, although the reasons which the learned Judges of the High Court have assigned for coming to the same conclusion as the First Court do not proceed on the same lines as those followed by the District Judge. In substance, however, there is absolute concurrence between the two Courts.

The Government appears to have failed also in the Court of the Subordinate Judge of North Arcot, and their appeal to the High Court was dismissed.

As their Lordships substantially agree with the conclusion arrived at by the Courts in India, they do not think it necessary to traverse at any great length the grounds upon which the High Court and the District Judge have rested their judgments. It has been argued before the Board that the *sanad* of the plaintiff could not possibly override the express provisions of the Regulation and that the Executive Government had no power to convey to the grantee—namely, the *zemindar*—larger rights than the Statute provided. It was urged that the rights of the Crown cannot be taken away by implication, and it was stated that, having regard to the terms of the section already referred to, the Government had absolute power at any time to direct an investigation into the title of the *lakhiraj* lands to which the plaintiff laid a claim as part and parcel of his estate not liable to assessment by Government. In view of this contention which has been strenuously pressed by learned Counsel for the Government it becomes necessary to examine a little more closely the circumstances which led to the conferment of the *sanad* on the *zemindar* of Venkatagiri and the other *zemindars* who were in the same position with him, and to consider how far the grant is affected by the provisions of Madras Regulation XXV of 1802.

As already observed, the British Authorities appear to have taken in hand as early as September 24, 1799, the regularisation of the land revenue in the Carnatic and to have issued instructions to the Board

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of Revenue as to the line of action to be taken for the purpose of instituting a general inquiry into the conditions under which the land was held within those territories. Regulation XXV of 1802 was an outcome of the enquiries made under those instructions to the Board of Revenue, but it appears that whilst these inquiries were proceeding with regard to a general settlement of revenue, simultaneously an enquiry was in progress respecting the amount the Venkatagiri estate should in addition to the "established *peshcush*" pay in lieu of its release from the liability to keep up an army for the service of Government.

Mr. Stratton, the *Peshcush* Collector of North Arcot, had been deputed to make a thorough enquiry as to the resources of the different *polygars*, and the report which he submitted to the Government on July 14, 1801, contained all the requisite information, and upon that information the commutation which was granted to the *zemindar* of Venkatagiri in respect of his military force appear to have been fixed. He sets out in his report the different kinds of *inams*, some of which the *zemindar* was at liberty to resume at his own discretion, others which he could not resume without sufficient reason, such as neglect of duty, etc. All these lands appear to have been taken into consideration in arriving at the estimate of the commuted amount.

The *sanad* to the *zemindar* of the Venkatagiri was issued, as already stated, on August 24, 1802, by the Governor in Council, Lord Clive, on behalf of the East India Company. The material terms of the *sanad* have already been referred to.

On the same date Lord Clive addressed a letter to the *zemindar* in terms which I have little doubt as to the meaning to be attached to the grant. He states first the object with which the *sanad* was granted, and goes on to say that: "Under the circumstances, the amount which your brave self has to pay annually in future is fixed as follows: In consideration of military service—eighty nine thousand three hundred and eighty five *star pagodas*. The fixed *peshcush* (tribute)—twenty one thousand six hundred and seventy three *pagodas*. Total—one lakh eleven thousand and fifty

eight *star pagodas*." And what follows is important. The document goes on to say: "As the above mentioned amount is the maximum portion of your exalted self's *zemindari* which should annually be sent to the Government on account of the expenses for general protection, therefore, *sanad* (deed) of perpetual ownership, to the effect that the sum of one lakh eleven thousand and fifty-eight *star pagodas* should be paid to Government annually, by the *zemindari* of your brave self, by way of permanent *jama* (assessed revenue), is sent to you under the seal and signature of the members of the Government." And again: "Accordingly, having this matter in view all the incomes from the land of Amaram and Katnbadi retained in possession of foot soldiers were not included in the account of the item of the consideration for their service."

On August 25, 1802, a letter was addressed by the Secretary to the Government to the Collector of Western *Peshcush*, which included the three *zemindaris* principally concerned—namely, Venkatagiri, Calastry, and Bomrazepollam—making it clear that the revenues that were assessed upon these three *zemindaris* were deliberately fixed in the case of Venkatagiri at Rs. 1,11,058, to be paid annually by the *zemindar*. Paragraph 10 of that document is important, and it is in these terms: "To remove from the minds of the *zemindars* all doubt of the permanency of the present arrangement the Governor-in-Council has called *sanad-i-milkiyat istimrar* to be prepared under the seal and signature of his Lordship in Council for the purpose of being delivered to the *zemindars*, *kabuliyats* corresponding with these *sanads* are also transmitted, and the Special Commission desire that you will require the *zemindars* to sign and return them to you duly executed to these *kabuliyats* you will annex a *kistbundy* fixing the *kists* according to the seasons of produce."

In accordance with these instructions from the Government given to the Collector of Western *Peshcush*, *kabuliyats* were taken from the *zemindars* in identical terms; but before executing his *kabuliyat* the *zemindar* of Venkatagiri took particular care to have the extent of his *zemindari* inserted in specific terms in the *sanad* that was

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granted. That appears from Mr. Stratton's letter of September 17, 1802. In paragraph 6 that officer states as follows:—

"The Venkatagiri *zẽmindar* further made objections to sign his *kabuliyat* until I had specified therein the several districts composing the Venkatagiri *zẽmindari*; considering this scruple of no material import, I was induced to accede to his request and at his suggestion to recommend to you that the districts under him should be particularised at the back of his *sanad*, for which purpose it is now accordingly returned."

So far as these documents are concerned, they leave no possible doubt that the Government, represented by the Governor-in-Council on the one side, fixed a definite specific assessment on the whole *zẽmindari* of Venkatagiri irrespective of the particular assets derived from each particular unit of property within the estate, and that the *zẽmindar*, on his side, accepted that arrangement on that special understanding. The question now is, whether that action of the Government was, in view of the provisions of Madras Regulation XXV of 1802, valid or otherwise. As already stated, Counsel for the appellant have strongly argued that, in view of the provisions of section 4 of that Regulation, excluding the "*lakhiraj* lands (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents" from the permanent assessment of the land tax, it was not competent for the Governor-in-Council to grant a *sanad* of the character that is in issue in this case; and much stress is laid upon the instructions that were originally issued in connection with the enquiry into the general resources of the different estates in 1799. It is said that in that document the Government took care to reserve its right on all lands "at present alienated and paying no public revenue which may have been or may be proved to be held under illegal or invalid titles and the revenue of which is not included in the Committee's account."

In respect of this contention two considerations arise—firstly, whether the lands which are now sought to be assessed were in fact paying no public revenue, and, secondly, whether, in view of the provisions of section 3, it is open to the Government to contend

that the *sanad* should not be taken into account in the construction of section 4. Section 3 declares as follows: "where

the conditions of the permanent assessment of the revenue may have been adjusted, a *sanad-i-milkiyat istimrar*, or deed of permanent property, shall be granted on the part of the British Government to all persons being, or constituted to be *zẽmindars* or proprietors of land and each *zẽmindar* or proprietor of land shall execute and deliver to the Collector of the District a correspondent *kabuliyat*. The said *sanads* and *kabuliyats* shall contain the conditions and articles of tenure by which the lands shall be held; in all cases of disputed assessment, reference shall be had to the *sanads* and *kabuliyats* and judgment shall be given by the Courts of Judicature, in conformity to the conditions under which the agreement may have been formed in each particular case."

The above section lays down a definite rule relative to the principles on which the provisions in the Regulations should be construed. Now the *sanad* in question contains no reference to the *lakhiraj* lands within the Venkatagiri *zẽmindari*. It would follow, therefore, that in the case of this property the provisions of section 4 have no application and that the assessment fixed upon it by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in section 4 of the Regulation. In other words, both the assessment and the *sanad* are outside the Regulation under which the Government claims the right to resume the *inam* lands within the estate of the plaintiff and to assess them separately.

It should also be observed that, although the Regulation was passed on July 13, 1802, and the *sanad* was granted to the *zẽmindar* of Venkatagiri on August 24, the recommendation of the Commission of August 12, 1802, on which the *sanad* was granted, recommended that the new assessment should be fixed to run from 12th July of that year. After stating the principle on which they were proceeding in fixing the amount to be paid by the *zẽmindar* in commutation of the military service, in paragraph 40 he says as follows: "If the grounds on which we have now had the honour to propose that the assessment of public revenue

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should be fixed on the four western *zemindaris*, including the customary *peshcush* and equivalent for military service, be approved by your Lordships' in Council, the total amount of revenue derived to the State from those valuable Provinces will exceed the amount of the old *peshcush* by the sum of 1, 72,296 *pagodas*, and the aggregate amount of *peshcush* and the equivalent will, in future, be 2,50,000 *pagodas* per annum. We conclude the subject by recommending that the permanent assessment of the public revenue on these *zemindaris* be fixed accordingly at that rate, from the 12th day of July last." This also clearly shows that the arrangement in respect of the four western *zemindaris* was made independently of the provisions of the Regulation. Another thing has to be observed in connection with this arrangement namely, the difference in the terms of this *sanad* from the *sanads* granted to the other *zemindars* under the Regulation itself.

In the view their Lordships take of the general evidence in the case they do not consider it necessary to express any opinion on the question raised by the plaintiff that the controversy in dispute is *res judicata* in consequence of the decision of the Provincial Court in 1822; but it is desirable to point out that since that decision the Government at various times expressly assented to the position which the *zemindar* had taken up in respect of the *inam* lands within his estate. Their Lordships will refer only to three documents: first, Exhibit K, a letter of April 24, 1823, addressed by the Secretary to the Board of Revenue to the Chief Secretary to the Government, in which it was stated as follows:—

"The permanent *peshcush* of the *zemindari* of Venkatagiri was fixed upon the principles as upon Bomrauze and Calastray, and for the same reasons which induced the Board to state upon a former occasion that they considered the *zemindar* of Bomrauze not to be entitled to remission on account of certain villages having been taken from him by a decree of Court inasmuch as by the operation of that decree there was taken from him nothing on which his contribution to Government was fixed; they are now of

opinion that the *zemindar* of Venkatagiri is entitled to benefit by the resumption of any villages formerly alienated from his *zemindari* without question on the part of Government or being liable to assessment on the increase to his resources thereby acquired."

Again, in 1839 the Board of Revenue in a letter addressed to the Chief Secretary to the Government (Exhibit N) stated as follows: The "*zemindar* now rests his claim on the ground that as his permanent *cowle* was framed without any reference to its assets, and as it contains no reservation in respect to the right of resuming *lakhiraj* land, as in the case of the northern and other *zemindaris*, the right to resume *inams* or *lakhiraj* lands in the position of Peddapaloor belongs of right to him and by no means to the Government, and he cites a decree by the Provincial Court of the Northern Division in favour of the *zemindar* of Venkatagiri in a suit brought by the Collector of Nellore for the recovery of the village under similar circumstances" and in paragraph 7 they say as follows: "On the other hand, the decrees of the Zillah Court of Chittoor and of the Provincial Court of the Centre Division are in favour of the right of Government to resume, in preference to that of the *zemindar*. But it will be noticed that they contain no allusion to the dissimilarity in the terms of the Permanent Settlement of Calastray and the other western polliems, assuming that the *peshcush* was fixed as on the *zemindaris* in the northern, upon the assets, and that Regulation XXXI of 1802 applies to the former as to the latter. By a reference to the *kabuliyat* of the *zemindar* of Calastray and to the correspondence which passed at the time a permanent *cowle* was granted to him, it will be seen at once that the *peshcush* was not so fixed, and, as already shown, the Regulation above mentioned was not considered to apply to the case of the Venkatagiri *zemindar*."

On September 3, 1860, the Commissioner of the Division issued certain instructions for the guidance of the Deputy Collectors employed in *inam* investigation of the North Arcot District, and he

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correctly laid down the position with regard to the *zemindar* of Venkatagiri and the other *zemindars* who stood in the same position in the following terms:—"The private estates will be first noticed. The *zemindaris* of Kalahastri and Karvetinagar were, like the *zemindari* of Venkatagiri in the Nellore District, permanently settled in 1803 on the principle of the commutation of the military service tenure attached to them. The *peshcush* was not fixed on the assets of the estates, but was a proportion of the cost of the *zemindar's* military establishment, inclusive of Amarams and Kattubandis, diminished by the amount of revenue derived from salt, sayer and *abkari*, which were reserved by Government. The *inams* were not excluded by the terms of the Settlement, and the Government have, therefore, no right of reversion in them."

The Revenue Authorities in that part of the Presidency, in the face of the expression of opinion to which reference has been made here, have attempted to reverse the arrangement expressly entered into in 1802. In their Lordships' opinion this attempt fails.

Some stress was laid on behalf of the appellant on provisions of Madras Regulation XXXI of 1802. It is sufficient, however, to point out that that Regulation refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the payment of revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue; the revenue which was paid on the estate included the lands in question and the *jama* was assessed on the whole estate inclusive of the *lakhiraj* and *inam* lands.

For the foregoing reasons their Lordships are of opinion that the judgments and decrees of the Courts in India are right and should be affirmed and that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

N. H. *Appeals dismissed.*
Solicitors for the Appellant:—Solicitor India Office.
Solicitor for the Respondent:—Mr. Douglas Grant.

P ESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 131-20 OF 1921.

April 11, 1923.

Present:—Mr. PIPON, J.C.

Sardar GHULAM HAIDAR KHAN—

DEFENDANT—APPELLANT

versus

SARDAR ALI KHAN AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Civil Procedure Code (Act XIV of 1882), s. 53—Amendment of plaint, when to be allowed—Adverse possession—Co-sharers—Overt act—Joint property included in self-acquired property—Partition—Possession, whether to be upheld—Partition Act (IV of 1893), s. 4, applicability of.

Under O. VI, r. 17 of the Civil Procedure Code the powers of a Court in allowing an amendment of a plaint are far wider than was the case under the Code of 1882, and there is in the present Code no provision corresponding to the proviso to section 53 of the Code of 1882. [p. 750, col. 2] p. 751, col. 1.]

An amendment will not, however, be allowed if it converts the suit into one which is not only different from, but is inconsistent with, the plaint as originally lodged, and when the defendant is prejudiced by the amendment. [p. 751, col. 1.]

The main test in such cases is whether the amendment meets the ends of justice by allowing the whole question in dispute to be decided between the parties and to ensure a final decision and to avoid unnecessary litigation. [p. 751, col. 1.]

The possession of one co-sharer cannot become adverse to that of other co-sharers, unless he overtly asserts an exclusive title as against the others. [p. 752, col. 2.]

One of several co-sharers, if he includes a portion of the property in which he has a joint title in other property in which he has an exclusive title, may reasonably anticipate that he will not necessarily be disturbed or be put to unjustifiable expense when partition eventually takes place. Such action on his part, therefore, does not amount to an overt assertion of an exclusive title to that portion of the joint property as against the others. [p. 753, col. 1.]

Section 4 of the Partition Act refers to cases where a share in a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family, but even where the section does not apply the principle is that on partition property must, so far as possible, be left in possession of the person in occupation. An Executing Court should have regard to the principles of equity in adjusting the mode of partition. [p. 754, col. 1.]

Basunila Kumar Ghosh v. Moti Lal Ghosh, 11 Ind. Cas. 370; 15 C. W. N. 555 Note; 6 C. L. J. 8 Note, *Debi Sahai v. Tara Chand*, 44 Ind. Cas. 135; 44 P. W. R. 1918; 22 P. L. R. 1918, *Fatleh Chand v. Bilas Rai*, 34 Ind. Cas. 587; 61 P. L. R. 1916; 89 P. W. R. 1916; 96 P. R. 1916; 140 P. W. R. 1916, relied on.

First appeal from the order of the Sub-

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Judge, Peshawar, dated the 24th August 1921.

Sardar Raja Singh, for the Appellant.
Lala Dewan Chand, R. S., for Respondents Nos. 1 to 4.

JUDGMENT.—The parties to this case are descendants of S. Khanan Khan who died about the year 1880 and who was a member of a prominent Kazibash family residing in Peshawar City. He left 4 sons K. B. Khan Baba Khan, Jan Gul Khan, Ghulam Haidar Khan and Ghulam Hassan Khan. The present litigation arose in the following manner. Ghulam Hassan Khan had stood surety for a loan obtained by one Kala Khan from the firm of Seth Chand Mal-Magan Mal of Peshawar. After his death, which occurred some 9 or 13 years ago, the firm sued him and Kala Khan and obtained decree on the 30th of May 1913. In execution of this decree the 1-4th share owned by Ghulam Hassan Khan in the family estate was attached and sold. On the 8th of June 1917 the decree-holders purchased this share. On the 12th of April 1919 they sold what they had acquired in the execution proceedings to Nawab Ali Khan and his brother Ghulam Hussain Khan who are the sons of K. B. Khan Baba Khan. K. B. Khan Baba Khan was himself alive at the time and had two other sons Sardar Ali Khan and Abbas Ali Khan. Against the purchase of this estate by Nawab Ali Khan and Ghulam Hussain Khan two separate pre-emption suits were filed by their uncles Jangul Khan and Ghulam Haider Khan. During the pendency of these suits, *i. e.*, on the 2nd of July 1920, Ghulam Hussain Khan alone lodged a suit praying for partition of a certain portion of the family property. The property of which he claimed partition was a house known as "*trushwala*" which can be conveniently called house A, and a house known as "*mahar-kulan*" which can be conveniently described as house B. It was in these two houses that the share of Ghulam Hassan Khan had been sold in auction and acquired by Seth Chand Mal-Magan Mal and subsequently transferred to Ghulam Hussain Khan and Nawab Ali Khan. In this suit, however, Ghulam Hussain Khan, claimed a 1-4th share of both properties on the ground that he had acquired 1-8th as

his share of the purchase from the decree-holders and that the remaining 1-8th had been gifted to him by his father K. B. Khan Baba Khan. He alleged that K. B. Khan Baba Khan had gifted the whole of his 1-4th share to the plaintiff Ghulam Hussain Khan and his brother Nawab Ali Khan in equal shares. Ghulam Hussain Khan in his plaint stated that he was joint with Nawab Ali Khan and that he had no objection to Nawab Ali Khan being made a co-plaintiff. Nawab Ali Khan was added as a co-plaintiff on the 13th of July 1920 and the plaint was amended so as to include a claim for one-half of the two houses, *i. e.*, 1-4th representing the share of Ghulam Hussain Khan which they had purchased, and 1-4th which they alleged had been gifted to them by their father K. B. Khan Baba Khan. A week later, *i. e.*, on the 20th of July 1920, the two pre-emption suits were amicably compromised. It was agreed between the parties that the property purchased by Nawab Ali Khan and Ghulam Hussain Khan from the decree-holders should be treated as acquired for the whole family and that 1-3rd should be retained by the vendees, Nawab Ali Khan and Ghulam Hussain Khan, and that 2-3rds should go to Jangul Khan and Ghulam Haider Khan. This had the effect of dividing the estate of the deceased Ghulam Hassan Khan according to the shares to which his brothers would have normally succeeded. It may be remarked that K. B. Khan Baba Khan and his other two sons made no protest against this solution. On the same day Nawab Ali Khan and Ghulam Hussain Khan put in an application for the amendment of their plaint regarding partition of the property and obtained the leave of the Court to put in an amended plaint on the 2nd of August 1920. In this amended plaint K. B. Khan Baba Khan himself was joined as a plaintiff and the suit was for partition of 1-3rd of the whole of the family estate. Certain additional properties were now added to the plaint. To house A a portion shown on the plan by the letters "*alif*" "*be*" "*jim*" "*dal*" was added and house B a portion shown as "*ha*" "*wa*" "*za*" "*sin*." A further entire property was added to the claim in the shape of "*seraicha*." The defend-

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ants in the suit were Ghulam Haider Khan and Jangul Khan. Jangul Khan has not seriously resisted it. Ghulam Haider Khan who resisted the suit, is in actual possession of the properties which were added in the amended plaint, i. e., of the portion "*alif, ba, jim, dal*" in house A, the portion "*ha, wa, za, sin*" in house B and the whole of the "*seraicha*." He has set up a proprietary title to these three portions of the property in suit. The Trial Court has found that the two portions referred to above in houses A and B are not his exclusive property but are the joint property of the family and are liable to partition. It has found that the "*seraicha*" is the exclusive property of Ghulam Haider Khan and has dismissed the suit respecting it. In execution of the decree the Trial Court has held, overruling an application by Ghulam Haider Khan, that no account of actual possession can be taken in carrying out the partition of houses A and B. Arising out of these findings the following proceedings are now before this Court:—

1. An appeal by Ghulam Haider Khan from the decree for partition as affecting those portions of houses A and B in which he claims an exclusive proprietary title.

2. A cross-objection by the plaintiffs against the dismissal of their suit respecting the "*seraicha*."

3. An appeal by Ghulam Haider Khan against the refusal of the Executing Court to maintain possession in executing the decree for partition.

Orders on these three proceedings are included in the present judgment.

The first ground upon which the decree is attacked in appeal by Ghulam Haider Khan is that the Trial Court irregularly allowed an amendment of the plaint so as to convert the suit into one of a different and inconsistent character. It is argued that the first plaint implies that K. B. Khan Baba Khan having gifted the whole of his share to his sons Nawab Ali Khan and Ghulam Hussain Khan had no interest left in the property, and that, therefore, he could not sue as a plaintiff at all. It is pointed out that in the amended plaint upon which the suit finally proceeded, all question regarding this gift was dropped, and that Khan Baba Khan and his two sons now come forward in the capacity of joint

owners of 1-3rd of the estate which capacity they could not hold as shown by their own pleadings. Much stress is also laid upon the exclusion from the first plaint of the two portions of houses A and B referred to by vernacular letters, as described above and of the "*seraicha*" which is added to the suit. These arguments, however, appear to me to have little weight when closely examined. The question of the respective titles of Khan Baba Khan and his two sons is not one which in any way affects the defendant or the title upon which he now sets up as a bar to partition. It is, no doubt, true that one of the objects of the original suit was to defeat the claims for pre-emption by showing that the two vendees, Nawab Ali Khan and Ghulam Hussain Khan, were prior to that purchase, already joint co-sharers in the property by reason of a gift from their father. At the same time, the suit had another object and that was to claim actual possession by partition as against the defendant Ghulam Haider Khan who was resisting their claim. That a large portion of the dispute was really one affecting the title of the parties to partition is brought out by the original plea filed by Ghulam Haider Khan himself in which he set up the contention, which he has now abandoned, that Khan Baba Khan had gifted his share not to Nawab Ali Khan and Ghulam Hussain Khan but to himself. It appears to me that the suit for partition could not possibly have been satisfactorily adjudicated upon until every portion of the joint family property had been brought into the suit, and that the Court was not only entitled to allow an amendment of the plaint in order to include such property, but that it would have been justified even on its own motion in requiring the plaint to be amended in order to include such property. There is no doubt that under section 53, Civil Procedure Code of 1882, it might have been urged that the character of the suit could not be changed by an amendment. The proviso to section 53 definitely prohibited a change of this nature. Even, however, under the old law there are rulings, notably *Khuda Baksh v. Budhar Mol* (1), which go to show that an amendment is not necessarily irregular merely because the character of the relief sought is to some extent changed. Under O. VI, r. 17

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of the present Code of Civil Procedure the powers of a Court are far wider in allowing an amendment of a plaint, and there is now no provision corresponding to the proviso to section 53 of the old Code. It is, however, an accepted principle that amendment will not be allowed if it converts the suit into one which is not only different from, but is inconsistent with, the plaint as originally lodged, and when the defendant is prejudiced by the amendment. Now, I am unable to see that either of these conditions can be shown in the present case. There is nothing really inconsistent between the amended and the original plaint, nor can I see that the defendant has in any way been prejudiced. The amendment was made after an issue was framed, but before any evidence had been heard. The main *ratio decidendi* in such cases is whether the amendment meets the ends of justice by allowing the whole question in dispute to be decided between the parties and to ensure a final decision and avoid unnecessary litigation. It appears to me that these objects are exactly those which have been obtained by an amendment in the present case. The real dispute between the parties is as to what property is joint between them and what property is exclusively owned by the defendant and must be excluded from partition. The object of the suit is to oust the defendant from exclusive possession of disputed portions of the property and the object of the defendant is to resist partition by confirming his exclusive title to those disputed portions. I hold, therefore, that the present suit and the decree passed in it cannot be impugned on the ground that the amendment of the plaint was irregular.

The next point argued for the appellant, Ghulam Haider Khan, is the question of his exclusive title to the portions of houses A and B which have been designated by letters as shown above. It is admitted that these portions were originally the ancestral property of the family. His title to these properties is urged upon two grounds. One is that he has acquired an inherent title by transfer from the owners, and the other is that his title cannot be impugned by the plaintiffs owing to their own conduct and the operation of the Law of Limitation

as affecting adverse possession. I take first the question of inherent title. The appellant contends that he acquired these properties from the joint owners by sale and by gift. He has never, however, been able to specify the circumstances or even the dates of these alleged sales and gifts. He has not even shown what portions were acquired by sale and what by gift. He is entirely without documentary evidence to establish these alleged transfers. I cannot, it is true, agree with the view which appears to have been taken by the Trial Court, that the absence of registered deeds is necessarily fatal in itself to the defendant's contention. If there had been deeds of any kind and if those deeds were unregistered, it would, no doubt, be true that the documents would be inadmissible in evidence and that their existence would, at the same time, exclude oral evidence of the transactions. But when no such documents are alleged to exist, there is no necessary bar to the defendant establishing his title by oral evidence if he can. At the same time, it is perfectly clear that he has failed to establish any such title by oral evidence. It is difficult, in fact, to regard seriously at all his attempt to establish a title by this means.

The appellant's attempt to rest his title upon other considerations is certainly more formidable. He argues, in the first place, that the plaintiffs have themselves admitted his title by their conduct during the litigation. It is pointed out that in the first plaint these two properties were omitted and that in the plans filed the boundary of the properties then sued for was, in one case, described as the property of the defendant and actually covered the lettered portion of house B. I think, however, that it would be difficult to say that there has been any admission of his title by the plaintiffs for this reason. A mere description of this nature is directed only to identifying the property. The argument is frequently put forward that descriptions of this nature operate as an admission of title when a house is described as the house of a particular person, whereas, in actual fact, such descriptions show nothing more than occupation and cannot possibly be regarded as implying proprietary title. It is argued, again, that the parties to the

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present suit were parties to a fraud practised upon the decree-holders Seth Chand, Mal-Magan Mal, and that the existence of the two additional properties, with which we are now dealing, was deliberately kept secret from the decree-holders in order to avoid their being attached in execution. It is contended that the plaintiffs cannot be heard in support of an alleged title based upon the existence of a fraud to which they were parties. As authorities for this general proposition the learned Counsel for the appellant quotes *Sarup Narain v. Madho Singh* (2), *Ram Lal v. Arur Chand-Jiwan Das* (3) and *Voddina Kamayya v. Gudisa Mamayya* (4). Those cases, however, dealt with facts which are not parallel to those of the present case. They lay down the principle that when a transfer has been made by an instrument intended fraudulently to defeat the legal claims of a third party, one of the parties to the fraud cannot come into Court to base a claim which rests upon a repudiation of that instrument. I am unable to see that we have any conditions of this nature in the present case. In the first place, we are not dealing with any instrument, which the plaintiffs are attempting to repudiate. The most that can be said is that they omitted a certain portion of the property in dealings with a third party with a view to preventing that third party from exercising a lawful lien against it. But I hardly think that the facts warrant even an assumption to this extent. There is nothing to show that there was any kind of active fraud practised upon the decree-holders by the joint action of the plaintiffs and defendant to the present case. The most that can be said is that the decree-holders did not know that the judgment-debtor against whom they were executing, owned property additional to that which they sought to attach. It was not absolutely incumbent upon the present parties to set the decree-holders right in this respect, and even if it can be said that they contributed by silence or by other means to the delusion of the decree-holders

in this respect, they cannot thereby be described as parties to a fraud and be prevented, by reason of such a fraud, from urging a title, one against the other, in respect of property which the decree-holders failed to attach. I do not consider, therefore, that the rulings quoted on behalf of the appellant are relevant to the present case or that the plaintiffs are in any way debarred from contending that the properties shown by letters in houses A and B are joint family property in which the judgment-debtor Ghulam Hassan Khan had originally an interest and which interest passed to the other members of the family on his death.

It is urged, again, for the appellant that he has been admittedly in possession of these properties for more than 12 years and that his possession is shown to be overtly adverse to other alleged co-sharers. The Trial Court has overruled the plea of adverse possession on the general principle that the possession of one co-sharer cannot become adverse to that of other co-sharers. This general principle is, no doubt, qualified by the condition that the possession of a co-sharer can actually become adverse if he overtly asserts an exclusive title as against others. I have to see, therefore, whether any overt assertion of exclusive title can be established in the present case. So far as I can see, the only evidence which we have of any assertion of exclusive title is the fact that the defendant in the case of house B purchased an adjoining property and, in re-constructing the buildings, included the lettered portion of house B in his personally acquired estate. It is argued that such inclusion is in itself an assertion of an exclusive title. It may be said in the case of house property that actual alienation of a particular area by a single co-sharer in possession constitutes an assertion of exclusive title. I have recently dealt with a case in which it was contended that in the case of agricultural land the alienation by a co-sharer of a specific plot constituted an assertion of exclusive title by the mere fact of alienation. I held in that case that such a transfer in the case of agricultural land did not necessarily constitute an assertion of exclusive title, as it was a well-known practice in this Province that such a transfer conferred

(2) 30 Ind. Cas. 253; 2 O. L. J. 399; 18 O. C. 131.

(3) 30 Ind. Cas. 482; 175 P. L. R. 1915; 115 P. W. R. 1915.

(4) 43 Ind. Cas. 352; 32 M. L. J. 484.

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two separate rights upon the alienee; a right to immediate but not to permanent possession, and a right to claim an equal area on eventual partition. An alienee would accept a transfer of this nature because in more than 90 per cent of cases of partition effected by Revenue Authorities actual possession is maintained on partition up to the limit of the occupier's proportionate share. Now, an alienation is a very much stronger form of proprietary conduct than the mere inclusion of a property in another estate to which the occupier has admittedly an exclusive title. The presumption against such inclusion being regarded as the act of an exclusive proprietor is much weakened if it be remembered that a Civil Court as well as a Revenue Authority, on effecting ultimate partition, will, so far as possible, allow possession to be retained. One of the several co-sharers, therefore, if he joins a portion of the property in which he has a joint title, to other property in which he has an exclusive title may always reasonably anticipate that he will not necessarily be disturbed, or be put to unjustifiable expense when partition eventually takes place. It is true that in the present case the Civil Court, has in execution proceedings declined to accept the contention that possession must be maintained as far as possible. In this view, however, as I shall show below, the Executing Court was clearly wrong, and I can see no reason to suppose that the defendant anticipated that, if his title was other than exclusive, he would necessarily be deprived of a portion of the property which he had added to his personal acquisition. Further, it may be remarked that this argument can only apply to one of the two houses now in suit. The lettered portion of house A has not been included in any adjoining property acquired by the defendant. I must hold, therefore, in the present case that there is nothing to show an overt assertion of exclusive ownership on the part of the defendant.

On the above findings the appeal of the defendant fails.

I now turn to the cross-objections by the plaintiffs regarding the "*seraicha*" which has been found by the Trial Court to be the exclusive property of the defendant and respecting which the suit has been

dismissed. This property is a small *serai*. It was purchased in 1880 in the name of Ghulam Haider Khan alone in an auction-sale held by the Municipality of Peshawar. The title-deed to this *serai*, therefore, is in the defendant's name alone and the onus of proving that he is, nevertheless, not the exclusive owner must rest heavily on the plaintiffs. This onus they do not appear in any way to have discharged. In fact, there are only two points put forward by them to impugn the presumption. One is that there were certain other deeds executed in 1881 and 1883 in favour of Jangul Khan and Khan Baba Khan, the property dealt with by which was, nevertheless, treated as joint family property. I am unable to see, however, that any particular inference is to be drawn from these deeds and there is no other evidence to support the contention of the plaintiffs. The other point which plaintiffs have argued in these cross-objections is that the defendant in the Trial Court, produced a lease-deed relating to the *serai* with a view to showing that he had made a lease of it in the capacity of exclusive owner in the year 1908. It is argued that this deed shows unmistakeably signs of having been tampered with, and that it is, therefore, a forgery, and that the deed really related to a lease made in 1912. The Trial Court did not consider it necessary to take up the question as to whether there had or had not been a forgery, and I do not consider that it is necessary for me to re-open it in the present appeal, inasmuch as the production of the deed is quite immaterial to the suit. It is not in the least necessary for the defendant, in my opinion, to prove an adverse possession extending over more than 12 years, as he has proved an exclusive title quite independently of this and as the plaintiffs have been quite unable to rebut the existence of that title. I hold that the Trial Court has correctly dismissed the claim to the "*seraicha*" and I dismiss the cross-objections of the plaintiffs.

It remains to consider the appeal which has been lodged by the defendant in respect of the order of the Court in execution refusing to allow actual possession to be taken into consideration in carrying out the partition.

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The Trial Court has, it is pointed out, alluded to the inconvenience and injustice which may accrue to the defendant if he is deprived of property of which he is now in possession and upon which he has incurred expense. The Court, nevertheless, considered that it was legally debarred from passing an order to maintain the possession in partition unless the parties themselves consented to such a mode of partition. In this respect it is not seriously contended by the respondents' Counsel that the Court had a discretion far wider than that with which it believed it was invested. It is pointed out, however, for the respondents that what the defendant in this case really demanded was that he should be allowed to retain possession of the whole of the property, the other side being compensated with money. Section 4 of the Partition Act refers to cases where a share in a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such a family. But at the same time an Executing Court can be governed by principles of equity in adjusting the mode of partition. This is the view taken in *Basunta Kumar Ghosh v. Moti Lal Ghosh* (5) (a Calcutta ruling), *Debi Sahai v. Tara Chand* (6) (Punjab) and *Fatteh Chand v. Bilas Rai* (7). The first of these rulings is an authority for the proposition that even where section 4 of the Partition Act does not apply, it is a well-known principle of equity that property must, so far as possible, be left in possession of the person in occupation. The Punjab ruling also recognises the power of a Court to give effect to actual possession. So far, therefore, as the present Court believed itself to be entirely debarred from considering the question of maintaining the possession of any one of the parties, its order can only be considered as wrong. At the same time, the respondents' contention has this much weight that there may not be, in the present case, any good reason for

allowing the defendant to retain possession¹¹ of the *whole* of those portions of the property which he occupies, or to insist that the plaintiffs must accept monetary compensation instead of actual property. What is required in the present case is an equitable partition of the property itself allowing the defendant, so far as possible, to retain possession of such portions occupied by him as cannot be taken from him without wholly unjustifiable inconvenience and expense. The plaintiffs should receive a portion of the actual property and it will be for the Executing Court to decide whether these portions sufficiently cover their proportionate claims, or whether any adjustment is required in the way of monetary compensation. I, therefore, overrule the order of the Executing Court dated the 7th November 1921 as wrongly decided upon a preliminary point and remand the execution proceedings for a fresh decision. It so happens that the present presiding officer of the Executing Court is Sardar Ali Khan, who is a party to the present appeal as representative of his deceased father K. B. Khan Baba Khan. It will, therefore, be impossible for the execution proceedings to be decided by him. I direct that they be transferred to the Court of the District Judge of Peshawar who will dispose of them in the manner which I have indicated above.

On the above findings, the appeal by Ghulam Haider Khan in the original suit is dismissed with costs. The cross-objections of the plaintiffs in the original suit are also dismissed with costs. The appeal of Ghulam Haider Khan against the order of the 7th of November 1921 in execution is accepted, that order is set aside and the execution proceedings are remanded for fresh decision. The costs of the appellant in the execution appeal to be borne by the respondents.

Z. K.

Order accordingly.

(5) 11 Ind. Cas. 370; 15 C. W. N. 555 Note; 6 C. L. J. 8 Note.

(6) 44 Ind. Cas. 1351; 44 P. W. R. 1918; 22 P. L. R. 1918.

(7) 34 Ind. Cas. 587; 61 P. L. R. 1916; 89 P. W. R. 1916; 96 P. R. 1916; 140 P. W. R. 1916.

DWARKA DAS V. RAHIM BAKHSH.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 786
of 1922.

February 20, 1923.

Present.—Mr. Justice Broadway.

DWARKA DAS—PLAINTIFF—PETITIONER
versusRAHIM BAKHSH—DEFENDANT—
RESPONDENT.*Civil Procedure Code (Act V of 1908), s. 115,
O. VII, r. 10, O. XLIII, r. 1 (a)—Order directing
return of plaint confirmed on appeal—Revision.*

Where a Trial Court holds that it has no jurisdiction to entertain a suit and its order is upheld on appeal, the order of the Appellate Court is open to revision by the High Court. [p. 756, col. 1.] (Case-law discussed.)

Petition, under section 44 of Act VI of 1913, for revision of the order of the Subordinate Judge, First Class, Multan, dated the 28th July 1922, reversing that of the Munsif, First Class, Multan, dated the 25th May 1922.

Lala Har Gopal, for the Petitioner.

Lala Fakir Chand, for the Respondent.

JUDGMENT.—One Dwarka Das of Multan sued Rahim Bakhsh of Hoshiarpur District for Rs. 380 alleged to be due by the defendant on account of damages for breach of a contract. An objection was taken by Rahim Bakhsh to the effect that the Court at Multan had no jurisdiction to try the case, inasmuch as the cause of action had arisen wholly in Hoshiarpur. This plea was given effect to by the learned Munsif who dismissed the suit. Against this order of dismissal the plaintiff preferred an appeal to the Subordinate Judge who held that the learned Munsif was wrong in dismissing the suit and should have returned the plaint under O. VII, r. 10, for presentation to the proper Court. Agreeing with the learned Munsif that the Multan Court had no jurisdiction, the learned Subordinate Judge returned the case to the learned Munsif with the direction that action under O. VII, r. 10, Civil Procedure Code should be taken. Against this order the plaintiff has come up to this Court in revision through Mr. Hargopal and I have heard Mr. Fakir Chand for Rahim Bakhsh.

Mr. Fakir Chand has urged that, inasmuch as the learned Subordinate Judge was properly seized of the case, his order is not

open to revision by this Court, reliance being placed on *Chhubu Mian v. Har Charan Das* (1); *Arur Singh v. Bua Ditta* (2); *Dowlat Ram v. Asa Ram* (3); *Amir Hassan Khan v. Sheo Baksh Singh* (4) and *Chandu Lal v. Kokamal* (5). On the other hand, Mr. Hargopal referred to *Jagan Nath-Diwan Chand v. Jagan Nath-Moti Lal* (6); *Vuppuluri Atchayya v. Sri Kanchumarti Venkata Sectarama Chandra Rao* (7); *Durga Parshad-Mutsaddi Lal v. Rulia Mal-Dogar Mal* (8); *Damri Shah-Thakur Ram v. Rulia Mal-Dogar Mal* (9); *Zamiran v. Fateh Ali* (10) and *Vishwanath Govind Deshmone v. Rambhat* (11). The question is not free from difficulty as the authorities cited are conflicting. In *Chhubu Mian v. Har Charan Das* (1) Scott-Smith, J., held that an order passed under similar circumstances was not open to revision. In this case *Arur Singh v. Bua Ditta* (2) was followed which followed *Dowlat Ram v. Asa Ram* (3). In *Jagan Nath-Diwan Chand v. Jagan Nath-Moti Lal* (6) the same learned Judge appears to have taken a different view and, following *Vuppuluri Atchayya v. Sri Kanchumarti Venkata Sectarama Chandra Rao* (7) and *Kam Labhaya v. Bishan Das* (12), as well as *Durga Parshad-Mutsaddi Lal v. Rulia Mal-Dogar Mal* (8), he held that while interference in revision is ordinarily inadvisable in such cases, this Court's revisional powers could be exercised in exceptional cases to remedy an injustice, and

(1) 18 Ind. Cas. 529; 119 P. R. 1912; 101 P. L. R. 1913; 48 P. W. R. 1913.

(2) 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911.

(3) 46 P. R. 1886.

(4) 11 C. 6; 11 L. A. 237; 4 Sar. P. C. J. 559; Ratique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(5) 61 Ind. Cas. 361; 43 A. 334; 19 A. L. J. 110.

(6) 71 Ind. Cas. 38.

(7) 18 Ind. Cas. 555; 39 M. 195; 13 M. L. T. 60; 24 M. L. J. 112.

(8) 65 Ind. Cas. 282; 4 L. L. J. 176; 29 P. L. R. 1922; (1922) A. L. R. (L) 100.

(9) 64 Ind. Cas. 387; 2 L. L. J. 555; 17 P. L. R. 1922.

(10) 32 C. 146.

(11) 15 B. 148; 8 Ind. Dec. (N. S.) 99.

(12) 3 Ind. Cas. 607; 77 P. R. 1909; 124 P. L. R. 1909; 125 P. W. R. 1909.

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proceeding on that view the learned Judge did interfere in revision. In the present case the question is whether the Multan Courts had jurisdiction to try the case. A reference to the correspondence between the parties seems to indicate that the contract for the supply of coal, a breach of which has resulted in this case, was entered into at Multan and, therefore, it would appear that the learned Munsif was wrong in declining jurisdiction. It is true that the Hoshiarpur Courts also have jurisdiction to deal with the case, but it cannot be denied that a plaintiff has the right to select the *forum*, and it is certainly a hardship to force him to institute the suit at Hoshiarpur when the Multan Courts have jurisdiction. It is true that their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Bakhsh Singh* (4) have laid down that a Court having jurisdiction to dispose of a case is at liberty to decide that case wrongly and that a wrong decision would not necessarily render its order open to revision. But that case is to some extent distinguishable inasmuch as the question of jurisdiction did not therein arise, whereas it is just this question of jurisdiction which has to be determined in the present case. I admit that a conflict in the authorities on the point renders the decision a little difficult, but having regard to the most recent pronouncement of this Court, as reported in *Jagan Nath-Diwan Chand v. Jagan Nath-Moti Lal* (6), I think I would be justified in interfering, and, I, therefore, accept this revision and direct the Court at Multan to receive the plaint and dispose of the suit in accordance with law. In the circumstances, however, I leave the parties to bear their own costs in this Court.

Z. K.

Petition accepted.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 2154 OF 1921.

November 16, 1922.

Present:—Mr. Justice FRODWARD.

QADIR BAKHSH—DEFENDANT

—APPELLANT

VERSUS

SHAMAS DIN—PLAINTIFF AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—Appeal against order of remand—Finding of fact based on misappreciation of case—High Court, interference by.

In an appeal from an order of remand findings of fact cannot be examined in second appeal, but where it appears that the first Appellate Court has failed to appreciate the real question in controversy between the parties, the High Court will interfere and direct a re-hearing of the appeal. [p. 758, col. 1.]

Appeal from the decision of the District Judge, Lyallpur, dated the 5th July 1921, from the Munsif, first Class, Chiniot, District Jhang, dated the 12th January 1920.

Mr. Fakir Chand, for the Appellant.

Mr. Feroz-ud din Ahmad, for the Respondents.

JUDGMENT.—One Khuda Bakhsh, son of Muhammad Bakhsh, of Chiniot purchased 8½ marlas of land situate in the town of Chiniot from 26 persons under five deeds of sale. On the 11th January 1919 one Shamas Din, son of Muhammad Yar, filed a pre-emption suit claiming to be entitled to pre-empt this site as against Khuda Bakhsh. On the 3rd February 1919, Khuda Bakhsh appeared in Court and stated that he had, on the 11th January 1919, transferred the entire site to one Qadir Bakhsh and had, therefore, no further interest in the matter. Qadir Bakhsh was accordingly impleaded and as he was a minor his uncle Ibrahim was made his guardian *ad litem*. On behalf of Qadir Bakhsh it was pleaded that he had purchased the site in question from Khuda Bakhsh and that he had at least an equal right to pre-empt. Shamas Din, the plaintiff, very stoutly contended that the sale to Qadir Bakhsh was a fictitious one and that Khuda Bakhsh was still the real owner of the property. The Trial Court framed issues as to the existence of the custom of pre-emption and whether the plaintiff had a preferential right to pre-empt as against

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both the vendees. The third issue was as follows :—

"If the plaintiff's plea of superiority fails against Qadir Bakhsh, is the second sale in favour of the latter a fictitious transaction collusively contracted with a view to defeat the plaintiff?"

The fourth and fifth issues related to the market price and the amount paid. It was held that the right of pre-emption existed in that particular quarter of the town of Chinot and that Shamas Din's right to pre-empt was superior to that of Khuda Bakhsh but that Qadir Bakhsh had an equal right. The third issue was decided against the plaintiff, it being held that the sale to Qadir Bakhsh was not a fictitious transaction. The plaintiff's suit was accordingly dismissed, no decision being given with regard to Issues Nos. 4 and 5.

The plaintiff then preferred an appeal to the District Judge who held that the second sale purporting to be in favour of Qadir Bakhsh was really in favour of his uncle Ibrahim and, acting under O. XII, r. 23, Civil Procedure Code, he remanded the case for a fresh decision, at the same time directing that Ibrahim should be made a party. Against this order of remand an appeal was preferred to this Court on behalf of Qadir Bakhsh, minor, under O. XLII, r. 1 (u). The appeal was disposed of on the 31st May 1922, by Mr. Justice Brasher being heard *ex parte* as neither Shamas Din nor his Counsel appeared. Subsequently, on the 21st July 1922, Mr. Justice Brasher set aside the *ex parte* order and I have now heard Mr. Fakir Chand on behalf of the appellant, Qadir Bakhsh, and Mr. Feroz-ud-Din Ahmad for the respondent Shamas Din.

Mr. Feroz ud-Din contended that the finding of the District Judge that the sale purporting to be in favour of Qadir Bakhsh was in fact in favour of Ibrahim was a finding of fact which could not be examined in second appeal and referred me to *Sawan Singh v. Mothu* (1), *Waryam Singh v. Harnam Singh*

(2) and *Honda Ram v. Hotu Ram* (3). In *Sawan Singh v. Mothu* (1) it was held that an appeal against an order of remand under O. XII, r. 23 based solely on a finding of fact is not competent. To the same effect was the decision in *Waryam Singh v. Harnam Singh* (2) as well as in *Honda Ram v. Hotu Ram* (3). *Sawan Singh v. Mothu* (1) was considered by a Full Bench of this Court in a case reported as *Umri v. Shah Mohammad* (4) but was not overruled. *Waryam Singh v. Harnam Singh* (2) and *Honda Ram v. Hotu Ram* (3) do not appear to have been cited before the Full Bench and as I understand the situation it is that, in an appeal from an order of remand, findings of fact cannot be examined by this Court sitting as a Court of second appeal.

Mr. Fakir Chand admitted that the finding of the learned District Judge that Ibrahim was the real vendee in the sale by Khuda Bakhsh is one of fact, but he contended that the District Judge has entirely misunderstood the case and has failed to appreciate the real question in controversy between the parties, and that, therefore, the appeal to him had not been properly tried. He contended, therefore, that, in such circumstances, the appeal should at least be re-heard.

As has been stated above, when Khuda Bakhsh came into Court and alleged that he having sold the land in suit to Qadir Bakhsh, had no further interest in it, the plaintiff clearly asserted that the alleged sale in favour of Qadir Bakhsh was entirely fictitious and ineffectual, Khuda Bakhsh still being the real owner of the land. Nowhere was it pleaded that Ibrahim was the real vendee under the second sale. The Trial Court held the sale was not fictitious and had been made in favour of Qadir Bakhsh. In the grounds of appeal to the District Court the plaintiff reiterated his contention that the sale was in fact no sale at all having been but a fictitious transaction entered into with a view to defeat his right of pre-emption. Nowhere

(2) 48 Ind. Cas. 379; 109 P. R. 1918; 23 P. L. R. 1919.

(3) 59 Ind. Cas. 715; 2 L. 25; 31 P. W. R. 1921; (1922) A. I. R. (L) 97.

(4) 68 Ind. Cas. 849; 3 L. 218; 4 L. L. J. 359; (1922) A. I. R. (L) 178 (F. B.).

(1) 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914.

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at any time was it alleged by either of the parties that, as a matter of fact, the sale had been effected in favour of Ibrahim. The question as to who was the vendee never having been raised was never put in issue nor was Ibrahim ever made a party. The finding of the learned District Judge thus appears to have been based on misappreciation of the true controversy between the parties and he does not appear to have realised that the question for decision was whether the sale in question was a fictitious one or not. I, therefore, think that, in such circumstances, a re-hearing of the appeal by the District Judge is necessary. In this view I am supported by a case decided by a Division Bench of the Calcutta High Court reported in *Dibakar Nag v. Mritunjoy Bhattacharya* (5).

I, therefore, accept this appeal and, setting aside the order of the learned District Judge, dated the 5th July 1921, return the appeal to the District Court for a re-hearing and a re-decision in accordance with law.

Costs in this Court will follow the event.
W. C. A. & N. H. *Appeal accepted.*

(5) 13 Ind. Cas. 495.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1422 OF
1922.

January 12, 1923.

Present:—Mr. Justice Campbell.

GANDA SINGH—DEFENDANT

—APPELLANT

versus

**BHAN—VENDOR—DEFENDANT FOR SELF
AND AS REPRESENTATIVE OF HIS BROTHER
BANSI DAS, DECEASED—PLAINTIFF—
PRE-EMPTOR—RESPONDENT.**

*Pre-emption—Death of pre-emptor after decree,
effect of—Sale of land of value of Rs. 100 by
unregistered deed, whether liable to pre-emption—
Registration Act (XVI of 1908), ss. 17, 49—
Evidence Act (I of 1872), ss. 58, 91.*

A pre-emption decree cannot be affected by anything which happens after it is made.

Niaz Ali v. Muhammad Ramzan, 37 Ind. Cas. 227; 130 P. R. 1916; 193 P. W. R. 1916, *Thamman Singh v. Santa*, 53 Ind. Cas. 457; 119 P. R. 1919; 80 P. L. R. 1920 and *Aima Singh v. Hem Raj Shah*, 59 Ind. Cas. 939, followed.

After a decree had been passed in a pre-emption suit the pre-emptor died and the original vendor was his only legal representative:

Held, that this did not affect the decree which had been passed and did not involve the dismissal of the suit on appeal.

In an appeal against a pre-emption decree the Appellate Court has only to see whether the decree was correct when it was passed.

In the Punjab the law does not require a sale of immoveable property of the value of Rs. 100 or upwards to be by a registered instrument, but merely prevents an unregistered deed of sale for Rs. 100 or upwards from affecting the property dealt with or from being used as evidence to affect it.

A sale of immoveable property of the value of Rs. 100 or upwards effected by means of an unregistered deed of sale is, nevertheless, a sale and is liable to pre-emption.

Janki v. Girjadas, 7 A. 482; A. W. N. (1885) 97; 4 Ind. Dec. (N. S.) 749 (F. B.), relied on.

In a suit to pre-empt a sale of land sold for Rs. 100, the sale was admitted in the pleadings and the vendee subsequently produced an unregistered deed of sale:

Held, that the sale having been admitted in the pleadings no further proof of it was required under section 58 of the Evidence Act, and the provisions of section 91 of the Act could not, therefore, come into play.

Second appeal from a decree of the Additional District Judge, Lahore, dated the 24th February 1922, affirming that of the Munsif, First Class, Lahore, dated the 3rd January 1921.

Lala Amar Nath Chona, for *Lala Lachhmi Narain*, for the Appellant.

Diwan Mehr Chand, for the Respondent.

JUDGMENT.—This is a second appeal in a case where both the Courts below have concurred in giving the plaintiff a decree for possession by pre-emption of the property in suit for Rs. 100.

The first contention raised is that the pre-emptor died after the decree and pending the appeal in the lower Appellate Court and that the original vendor himself being his legal representative the suit should now be dismissed on appeal. No valid grounds for this argument have been put forward. It was ruled in *Niaz Ali v. Muhammad Ramzan* (1) that a pre-emption decree could not be affected by anything which

(1) 37 Ind. Cas. 227; 130 P. R. 1916; 193 P. W. R. 1916.

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happened after it was made, and analogous cases are *Thamman Singh v. Santa* (2) and *Atma Singh v. Hem Raj Shah* (3). The Appellate Court has to see whether the decree was correct when it was passed. If the pre-emptor had survived until after the decision of the present appeal and had then died, the property in suit presumably would have gone back to the vendor as his heir.

The second point is that the sale price was Rs. 100, and the sale-deed was unregistered. The fact does not render the transfer something other than a sale within the meaning of the Punjab Pre-emption Act. In *Janki v. Girjadat* (4) there was a sale which the Transfer of Property Act required to be by registered deed and in spite of there being no such registered deed, a Full Bench held that there had been a pre-emptible sale. In this Province the law does not require a sale of immoveable property of the value of Rs. 100. and upwards to be by registered instrument but merely prevents an unregistered deed of sale for Rs. 100 or upwards from affecting the property dealt with or from being used as evidence to affect it. The pre-emptor in this case did not use the sale-deed and did not wish to use it. It was produced in Court by the vendee, after the sale had been admitted in the pleadings and when, under section 58 of the Evidence Act, no proof was required of the sale. Thus section 91 of the same Act would not come into operation in any case.

The third point raised is as regards limitation. The learned Counsel for the appellant is obliged to concede that no other Article in the circumstances is applicable except Art. 120 which has been applied by the Courts below.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(2) 53 Ind. Cas. 457; 119 P. R. 1919; 80 P. L. R. 1920.

(3) 59 Ind. Cas. 939.

(4) 7 A. 482; A. W. N. (1885) 97; 4 Ind. Dec. (N. S.) 749 (F. B.)

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1036 OF 1920.

March 2, 1923.

Present.—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Zaiar Ali.

SALIG RAM—VENDEE—DEFENDANT—
APPELLANT

versus

BADHAWA AND OTHERS—PLAINTIFFS AND
MANGAL—VENDOR—DEFENDANT—
RESPONDENTS.

Custom v. Personal law—Brahmans of Gokalgarh, District Ambala—Burden of proof.

The circumstance that a family or a tribe has departed from its personal law in one respect; for instance, the incompetency of a daughter to inherit her father's property, does not necessarily lead to the conclusion that it has adopted agricultural custom in all other respects. [p. 760, col. 1.]

The initial presumption in the case of Brahmans is that they are governed by their personal law and the onus is on the person who sets up a custom restricting a Brahman proprietor's powers of alienation to establish it. [p. 759, col. 2.]

The Brahmans of Gokalgarh in the Ambala District are not governed by agricultural custom in matters of alienation.

Ambala is, ethnically and by language, more connected with the United Provinces than the Punjab, and the Brahmans of that District follow their personal law and do not observe any custom like that of the agriculturists of the Punjab. [p. 760, col. 1.]

Kapuria v. Mangal, 149 P. R. 1908; 192 P. W. R. 1908, followed.

Second appeal from a decree of the District Judge, Ambala, dated the 24th March 1920, reversing that of the Senior Subordinate Judge, Ambala, dated the 4th March 1919.

Lala Jagan Nath, for the Appellant.

Mr. Devi Dial, for the Plaintiffs-Respondents.

JUDGMENT.—On the 19th July 1918, one Mangal, a Brahman of Mauza Gokalgarh, in the District of Ambala, sold a plot of land to the defendant, Salig Ram, for Rs. 2,400. The plaintiffs, who are the reversioners of the vendor, contest the sale on the usual grounds, and the only question for determination is whether the Brahmans of Gokalgarh are governed in the matter of alienation by agricultural custom. Now, it is beyond dispute that the initial presumption in the case of Brahman is that they are governed by their personal law, and the onus on the plaintiffs to establish a custom

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restricting the proprietor's power of alienation.

In support of the custom set up by them the plaintiffs rely upon the fact that almost the whole of the agricultural land in the village belongs to Brahmans who depend mainly on agriculture for their livelihood. They also invite our attention to the oral evidence which shows that a daughter is excluded from succession to the estate of her father; but the circumstance that a family or a tribe has departed from its personal law in one respect, namely, the incompetency of a daughter to inherit her father's property does not necessarily lead to the conclusion that it has adopted agricultural custom in all other respects. It is conceded that there is not a single case, judicial or otherwise, in which the authority of a Brahman proprietor to alienate his ancestral land was ever challenged. On the other hand, we have evidence to the effect that during the last 30 years there have been no less than 130 alienations in this village, and the witnesses for the plaintiffs themselves admit that not a single alienation has been contested by either the son or the reversioner. In these circumstances, we are of the opinion that the plaintiffs on whom the onus rested have failed to establish the custom invoked by them.

It is to be observed that in *Kapuria v. Mangal* (1), it was held by the Punjab Chief Court that in matters of alienations Brahmans of Mauza Sambaka, in the Ambala District, were governed by the Hindu Law and not by custom. As pointed out in that judgment, Ambala is ethnically and by language more connected with the United Provinces than the Punjab, and the Brahmans of that District follow their personal law and do not observe any custom like that of the agriculturists of the Punjab.

For the aforesaid reasons we accept the appeal and, reversing the decree of the District Judge, restore that of the Court of first instance with costs throughout.

Z. K.

Appeal accepted.

1) 149 P. R. 1908; 192 P. W. R. 1908.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REFERENCE No. 208 OF 1922.

April 27, 1923.

Present:—Mr. Piwon, J. C.

Lala PUNNU LAL AND OTHERS

—DEFENDANTS—PETITIONERS

versus

Rai Sahib Lala BHOJA RAM AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 77 (3), (i), 98—Jurisdiction of Civil and Revenue Courts—Suit by superior proprietor for declaration of right to recover dues in kind from inferior proprietor, nature of—Suit, whether cognisable by Civil or Revenue Court—Direction under s. 98, whether confers jurisdiction on Civil Court—Jurisdiction, whether can be conferred by consent.

Parties to a suit cannot confer jurisdiction upon any Court by mutual agreement. [p. 762, col. 1.]

A suit for a declaration of the right of a superior proprietor to recover dues in kind from an inferior proprietor is essentially one arising out of the conditions of a tenancy and is excluded from the cognisance of a Civil Court by section 77 (3), (i) of the Punjab Tenancy Act. [p. 762, col. 1.]

Section 98 of the Punjab Tenancy Act refers solely to the action of a Revenue Court. It confers upon the Revenue Court a certain power of making a direction to the parties before it. That direction may bind the parties, but it does not necessarily bind a Civil Court, or confer upon that Court a jurisdiction which it would not otherwise possess. Where a Revenue Court refers the parties to a civil suit under the provisions of section 98 of the Punjab Tenancy Act, the Civil Court does not thereby acquire jurisdiction to hear a suit which it would otherwise be incompetent to entertain under the other provisions of the law. [p. 763, cols. 1 & 2.]

Reference made by the Divisional Judge, Derajat, under his No. 75 Cl. dated the 17th March 1922.

Mr. Udhe Khan, for the Respondents.

ORDER.—The material facts of the case are these. Rai Sahib Bhoja Ram is the superior proprietor or "*ala malik*" of certain lands situated in Ratta Kulachi in the Dera Ismail Khan District: the defendants Lala Punnu Lal and others are inferior proprietors or "*adna maliks*" of the same land. Prior to the Settlement of 1903 the "*adna maliks*" of this village ordinarily paid certain dues to the "*ala maliks*" in kind. In the Settlement of 1903 these dues were, in the majority of cases, commuted by order of the Collector into cash payment. No order in this respect, however, was actually recorded with

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regard to the land to which this suit relates. *Rai Sahib* Bhoja Ram instituted in a Revenue Court a suit for the recovery of arrears of these dues calculated upon certain payments in kind. He based his claim upon an agreement made between the predecessors of the parties on the 21st of August 1879. The defendants repudiated the validity of this agreement and pleaded, *inter alia*, that the question as to the plaintiff's right to recover dues from them in kind was one which could only be decided by a Civil Court. The Revenue Court in which the suit for these arrears had been lodged, applied under section 98 of the Punjab Tenancy Act, for the sanction of the Collector to refer the plaintiff to a separate suit for the establishment of his claim to recover the dues claimed in kind. The Collector duly granted the sanction. It is not specifically stated in the application of the Revenue Court that the plaintiff be referred to a Civil Court. The order of the Collector, however, refers specifically to a suit in a Civil Court. In any case, sanction was applied for under section 98 of the Tenancy Act, it must be presumed that the Revenue Court intended to refer the plaintiff to a Civil Court. The plaintiff then lodged in a Civil Court the present suit for a declaration that he was entitled to recover from the defendants in kind the dues claimed. A preliminary point was raised by the defendants that the suit was not cognizable by a Civil Court. The Sub-Judge who heard the suit adjudicated upon this plea by a preliminary order holding that he had jurisdiction. Against this order the defendants applied to the Judicial Commissioner for revision. The Judicial Commissioner declined to interfere purely on the ground that the order challenged was of an interlocutory nature and that no revisional proceedings could lie. He did not touch the question as to whether the Sub-Judge was or was not right in holding that he had jurisdiction to determine the suit. The suit has now been determined by the Sub-Judge and the plaintiff granted a decree. The defendants appealed to the Divisional Court and one of the grounds of appeal was that the Civil Court had no jurisdiction

to adjudicate upon the claim. The Divisional Judge has come to the conclusion that the declaratory suit was one cognizable only by a Revenue Court and has referred the case to me, under section 100 of the Tenancy Act, for the decree to be registered as that of a Revenue Court. If his recommendation is accepted, the effect of my order would be to oust the jurisdiction both of the Divisional Judge and of my Court and to allow the defendants to appeal to the Court of the Revenue Commissioner.

The case was argued before me yesterday by Mr. Udhe Bhan for the plaintiff and by one of the defendants Lala Punnu Lal who is himself a Pleader. Mr. Udhe Bhan argued that the Civil Court had jurisdiction to try the suit and resisted the recommendation made by the Divisional Court for its registration in a Revenue Court. Lala Punnu Lal for the defendants supported the view of the Divisional Judge in so far as it related to the contention that the Civil Court had no jurisdiction. He opposed, however, the recommendation that the decree should be registered as one of a Revenue Court. In support of his opposition to registration of the decree as that of a Revenue Court he relied, *inter alia*, upon two arguments (a) that the commutation of dues paid by the inferior proprietors to superior proprietors was a question which a Revenue Officer, as opposed to a Revenue Court, had power to dispose of under section 146 of the Punjab Land Revenue Act, and that under section 158 of the said Act a Civil Court could have no jurisdiction in any matter which a Revenue Officer was empowered by the Act to dispose of, or to take cognizance of.

(b) That as the Sub-Judge who heard the suit, was not invested with any powers of a Revenue Court, his decree could not be registered as that of a Revenue Court.

Counsel were heard at some length upon their respective contentions. At to-day's adjourned hearing, however, they stated before me that they had, to this extent, agreed upon the questions involved, so far as they affected the present suit only, that the plaintiff was prepared to admit that the suit was cognizable by a Revenue Court only, and that the defendants would similarly

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withdraw their opposition to the decree being registered as that of a Revenue Court. At the same time, it must be remembered that parties to a suit cannot confer jurisdiction upon any Court by a mutual agreement, and it is, therefore, necessary for me to adjudicate upon the question of jurisdiction. Further, Mr. Udhe Bhan, while withdrawing his attempt to establish that the Civil Court has jurisdiction so far as the present suit is concerned, continued strenuously to urge upon me the contention which he had already argued, that the Civil Court had full jurisdiction. I deal with this question, therefore, in more detail.

It cannot be seriously denied that the original suit was correctly lodged in the Revenue Court and was governed by section 77 (3) (p) of the Punjab Tenancy Act. This, however, would not necessarily imply that a suit for a declaration of the rights of a superior proprietor to recover dues from an inferior proprietor would also be governed by the same provision. This point has, I think, been lost sight of by the Divisional Judge when he quotes section 77 (3) (p) of the Tenancy Act, in support of his view. At the same time, I do not think it can be seriously argued that a suit for a declaration of this nature is not essentially one arising out of the conditions of a tenancy, and that it would not be, in ordinary circumstances, a suit cognizable by a Revenue Court only. This, of course, is without prejudice to the argument put forward by the other side that the suit is not cognizable by a Court at all, whether Civil or Revenue, on the ground that the question for determination is one for disposal by a Revenue Officer under the provisions of section 146 of the Land Revenue Act. But the argument put forward by Mr. Udhe Bhan is really of a different nature. He contends that whether or not a Civil Court would have jurisdiction to decide a suit of this nature, if instituted before it by a party on his own motion, it has, nevertheless, jurisdiction over a suit of any nature, even one cognizable purely by a Revenue Court, when once a valid reference has been made to it under section 98 of the Tenancy Act. In other words, the contention of the learned Counsel is that a Revenue Court has jurisdiction

under section 98 to decide that any question of any description which may come before it is more proper for decision by a Civil Court and that, when it decides that such a question is more proper for decision by a Civil Court and when the Collector's sanction is duly given, it is quite immaterial whether or not that question is one upon which a Civil Court could otherwise adjudicate. He goes so far as to argue that a suit cognizable purely by a Revenue Court and excluded from the cognizance of a Civil Court by all other provisions of the Tenancy Act, may nevertheless be tried by a Civil Court whenever the parties are referred to it under section 98 of the Tenancy Act. In support of his view he refers me to the Punjab Chief Court Rules and Orders, Vol. I, section 4 (new Edition) and lays particular stress upon the words of paragraph 7 (2) of the same where the framers of the order say, "Section 98 of the Punjab Tenancy Act and section 117 of the Punjab Land Revenue Act empower Revenue Officers and Courts to refer certain matters to the adjudication of Civil Courts, and when an order has been duly made under either of those sections, the Civil Courts would have jurisdiction to adjudicate upon the matters referred to them." He wishes it to be inferred from this that a Revenue Court has actually the power of conferring jurisdiction upon a Civil Court to try a suit which would otherwise be excluded from that Civil Court's jurisdiction. He has been unable to show me any direct precedent in which such a view has been taken by the highest Civil or Revenue Authority of the Punjab or this Province. He refers me, however, to a ruling of the Financial Commissioner of the Punjab published as *Ganga Singh v. Badr-ud din* (1). In that case a Revenue Court had referred the parties to a Civil Court upon a certain question of occupancy rights which it would appear was essentially one for the decisions of a Revenue Court. When application for sanction to this reference was made to the Collector, the Collector proceeded to determine and adjudicate upon the suit on its merits as a revenue suit. The Financial Commissioner

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held that the action of the Collector was *ultra vires*, the sole question before him for decision being whether or not sanction should be given under section 98 of the Tenancy Act. It may be admitted that there is a certain implication in this order that, although the suit was one triable by a Revenue Court, the latter was, nevertheless, empowered to make a valid reference to a Civil Court under section 98. I doubt, however, if the learned Financial Commissioner fully intended to go as far as the judgment would appear to imply. He was mainly concerned with the action of the Collector in treating a mere application for sanction to make a reference as a proceeding which allowed him to adjudicate upon the merits of the suit. I am by no means sure, therefore, whether this ruling is a clear precedent for the position which the learned Counsel seeks to establish. On the other hand, there appear to me to be many considerations which militate against his view. The learned Divisional Judge is, I think, beside the point when he quotes section 6 of the Civil Procedure Code as applicable to the question. Section 6 refers only to the question of the pecuniary jurisdiction of Civil Courts. Section 9, however, would appear to me to apply. This section runs as follows:—"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." Now the jurisdiction of Civil Courts in matters which are cognizable by Revenue Courts is expressly barred by Statute. To admit the validity of Mr. Udhe Bhan's contention we must assume that this bar is removed by section 98 of the Tenancy Act or, in other words, that Revenue Courts have, if they so wish, the power of conferring upon Civil Courts jurisdiction which they would otherwise not possess, purely on the ground that a Revenue Court considers the question "more proper" for decision by a Civil Court. I think that it would be extremely difficult to accept this view. Section 98 refers solely to the action of a Revenue Court. It confers upon the Revenue Court a certain power making a direction to the parties before it. That direction may bind the parties, but I cannot see how it can neces-

sarily bind a Civil Court or confer upon that Court a jurisdiction which it would not otherwise possess. Again, if the contention of the learned Counsel is really a correct exposition of the law, I cannot believe it possible that there would not have been cases both in the Punjab and in the North-West Frontier Province in which the position would not have been clearly defined. I cannot agree that the wording of section 98 is so clear that no ruling upon the point has ever been required. On the contrary, I can state unhesitatingly that, so far as the North-West Frontier Province is concerned, it has been the invariable practice for the question of the respective jurisdictions of a Civil and a Revenue Court to be decided by reference to section 77 of the Tenancy Act, and not by any principle that valid jurisdiction arises by reason of a mere reference under section 98. I must hold, therefore, that when a Revenue Court refers the parties to a civil suit under the provisions of section 98 of the Tenancy Act, the Civil Court does not thereby acquire jurisdiction to hear a suit which it would otherwise be incompetent to entertain under all other provisions of the law. It follows from the above finding that the present decree cannot remain as one passed by a Civil Court. On the withdrawal by the defendants of their opposition to the registration of the decree by a Revenue Court, I need not deal at length with the further questions involved. So far as I am aware, there is no justification for the contention that the decree cannot be registered as that of a Revenue Court, because the Sub-Judge was invested only with civil powers. The other contention raised by the defendants that the jurisdiction of all Courts, either Revenue or Civil, is ousted by the provisions of section 146 and section 158 of the Land Revenue Act, because the matter is one with which a Revenue Officer was empowered to deal, is undoubtedly more formidable. I have, however, once the decree is registered as that of a Revenue Court, no further jurisdiction to adjudicate upon this point. It is one which can be raised by the defendants in their appeal to the Revenue Commissioner to whom an appeal will now lie. I, therefore, accept the recommendation of the Divisional Judge, and under the provisions of section 100 of the

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Punjab Tenancy Act order the present decree to be registered as the decree of a Revenue Court. The parties will bear their own costs in the present proceeding.

Z. K.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2838 OF 1918.
(CIVIL MISCELLANEOUS NO. 66 OF 1921.)

January 20, 1923.

Present:—Mr. Justice Broadway and
Mr. Justice Zafar Ali.

GOBIND SARUP AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

KULDIP SINGH, MINOR, THROUGH
Musammat SHILA WANTI, HIS MOTHER—
PLAINTIFF AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

*Transfer of Property Act (I V of 1882), s. 101—
Merger—Mortgagee acquiring equity of redemp-
tion.*

The latter portion of section 101 of the Transfer of Property Act does not apply where no intervening incumbrances exist and where a merger of a less estate takes place in a greater estate which is to be distinguished from the merger of a lower in a higher security. Where a mortgagee also becomes the absolute owner of the equity of redemption, the mortgage is extinguished by merger, unless there are any puisne or mesne incumbrances against which the equity of redemption is required to be kept alive. [p. 765, col. 2.]

Bhawani Kumar v. Mathura Prasad Singh, 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 39 I. A. 228 (P. C.); *Arumugasundara Maharaja Pillai v. Narasimha Iyer*, 29 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110, *Rajah of Kalahasti v. Prayag Dossjee Varu*, 35 Ind. Cas. 224; 30 M. L. J. 391; (1916) 2 M. W. N. 92 and *Sri Ram v. Ramji Das*, 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909, relied on.

Khtali Ram v. Gulab Khan, 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911 and *Bur Singh v. Hazara Singh*, 63 Ind. Cas. 760; 3 L. 99; (1922) A. I. R. (L.) 275, distinguished.

Second appeal from a decree of the District Judge, Gurdaspur, at Dailhousie, dated the 28th June 1918, affirming that

of the Subordinate Judge, First Class, Gurdaspur, dated the 7th January 1918, Mr. M. L. Puri, for Dr. Nand Lal, for the Appellants.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—This was a pre-emption suit. The land pre-empted had originally been mortgaged to Ram Chand Khatri and Charan Das Agarwal, but the owner subsequently sold the equity of redemption to Gobind Sarup, son of Ram Chand. The pre-emptor asserted that the son was a *benamidar* for the father and that the mortgage had merged in the sale. This was denied by Ram Chandra and it was contended on his behalf that the mortgage still subsisted and did not merge in the sale. Section 101 of the Transfer of Property Act, *Gokaldas Gopaldas v. Purnamal Premasukhdas* (1); *Yellapaddi Mahalakshammal v. Sriman Madhva Siddhartha Oonahini Nidhi* (2); *Khtali Ram v. Gulab Khan* (3); *Ghanaya v. Pandit Chhajju Ram* (4) and *Baldeo Parshad v. Uman Shankar* (5) were cited in support of this plea. The Trial Court came to the conclusion that the authorities cited were not applicable and that the mortgage merged in the sale because the mortgagee and the purchaser of the equity of redemption were one and the same. In his appeal to the District Judge, Ram Chand raised for the first time the point—which was not mentioned even in the grounds of appeal—that as there was a co-mortgagee with him in the person of Charan Das, the mortgage could not merge in the sale. Having regard to the fact that the name of Charan Das did not appear either in the deed of the sale of the equity of redemption, or in the pleas of the defendant, or in the Revenue Records wherein Ram Chand figured as the sole mortgagee, the learned District Judge presumed that Charan Das had been bought out by Ram Chand. On the question of merger he agreed with the First Court and dismissed the appeal.

(1) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(2) 11 Ind. Cas. 865; 35 M. 642; 10 M. L. T. 169; 21 M. L. J. 811; (1922) M. W. N. 24.

(3) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911.

(4) 38 P. R. 1894.

(5) 4 Ind. Cas. 810; 32 A. 1; 6 A. L. J. 987.

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In this further appeal to this Court, the defendant-appellants' Counsel, Mr. Mukand Lal Puri, contends (1) that the lower Appellate Court erred in presuming that Charan Das had been bought out, and (2) that in the absence of all evidence to the contrary, the proper inference as to Ram Chand's intention was, that he intended to keep his mortgagee rights alive as evidenced by the fact that he purchased the equity of redemption in the name of his son. Besides the rulings cited by the Trial Court he refers to *Dinobundho Shaw Chowdhry v. Jogmaya Dast* (6); *Gopal Chunder Sreemany v. Herembo Chunder Holdar* (7); *Girdhar Das v. Ram Aular Singh* (8) and *Bur Singh v. Hazara Singh* (9) and Gour's Law of Transfer of Property, Volume II, page 1284, paragraph 2002. Bakhshi Tek Chand has argued to show that these rulings are not in point and has cited to the contrary *Mohesh Lal v. Mohant Bawan Das* (10); *Bhawant Kumar v. Mathura Prasad Singh* (11); *Arumugasundara Maharaja Pillai v. Narasimha Iyer* (12); *Rajah of Kalahasti v. Prayag Dossjee Varu* (13); *Sri Ram v. Ramji Das* (14); *Ahmad Shah v. Walidad Khan* (15) and *Ram Dut Singh v. Balkaran Singh* (16) and Dr. Ghose's Law of Mortgages, Volume I, pages 516-17.

As regards (1) we are of opinion that the lower Court was justified in drawing the inference that Charan Das had been bought out, and we need say no more on this point.

As regards (2) the law of merger in this country is codified in section 101 of the Trans-

fer of Property Act, but part 2 of that section does not apply where no intervening incumbrances exist and where a merger of a less estate takes place in a greater estate which is to be distinguished from the merger of a lower in a higher security. In the present case a less estate merged in a greater estate and by purchasing the equity of redemption the mortgagee became the proprietor of the estate and thus the mortgage was extinguished. *Bhawant Kumar v. Mathura Prasad Singh* (11), which is a Privy Council ruling is one of the authorities on this point. In that case the property mortgaged was sold in execution of a decree obtained by the mortgagee on the mortgage-bond and was purchased by himself. It was held that the purchaser became the proprietor of the estate sold and not merely the purchaser of such right, title and interest in it as the mortgagor might have had.

In *Arumugasundara Maharaja Pillai v. Narasimha Iyer* (12) it was decided by a Division Bench of the Madras High Court that section 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in this favour is extinguished.

Similarly, a Division Bench of that Court in the case reported as *Rajah of Kalahasti v. Prayag Dossjee Varu* (13) held that where a mortgagee becomes also absolute owner of the equity of redemption the equitable estate merges in the legal, unless there are any puisne or mesne encumbrances against which the equity is required to be kept alive.

The same view was held by the Punjab Chief Court in *Sri Ram v. Ramji Das*, (14) where it was decided that when a mortgagee purchases the equity of redemption in respect of the land mortgaged, the mortgagee rights merge in the right of ownership.

Lastly, may be cited the following from Ghose on Mortgages, 5th Edition, Volume I, page 516.—“A merger can take place only when a security comes into immediate contact, so to speak, with the ownership, or, in other words, when they

(6) 29 C. 154; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 29 I. A. 9 (P. C.).

(7) 16 C. 523; 8 Ind. Dec. (N. S.) 345.

(8) 8 C. W. N. 690.

(9) 63 Ind. Cas. 760, 3 L. 99; (1922) A. I. R. (L.) 275.

(10) 9 C. 961; 13 C. L. R. 221; 10 I. A. 62; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 (P. C.).

(11) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 39 I. A. 228 (P. C.).

(12) 29 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110.

(13) 35 Ind. Cas. 224; 30 M. L. J. 391; (1916) 2 M. W. N. 92.

(14) 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909.

(15) 98 P. R. 1906; 83 P. L. R. 1906; 63 P. W. R. 1906.

(16) 45 Ind. Cas. 231; 5 O. L. J. 87.

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unite without any outstanding interest in a third person."

The authorities said to be the contrary, *i.e.*, *Khiali Ram v. Gulab Khan* (3) and *Girdhar Das v. Ram Autar* (8), are distinguishable. In the former the land mortgaged was sold by the widow of the mortgagor who had only a life-estate in the property and, therefore, the sale by her was not held equivalent to a sale by the owner-mortgagor himself. In *Girdhar Das v. Ram Autar Singh* (8) the facts are not fully stated and, therefore, it cannot be said whether it has any bearing on the facts of the present case.

Having regard to all the authorities reviewed above, we are of opinion that the mortgage was extinguished. Therefore, we dismiss the appeal with costs.

Z. K.

*Appeal dismissed.***LAHORE HIGH COURT.**

MISCELLANEOUS FIRST CIVIL APPEAL

No. 1996 OF 1922.

February 17, 1923.

Present.—Mr. Justice Scott-Smith,**MEHR CHAND AND ANOTHER—****JUDGMENT-DEBTORS—APPELLANTS***versus***RAM LAL AND OTHERS—DECREE-HOLDERS****—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), ss. 47, 96—Execution of decree—Order issuing warrant for arrest of judgment-debtor—Appeal, whether lies.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree is an order under section 47 of the Civil Procedure Code and is appealable as a decree under section 96 of the Code.

Ardeshtirji Framji v. Kalyan Das, 3 Ind. Cas. 46; 32 A. 3; 6 A. L. J. 912, relied on.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Gurgaon, dated the 10th July 1922.

Mr. Kanwar Narain, for the Appellants;

Lala Nanwa Mal, for the Respondents.

JUDGMENT.—This is an appeal by the judgment-debtors, Mehr Chand and Hukam Chand, against an order of the Subordinate Judge, First Class, issuing warrants for their arrest in execution of a decree. Lala Nanwa Mal raised a preliminary objection on behalf of the respondents to the

effect that no appeal lay and referred to section 104 (1) (b) of the Civil Procedure Code which allows an appeal from an order under any of the provisions of the Code of Civil Procedure imposing a fine or directing the arrest or detention of any person except where such arrest or detention is in execution of a decree. Mr. Kanwar Narain urges that the order of the lower Court certainly is not appealable as an order under section 104, but that it is appealable as a decree under section 96 of the Code of Civil Procedure, and that it was an order passed under section 47. In my opinion this contention is correct as was held in *Ardeshtirji Framji v. Kalyan Das* (1).

As regards Mehr Chand, appellant, it is admitted that his father, Mitter Sen, is one of the judgment-debtors. He is the manager of the family to which his son belongs and the Court below has directed a warrant of attachment of moveable and immoveable property to issue against the other judgment-debtors including Mitter Sen. There does not seem to be any reason why Mehr Chand should be arrested at present at all events until it is seen what the result of the attachment of the property belonging to the family is.

As regards Hukam Chand no such reason for not issuing a warrant exists, and the only point urged in the grounds of appeal is that an appeal is pending from the decree sought to be executed, a warrant of arrest should not have issued. The execution of the decree, however, has not been stayed and the mere fact that an appeal is pending is no reason for not enforcing execution by arrest of the judgment-debtor. When Hukam Chand appears before the Court he will have an opportunity of showing cause why he should not be confined in the civil prison, and if he is not satisfied with the order that is passed he will be at liberty to appeal from it.

I accept the present appeal so far as Mehr Chand is concerned and set aside the warrant issued against him. As far as Hukam Chand is concerned the appeal is dismissed.

Z. K.

Appeal dismissed.

(1). 3 Ind. Cas. 46; 32 A. 3; 6 A. L. J. 912.

NIHAL, DEVI & CHUNI LAL,

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1916 OF 1921.

January 4, 1923.

Present.—Mr. Justice Broadway and
Mr. Justice Zafar Ali.*Musanimat* NIHAL, DEVI AND OTHERS—
PLAINTIFFS—APPELLANTS
versus*Rai* CHUNI LAL AND OTHERS—
DEFENDANTS—RESPONDENTS.*Court-Fees Act (VII of 1870), s. 7 (iv) (c),
Sch. II, Art. 17 (iii)—Suit for declaration that
certain property is wakf and that a decree obtained
in respect of it shall not affect its nature of—
Court-fee payable.*

Certain trust property was mortgaged by the trustee to the defendant who obtained a decree on his mortgage and obtained possession of the property. Plaintiffs, who were not parties to the decree, brought a suit for a declaration that the property was public property, that the trustee had no right to mortgage it, and that the decree for possession obtained in respect of it by the defendant was void and inoperative and not liable to execution:

Held, (1) that the suit was in its essence one for a declaration only and that the plaintiff did not disclose any claim for a consequential relief; [p. 768, col. 2.]

(2) that the plaintiffs not being parties to the decree obtained by the defendant on his mortgage, it was not incumbent on them to ask for an injunction prohibiting the defendant from executing the decree; [p. 768, col. 2.]

(3) that, therefore, the suit fell under Art. 17 of Schedule II to the Court-Fees Act and not under section 7 (iv) (c) of the Act. [p. 768, cols. 1 & 2.]

Amin Chand v. Sant Murli Dhar, 19 Ind. Cas. 219; 18 P. R. 1913; 151 P. W. R. 1913; 211 P. L. R. 1913, followed.

(Case-law discussed.)

First appeal from an order of the Senior Subordinate Judge, Gurdaspur, dated the 17th March 1921.

Lala Har Gopal, for the Appellants.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—This is an appeal against the judgment of the Senior Subordinate Judge of Gurdaspur, dated the 17th of March 1921, rejecting the plaint in the suit on the ground that the Court-fee paid thereon was insufficient. The question before this Court now is whether the view taken by the Senior Subordinate Judge as to the insufficiency of the Court-fee is correct. The suit, according to the plaint, purported to be for a declaration. In the plaint it was set out that Raman Mal *alias* Sain Lok had been the *sarprast* or manager of certain property dedicated to the public and had executed a mortgage in favour

of Rai Chuni Lal on the 21st of July 1911. The property mortgaged included 2 *kanals* 11 *marlas* of the dedicated land now in suit. The plaint went on to recite that Rai Chuni Lal had obtained a decree for possession against Raman Mal and it was prayed that the Court should grant a declaration to the effect that the land in suit was public property and that Raman Mal had no right to mortgage the same in favour of Rai Chuni Lal and that the decree for possession obtained by Rai Chuni Lal on the strength of this mortgage-deed and dated the 21st of August 1920 be declared void and inoperative and not liable to execution *qua* the property in suit. The learned Subordinate Judge held that the present case fell within the purview of *Govind v. Dheklu* (1), and returned the plaint in order that a Court-fee be paid thereon according to the jurisdictional value placed on the suit by the plaintiffs, *viz.*, Rs. 6,600. This order was passed on the 3rd of March 1921, and, as the Court-fee was not paid, the plaint was rejected on the 17th of March 1921.

On behalf of the appellants Mr. Har Gopal has urged that the suit, as laid, was purely of a declaratory nature and, therefore, had been properly stamped. For the respondents Mr. Tek Chand contended that the prayer in the plaint, when properly construed, clearly disclosed the fact that the plaintiffs sought an injunction against the execution of the decree, to which the plaintiffs themselves were not parties. Mr. Har Gopal referred to *Amin Chand v. Sant Murli Dhar* (2); *Zinnatunnessa Khatun v. Girindra Nath Mukerjee* (3), *Shrimant Sagajirao v. S. Smith* (4); [both of which cases were followed in *Ganesht Lal v. Beni Pershad* (5)], *Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon* (6), *Arunachalam Chetty v. Rangasamy Pillai* (7), and *Bua Ditta*

(1) 56 Ind. Cas. 550; 19 N. L. R. 15;

(2) 19 Ind. Cas. 219; 18 P. R. 1913; 151 P. W. R. 1913; 211 P. L. R. 1913.

(3) 30 C. 788.

(4) 20 B. 736; 10 Ind. Dec. (N.S.) 1061.

(5) 9 Ind. Cas. 673; 1 P. R. 1911; 47 P. L. R. 1911; 22 P. W. R. 1911.

(6) 30 M. 18; 1 M. L. T. 412.

(7) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154 (F. B.)

NIHAL DEVI v. CHUNI LAL:

v. *Ladha Mal* (8). On the other hand Mr. Tek Chand rested his case on *Harihar Prasad Singh v. Shyam Lal Singh* (9), *Fulkumari v. Ghanshyam Misra* (10), *Deokali Koer v. Kedar Nath* (11) and *Umatul Batul v. Nauji Kuar* (12). *Fulkumari v. Ghanshyam Misra* (10) was reversed on appeal to the Privy Council in the case reported as *Phulkumari v. Ghanshyam Misra* (13). The facts were different and neither of the authorities affords any assistance.

In *Harihar Prasad Singh v. Shyam Lal Singh* (9), consequential relief was clearly claimed and Mr. Hari Gopal frankly admits that if, in the present case, consequential relief is found to have been claimed by the plaintiffs his appeal must fail.

Similarly, in *Umatul Batul v. Nauji Kuar* (12), an injunction was prayed for and this case needs no further discussion.

Deokali Koer v. Kedar Nath (11) was the case chiefly relied on by Mr. Tek Chand who claimed that the facts there were practically identical with the facts of the present case. In that case, however, their Lordships of the Calcutta High Court held that the suit as laid did not fall within the purview of section 42 of the Specific Relief Act. The point which is now under consideration was not apparently gone into. It is true that in some respects the relief sought for in the Calcutta case is similar to the relief claimed in the present case but, as pointed out as above, the case was decided on another point.

The present case is in many respects similar to the case reported as *Amin Chand v. Sant Murlidhar* (2) where the plaintiff claimed to be in possession of a *Dharmshala* alleged to be *wakf* property and sued for a declaration that the sale of such property made by the former manager was illegal and that a decree passed for possession of the property on the strength of the sale-deed should have no effect on the said prop-

erty. It was held that as the plaintiff was not a party to the suit in which the decree was obtained it was not necessary to sue to have the decree set aside as the plaintiff could regard it as a nullity.

In *Govind v. Dheklui* (1), no doubt it was held that a suit for a declaration that a decree is null and void and for setting it aside is one both for a declaration and for consequential relief and, therefore, is governed by clause (iv) (c) of section 7 of the Court-Fees Act. There, however, as far as can be ascertained from the report, the plaintiff had been a party to the decree sought to be set aside.

In *Bua Ditta v. Ladha Mal* (8) a Division Bench of this Court appears to have held that when a plaintiff is not a party to the decree sought to be set aside consequential relief, for example, by injunction, need not be claimed. In that case the authorities cited by Mr. Hari Gopal were considered and the principles enunciated in *Arunachalam Chetty v. Rangasamy Pillai* (7) were approved of.

In our opinion, the plaint, as framed, does not in itself disclose any claim for consequential relief and inasmuch as the plaintiffs are not parties to the decree dated the 21st of August 1920 we do not think it was incumbent on them to ask for an injunction prohibiting the decree-holder from executing the decree. What the plaintiffs seek is a declaration that a small portion of the property included in the decree is property dedicated to the public and as such not liable to be used for other purposes.

We, therefore, accept this appeal and return the case to the Court below with the direction that the plaint be admitted and the case be proceeded with in accordance with law.

The order sending this appeal to a Division Bench did not clearly admit the appeal to a hearing but both parties agreed that the only question involved in the appeal was whether the plaint had been properly stamped and that further notice was not necessary. Costs in this Court will follow the event.

Z. K.

Appeal accepted.

(8) 54 Ind. Cas. 833; 2 U. P. L. R. (1) 371 65 P. W. R. 1920.

(9) 21 Ind. Cas. 404; 40 C. 615.

(10) 31 C. 511.

(11) 15 Ind. Cas. 4271 39 C. 704; 16 C. W. N. 838.

(12) 6 C. L. J. 4271 11 C. W. N. 705.

(13) 35 C. 2021 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 L. A. 22 (P. C.).

GHULAM HUSSAIN V. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 163 OF 1923.

April 12, 1923.

Present.—Mr. Justice Daniels.

GHULAM HUSSAIN AND OTHERS—

APPELLANTS

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 304, 325—
Culpable homicide—Joint attack by several persons
—Offence.*

Where several persons jointly attack another with *lathi* fracturing his skull and inflicting a number of other injuries which result in his death they are all equally guilty of culpable homicide even though it may not be possible to prove which of them inflicted the fatal blow. [p. 770, col. 1.]

Emperor v. Ram Newaz, 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615, relied on.

Criminal appeal against an order of the Sessions Judge, Budaun, dated the 11th January 1923.

Mr. Kamuda Prasad, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—The appellants, Ghulam Hussain, Bida Hussain, Raza Hussain and Maqbul Hussain, are the brothers of one *Musammatt Chanda*, prostitute. They were charged under section 304 of the Indian Penal Code with culpable homicide in causing the death of one Sukha. The learned Sessions Judge, on the supposed authority of *Emperor v. Bhola Singh* (1), has altered the charge to one under section 325 and with the concurrence of the assessors as regards three of the accused has convicted them under that section. As regards Raza Hussain the assessors appear to have been impressed by an *alibi* which he put forward but I agree with the learned Sessions Judge that the evidence in support of this *alibi* is of no value.

It is common ground that there was considerable previous ill-feeling between *Musammatt Chanda* and her brothers on the one side and Sukha and the principal witness Inayatullah on the other. Three days before the present occurrence a youth named Tajju who belonged to the party of the deceased had been beaten by the other party near Chanda's house and a

report had been made about it. On the day in question, 5th November 1922, Inayatullah and Sukha, according to the prosecution evidence, were passing *Musammatt Chanda's* house. the four accused were there and *Musammatt Chanda* incited them to attack the deceased and his companions which they did. It is probable that there was some previous exchange of abuse or verbal quarrel which Inayatullah has suppressed in his evidence. However that may be, Inayatullah was attacked and very badly beaten. The medical evidence shows that he had at least 12 different injuries, the first and most serious of which was on the head. His companion, Sukha, received injuries of which he died in Hospital four days later. The vault of the skull was extensively fractured and broken into five or six pieces as the result of one or more *lathi* blows. There were four other marks of injury on different parts of Sukha's person. The only injury sustained by any of the accused's party was a contusion on the left temple and a black eye on the person of Ghulam Hussain. Besides the evidence of Inayatullah, the prosecution case is supported by three other witnesses who saw the accused beating the deceased and his companion. The story put forward on behalf of the accused and supported by three witnesses is that one Munna came from the toddy shop near by, abused *Musammatt Chanda* and threatened to cut off her nose and to beat her brothers. Three of the accused beat him and drove him back to the shop. He then returned with five other persons including Sukha and Inayatullah, all armed with *lathis*. Inayatullah slapped *Musammatt Chanda* and on Ghulam Hussain remonstrating hit him on the head knocking him down. Two of his brothers then came out and a fight ensued between them.

I should have been glad of a little more assistance from the learned Judge in the way of detailed comment on the evidence, but I agree with the conclusion at which the learned Judge has arrived that the prosecution evidence is to be preferred to that of the defence. The latter is obviously difficult if not impossible to reconcile with the medical evidence. The witnesses who support the prosecution story apart

(1) 29 A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

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from Inayatullah are independent witnesses against whom no ground for partiality is established. The suggestion made on behalf of the accused to account for the complainant's party having received some 18 injuries one of which proved fatal as against two small injuries sustained by Ghulam Hussain is that Sukha and Inayatullah were drunk. No question as to this point was put to the Doctor who admitted them to Hospital and the only evidence which goes in any way to support the story is a statement elicited in cross-examination from the Head Constable Asfandiyar Khan who recorded Inayatullah's report. The learned Judge does not refer to this evidence but I cannot help feeling strong doubt as to the truth of the assertion. In the first place, no note of it was made at the time of recording the report and a man who was really drunk could hardly have dictated the detailed report which was made by Inayatullah at the time.

I am not sure the learned Judge correctly appreciates the law as regards the liability of several accused who jointly attacked the same person and inflicted fatal injuries on him. The learned Judge refers to the case of *Emperor v. Bhola Singh* (1) but the judgment in that case has to be read in the light of a more recent case *Emperor v. Ram Newaz* (2). If several persons jointly attacked the deceased with lathis fracturing his skull and inflicting a number of other injuries they are all equally guilty even though it may not be possible to prove which of them actually inflicted the fatal blow. In the present case it was quite unnecessary for the learned Sessions Judge to have altered the charge. It is, however, unnecessary for me to alter the conviction as no application in revision is before me and an offence under section 325 was certainly committed. For the reasons already given, I dismiss the appeal of all four accused.

M. A. A.

Appeal dismissed.

(2) 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 47 OF 1922.

July 5, 1922.

Present.—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

EMPEROR—ACCUSED*versus*

**HARI DAS MITRA AND ANOTHER—
OPPOSITE-PARTIES.**

*Criminal Procedure Code (Act V of 1898), s. 307—
Trial on several charges—Acquittal by Jury—
Magistrate agreeing in respect of graver charges—
Reference on minor charges, propriety of.*

There is nothing to prevent a Judge who has accepted the findings of the Jury in favour of the innocence of the accused in respect of certain graver charges, from making a reference under section 307 of the Criminal Procedure Code with the object of having some of the accused convicted on minor charges, where the prosecution has failed not because of the evidence happening to be false but because of the facts alleged being insufficient to support the graver charges. [p. 771, col. 2.]

Criminal reference made by the Sessions Judge, Khulna.

Babus *Dasaratht Sanyal* and *Hira Lal Chuckerbutty*, for the Accused.

Mr. *Orr*, for the Crown.

JUDGMENT.

Walmsley, J.—This case has been referred under section 307, Criminal Procedure Code, by the Sessions Judge of Khulna.

The story told by the prosecution is as follows:—Two young Brahmin women Jibantara, the wife of Khetra Nath Bhatta-charjee, and Prohabati, a widow, eloped with their lovers, hired a boat and after a week's travelling came to Bajna Bazar. The people of Bajna Bazar guessed what had happened, and thought it their duty to interfere, and they made arrangements for keeping the women, their lovers, and the women's ornaments until some relative could come and assume charge. The arrangement was, that the women and their lovers were taken to the house of Surendra Nath Mondal, the Panchayet, the ornaments were deposited with a shop-keeper named Keshab Chandra Saha and a man named Bijay started to convey information to Jibantara's husband. All these facts are admitted, and in regard to the motive of the Bazar people, the learned Judge has rejected the Police theory that they

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were seeking unlawful advantages for themselves.

During the night one of the lovers complained that some money had been stolen from him: the evidence is very unsatisfactory, but the allegation was a good pretext for a *chaukidar* to go to the *Thana* and in the afternoon Sub-Inspector Bipro Das Chakravarty arrived on the scene in a boat. He went first to Surendra's house and then took the women and their boat to Bajna Bazar. Arrived at the Bazar the Sub-Inspector was urgent in demanding the ornaments. His version is, that the very existence of the ornaments was denied, but the defence story that Keshab wanted all the witnesses to the deposit to be present at the return, and also wanted a formal receipt, is the more probable. The Sub-Inspector grew excited, and threatened to search Keshab's shop. Then he says Hari Das caused a disturbance and knocked him down. The Sub-Inspector took refuge in his boat: there he was attacked by an angry mob: the boat was pulled ashore, the women were dragged from it by force, the Sub-Inspector was persuaded to go to Surendra's shop where he was kept in confinement, and the furnishings of the boat were carried off. In desperation he agreed to say nothing about what had happened: then he was allowed to go and nearly all his belongings were restored.

On these allegations the following charges were framed:—

(1) against Hari Das, Abdul Khalifa, Surendra, the Panchayet, Keshab Lal Saha, and Purna Chandra Biswas, under section 147, Indian Penal Code, the common object being stated to be "by show of criminal force to compel Bipro Das Chakravarty, Sub-Inspector of Police, to omit to search Keshab's shop which he was legally entitled to do;

(2) against the same five persons under section 380, Indian Penal Code, for "theft of a bundle of clothes, a box, some beddings, articles of clothing, utensils, etc., in a boat which was used for the custody of property;"

(3) against the same five persons, except Abdul Khan, under section 365, Indian Penal Code, "for abduction of Jibantara and Probhabati with intent to cause them to be secretly and wrongfully confined;"

(4) against Hari Das and Surendra, Panchayet, only under section 365, Indian Penal Code, for abducting "Bipro Das Chakravarty, Police Sub-Inspector, with intent to cause him to be secretly and wrongfully confined;"

(5) against Hari Das alone under section 332, Indian Penal Code, for causing hurt to a public servant, the intention being stated in nearly the same words as in the first charge.

The Jury was unanimous in acquitting all the accused of all the charges but the learned Judge thinks, that Hari Das and Abdul Khalifa should be convicted under section 147, Indian Penal Code, and Hari Das under section 332, Indian Penal Code.

It is deplorable to think of the amount of public time that has been spent in the investigation of these charges. Witnesses were examined on ten days in the Committing Court, and in the Sessions Court, the hearing went on continuously for ten whole days.

So far as the acquittal of Surendra, Purna, and Keshab on all charges, and of Hari Das and Abdul Khalifa, on the charge under section 380, Indian Penal Code and of Hari Das on the charges under section 365, Indian Penal Code, I agree in the view taken by the learned Judge.

In regards to Abdul Khalifa, it is admitted that there is less evidence against him, than against Hari Das, and the evidence about the hour of occurrence leads me to doubt whether persons who did not take a prominent part were likely to be recognised. I think, therefore, that the verdict of the Jury should be upheld in his case also. He is accordingly acquitted.

That leaves only the case of Hari Das for consideration. It is urged with some force, that the learned Judge, having rejected much of the evidence and having accepted the Jury's finding on the grave charges, should not have made a reference with the object of having some of the accused convicted on minor charges. In this case, however, I do not think the argument applies, for here the prosecution has failed, not because the evidence as to what happened is false, but because the facts alleged do not amount to the offences of abduction and theft. The substance of the pro-

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secution case remains unaffected and that is, that a Sub-Inspector of Police was molested, while in exercise of his duties.

On this point the difficulties of the prosecution are increased by the words in which the common object under one section and the intention in the other are set out. The prosecution has taken upon itself to prove that Bipra Das, the Sub-Inspector, had a right to search Keshab Saha's shop. It is argued that he had no such right, and that if he had, he was acting contrary to the rules in searching after sunset. This question involves the second position of what the Sub-Inspector was doing in the Bazar. He was brought to Surendra's house, to enquire into a theft from Kali Das, but by the time he reached the Bazar, he had evidently taken the affairs of the women into his hands. It is quite conceivable that they misrepresented the position to him. But, whatever the explanation is, it is clear that he regarded the recovery of the ornaments as one of his first duties: it is also clear that he asked Keshab to produce them and that Keshab did not do so. The Sub-Inspector's right to search the house then depended on the offence which he was investigating and on Keshab's attitude to his demand. On the first point, I feel very doubtful as to whether the women had given the Sub-Inspector cause to believe that there had been theft. He said himself, "They said that the ornaments had been taken without their consent, but I did not understand whether the ornaments had been stolen or taken for safe keeping." I cannot believe, therefore, that the Sub-Inspector was investigating any charge of theft from the women. I am disposed to think that he was anticipating the complaint that was made by the husband of theft by the women when they eloped. The first essential, therefore, was wanting, and in my opinion, the second is equally wanting. I share the learned Judge's view that there was no denial of the deposit: all that happened was that Keshab asked for certain formalities which involved delay.

The result is, that, framed as the charges are, I do not think, that Hari Das can be convicted under either charges and on the

account the verdict of the Jury must be upheld in his case also.

I have already alluded to the amount of valuable time, that has been wasted over this case. I believe that the Sub-Inspector was hustled and treated with disrespect, thanks to his own want of tact, but the ingenuity with which the investigating Inspector and Sub-Inspector sought to entangle the accused in charges which the allegations did not support is most regrettable. If there was no one in the Police Department, to curb such misguided zeal, it is surprising that an intelligent Magistrate should have failed to see the facts in true proportion and to realise that the case was one that should be tried in his Court.

The reference is rejected, the verdict of the Jury is upheld and the accused are acquitted.

Suhrawardy, J.—The learned Sessions Judge in his exceedingly fair and lucid charge has expressed his opinion disbelieving the major portion of the story for the prosecution. I have carefully considered the evidence and I think, he has formed a correct estimate of it. To my mind, the whole fracas was due to the ill-judged interference of the Sub-Inspector who showed an unusual zeal in the matter worthy of a better cause. I am not sure that in the interest he took in the case he was actuated by a sense of duty. He went to the spot on receiving information that, it was 'rumoured' that one of the party of new comers had lost Rs. 52. He was not apparently attracted to the Bazar by this rumour, but by the further information, that two run-away young women with valuable jewellery had arrived there in the course of their wandering. It appears he took no notice of the alleged theft of Rs. 52, but immediately, on his arrival interested himself in the affairs of these women. I do not believe that the women voluntarily complained to him, if they ever did, that their ornaments were taken away from them by force or that they were wrongfully confined. I need not go into the facts further as the learned Judge has correctly gauged the whole situation having discarded almost the whole prosecution story as exaggerated and incredible, the learned Judge seems to be of opinion,

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that at least one fact was certain, that there was an unlawful assembly, one member of which, the accused Hari Das, assaulted the Sub-Inspector. The incident that led to the assault, as related by the prosecution, is also disbelieved by the Judge. In this state of the record, it cannot be said that the verdict of the Jury was perverse; in my opinion it was justified and reasonable.

We are told that the accused were kept in *hajat* for about five months in connection with this case. I cannot too strongly express my disapproval of the seriousness attached to this case brought on such apparently exaggerated charges because a Police Officer happened to be the complainant.

I agree in rejecting this reference.

N. H.

*Reference rejected;
Accused acquitted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 125 OF 1923.

April 12, 1923.

Present:—Mr. Justice Daniels.

AZIZ AHMAD—APPLICANT.

versus

BUDDHU KHAN AND OTHERS—

OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 522—Restoration of property—Trial Court; refusal of, to make order—Appeal—Revision.

The discretion to pass or not to pass an order for restoration of property under section 522 of the Criminal Procedure Code is vested in the Trial Court, and where that Court declines to make such an order in the exercise of its discretion, a Court of Appeal or Revision has no jurisdiction to compel it to do so.

Bhagbat Shaha v. Siddique Ostagar, 16 Ind. Cas. 176; 39 C. 1050; 16 C. W. N. 811; 13 Cr. L. J. 608 and *Muhammad Din v. Emperor*, 48 Ind. Cas. 510; 14 P. R. 1919 Cr.; 20 Cr. L. J. 30; 1 P. W. R. 1919 Cr.; 33 P. L. R. 1919, relied on.

Criminal revision from an order of the Sessions Judge, Kumaun, dated the 1st December 1922.

Mr. S. D. Sinha, for the Applicant.

Mr. P. L. Banerji, for the Opposite Parties.

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JUDGMENT.—This is an application in revision asking this Court to make, under section 522 of the Code of Criminal Procedure, an order for the restoration of the property which the Trial Court has refused to make. The discretion to pass or not to pass such an order is very clearly vested by the section in the Trial Court which says that the Court may pass such an order *if it thinks fit*. I know of no case in which a Court of Appeal or Revision has compelled a Court to pass such an order in a case in which in the exercise of its discretion it has declined to do so. Indeed, there is the authority of two High Courts, those of Calcutta and the Punjab, for the view that a Court of Appeal or Revision has no power to do so. This was held by the Calcutta High Court in the case of *Bhagbat Shaha v. Siddique Ostagar* (1) and by the Punjab High Court in *Muhammad Din v. Emperor* (2). Even if this Court in revision has power to pass the order applied for there are no such exceptional circumstances in this case as would justify such action. I dismiss the application.

Z. K. *Application dismissed.*

(1) 16 Ind. Cas. 176; 39 C. 1050; 16 C. W. N. 811; 13 Cr. L. J. 608.

(2) 48 Ind. Cas. 510; 14 P. R. 1919 Cr.; 20 Cr. L. J. 30; 1 P. W. R. 1919 Cr.; 33 P. L. R. 1919.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 327 OF 1923.

April 27, 1923.

Present:—Mr. Justice Buckland and Mr. Justice Cuming.

RAHIM SHEIKH AND OTHERS—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 308—Jury trial—Discharge of Jury—Misconduct—Inherent power of Court—Code, whether exhaustive.

So far as it deals with any point specifically, the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference and it is not within those for which the Code specifical-

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ly provides, it would not be reasonable to say that the Court has not the power to make such order as the ends of justice require. [p. 774, col. 2; p. 775, col. 1.]

Where the question of misconduct on the part of the Jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the Jury and empanel another. [p. 774, col. 2.]

The Criminal Procedure Code does not provide for such circumstances, but the presumption that jurors will discharge their duties without impropriety may explain the omission. [p. 774, col. 2.]

The power to discharge a Jury on such grounds is discretionary, but must not be exercised lightly, nor until the Judge has satisfied himself by such form of enquiry as, in the circumstances, he can adopt that reasonable grounds exist for exercising the power. [p. 774, col. 2.]

Reg. v. Davison, (1860) 8 Cox C. C. 360; 2 F. & F. 250, *Reg. v. Ward* (1869) 10 Cox C. C. 573; 77 L. T. 220; 16 W. R. 281 and *Olu Mahamad v. Emperor*, 7 C. W. N. xxxi (31), referred to.

Application against the order of the Sessions Judge, Rajshahi.

Babu *Bimal Chandra Das Gupta*, for the Petitioners.

JUDGMENT.

Buckland, J.—This application raises a novel point on which there does not appear to be any authority. The petitioners were put on their trial before the learned Sessions Judge of Rajshahi and a Jury upon charges under sections 436 and 34 of the Indian Penal Code, and the trial began on the 28th February last and continued from day to day until the 6th March. On that day when 11 witnesses for the prosecution had been examined the learned Judge recorded in the ordersheet that it had come to his notice that some of the Jury had been seen associating with the man looking after the case for the accused. The learned Judge appears to have held some sort of enquiry the nature of which is not specified though I will assume it was sufficient and that he was reasonably satisfied as to the conclusion at which he arrived, and thereupon stated that he had reason to believe this to be the case, and he consequently ordered the Jury to be discharged and the case to be tried *de novo*.

These are all the facts with which we have to deal and it is now objected on behalf of the petitioners that the order discharging the Jury and directing the trial to re-commence *de novo* was made without jurisdiction.

The contention submitted to us is that a case such as this is not provided for by the Code of Criminal Procedure and that sections 282 and 283 are exhaustive as regards discharging a Jury during the continuance of the trial; there are other sections referring to the discharge of a Jury such as section 305; but those are sections which only apply at a later stage. The sections, however, do not profess to deal with the circumstances in which a Jury may be discharged, rather it is the other way and, in the circumstances to which they refer, they state that that course may be pursued.

The argument submitted to us involves the proposition that whatever the stage of the trial may be, however gross the misconduct of a Jury, and however patent to everybody concerned it may appear, there is no remedy but that the trial must continue to run its course to its conclusion, when, it is submitted, it will be open to the Presiding Judge to submit the case to the High Court under section 307, Criminal Procedure Code. So far as a procedure would only bring the administration of justice into disrepute. In my judgment where the question of misconduct on the part of the Jury or other similar sufficient cause arises the Sessions Judge has inherent power to discharge the Jury and empanel another. It is true that the Code does not provide for such circumstances but, on the other hand, the presumption that jurors will discharge their duties without impropriety may explain the omission. The power to discharge a Jury on such grounds is one not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exist. The learned Sessions Judge in this case has held an enquiry. With his statement as to that I am satisfied and the power being one that is not covered by any section of the Code of Criminal Procedure I think it suffices to say that the matter is one for the Judge's discretion. So far as it deals with any point specifically, the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions.

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but where a case arises which obviously demands interference and it is not within those for which the Code specifying provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. Holding, therefore, as I do, that the Jury may be discharged in circumstances other than those specifically provided for by the Code, section 308 cannot be held to relate exclusively to the discharge of a Jury in the circumstances stated in the preceding sections. The learned Sessions Judge has in effect made an order under that section though he has not referred to it and there is, therefore, no reason to interfere. In my judgment this Rule must be discharged.

Cuming, J.—Certain persons were on their trial before the Sessions Judge of Rajshahi and some 11 witnesses for the prosecution had been examined. It was then brought to the notice of the learned Judge that some of the Jury had been seen associating with the man who was looking after the defence. The Court held an enquiry and being satisfied as to the truth of the allegation ordered the Jury to be discharged and the accused to be tried *de novo* with a fresh Jury. The present petitioner, the accused, has moved this Court on the ground that the Judge had no jurisdiction to discharge the Jury and order a *de novo* trial. He contended that the case was not covered by either section 282 or section 283 of the Criminal Procedure Code.

No doubt, the contention is correct so far that these sections do not provide for the discharge of the Jury for improper conduct during the trial. In England the Judge has the power to discharge the Jury if a necessity arises and whether the necessity has or has not arisen is for the Judge alone to decide and his decision is not open to review. In one case [*Reg. v. Ward* (1)] this course was followed because one of the Jurors had left the box without leave. Such discharge is not equivalent to a verdict of acquittal and the prisoner can be remanded for a fresh trial [*Reg. v. Davison* (2).] There is in this country no decided

case bearing on this point. In one case tried at the High Court Sessions the Jury before hearing the evidence for the defence wanted to give their verdict. Counsel for the defence pressed for their discharge on the ground of misconduct.* The prosecution objected to the course. The point was not decided as the Advocate-General entered a *nolle prosequi* *Emperor v. Olu Mahamad* (3). The learned Vakil for the petitioner contended that the trial should have been allowed to proceed and then apparently that the point that some of the Jury had been associating with the accused's man might be taken in appeal if necessary. The objection to such a course is obvious and in the present case the further difficulty arises that the Jury had been discharged. It, however, seems quite clear that unless the Judge had the power to discharge the Jury in cases of misconduct great difficulties must arise, and in many cases a serious miscarriage of justice and although the Code does not specifically provide for such contingencies it seems clear that the Judge must have such powers.

In this view the order of the learned Sessions Judge was right and I would discharge this Rule.

Z. K.

Rule discharged.

(3) 7 C. W. N. xxxi (31).

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 153 OF 1923.

April 11, 1923.

Present.—Mr. Justice Daniels.

JHAGRU AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 413
—Joint trial—Appealable and non-appealable sentences—Appeal whether lies against non-appealable sentence.

Where several persons are tried jointly and convicted at one trial, some of them receiving appealable and the others non-appealable sentences, the latter do not obtain a right of appeal merely owing to the fact of their joint trial with the others.
Hussain Khan v. Emperor, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546 and *Bhola v. Emperor*, 40 Ind. Cas. 332; 39 A. 549; 15 A. L. J. 574; 18 Cr. L. J. 684, followed.

(1) (1869) 10 Cox C. C. 573; 17 L. T. 220; 16 W. R. 281.

(2) (1860) 8 Cox C. C. 360; 2 F. & F. 250.

SUPDT. AND REMEMBRANCE LEGAL AFFAIRS, BENGAL *v.* NARAYAN CHANDRA BANERJEE

Criminal revision against an order of the Additional Sessions Judge, Jaunpur, dated the 25th of December 1922.

Mr. Kumuda Prasad, for the Applicants.
The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a revision on behalf of nineteen persons who were tried jointly with one Jhagru. Jhagru was given an appealable sentence and the applicant were given small sentences of fine against which, they if had not been tried jointly with Jhagru, no appeal lay under the provisions of section 413. The chief point raised by the revision is whether, if a person who is given a sentence which is ordinarily non-appealable is tried jointly with a person who is given a larger sentence, the former obtains a right of appeal which he would otherwise not have. Divergent views have been expressed on this subject but the latest published decisions of this Court, which are referred to by the learned Judge, namely, *Husain v. Emperor Khan* (1) and *Bhola v. Emperor* (2), are against the contentions of the applicants. In the latter case Piggott, J., stated that the practice of the Court on the subject must be taken as settled. My own view is in accordance with these decisions and I accordingly decline to accept this plea. I may add that the matter will soon cease to be of importance as section 413 is being altered in the amended Code of Criminal Procedure.

The learned Judge dismissed the appeal of Jhagru who did appeal. He was not, therefore, bound to send up the case of the other accused in revision under the rule laid down in *Bhola v. Emperor* (2). The appellant contended that he should have done so because of a chance remark at the end of his judgment that it was possible that some of the other accused might be innocent but he was unable to help them. This is not a finding; it is merely a remark as to a possibility in the case of accused whose cases the learned Judge had not considered in detail.

The case is one in which small fines only were imposed and I am not prepared in revision to consider the evidence against each individual accused. I dismiss the application.

Z. K.

Application dismissed.

CALCUTTA HIGH COURT.

GOVERNMENT APPEAL NO. 4 OF 1923.

May 8, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuning.

SUPRINTENDENT AND REMEMBRANCE, LEGAL AFFAIRS, BENGAL—

APPELLANT

versus

NARAYAN CHANDRA BANERJEE—

RESPONDENT.

Bengal Municipal Act (III of 1884), ss. 209, 353—Gift of land to Municipality on condition that it would erect necessary fencing—Requisition requiring erection of fencing, failure to obey—Offence.

The language of section 209 of the Bengal Municipal Act is only indicative of this, that there is power in a Municipality to require a person to cause a fence to be erected by the side of a tank; but because the power is existent in a Municipality by virtue of statutory provisions, it does not follow that a Municipality cannot accept a condition or enter into a binding engagement that it would erect a certain fencing at its own cost. [p. 779, col. 1.]

Accused made a free gift of certain land to the Howrah Municipality on condition that if at any time it was found necessary to erect a fencing at a certain place the Municipality would erect it at its own cost. Some years later the Municipality issued a requisition under section 209 of the Bengal Municipal Act calling upon the accused to erect the fencing. The accused failed to comply with the requisition and was prosecuted under section 353 of the Bengal Municipal Act.

Held, that the Municipality having accepted a gift of the accused's land on condition that it would erect the fencing at its own cost was bound by the condition and had no power to issue a requisition calling upon the accused to erect it, and that, consequently, the accused was not bound to comply with the requisition. [p. 779, col. 1.]

Appeal against an order of the Magistrate, First Class, Howrah.

(1) 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546.
(2) 40 Ind. Cas. 332; 39 A. 549; 15 A. L. J. 574; 18 Cr. L. J. 684.

SUPDT. AND REMEMBRANCE, LEGAL AFFAIRS, BENGAL, *V. NARAYAN CHANDRA BANERJEE*:

Babu *Monmota Nath Mukherji*, for the Appellant.—Under the law the owner is bound to put up the fencing and the very important question arises whether by an agreement with the Municipality the accused can contract out of the liability imposed by the Statute. As a question of fact, my case is that there was only an offer and no contract in reality, but even if there was the agreement the accused's liability under the Statute continued and the most that he could do was to put up his fence and realise the cost from the Municipality. The law says that a thing shall be done by the accused and the Municipality cannot alter the law.

[**Ghosh, J.**—There is no law which says that the Municipality cannot enter into the agreement. There is a provision in the Calcutta Municipal Act enabling the Calcutta Municipality to enter into such agreements.]

[Babu *Dasurathi Sanyal*—There is a similar provision in the Bengal Municipal Act—section 37].

Section 37 does not help. Under it the Municipality can make contracts for the purposes of the Act—that is all.

Babu *Dasurathi Sanyal* (with him Babus *Debendra Narain Bhattacharjee* and *Lalit Mohan Sanyal*), for the accused.—Under section 37 such contracts can be entered into. See section 69 which defines the purposes for which such contracts can be made: See Halsbury, Vol. XXVII, Art. 389, page 196. In the absence of express words in the Statute such contracts can be made.

There is another point of view from which the case should be considered. An attempt was made to prosecute the accused in 1914 and nothing was done and the present prosecution was barred under section 353 of the Act.

JUDGMENT.—This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against an order of acquittal passed by Mr. B. N. Mukherjee, Magistrate, First Class, Howrah, acquitting the accused in respect of an offence punishable under section 353 of Act III (B. C.) of 1884 of not complying with the terms of a notice under section 209 of the Bengal Municipal Act served on him on the 16th September 1922. The facts which have given rise to this appeal at

the instance of Government, shortly stated, are as follows:—The accused was served with a requisition under section 209 of the Municipal Act requiring him to cause a fence to be erected for the protection of passengers and pedestrians on the bank of a tank belonging to the accused. The accused disobeyed this requisition, his grounds being that in 1898 certain land on the side of the tank was made over by him to the Municipality and conditions were imposed by him on the Municipality at the time to the effect that if in future any fencing had to be erected or was required on the side of the tank the Municipality would erect such a fencing at their own costs. Now, it appears to us on examination of the record that the accused, who is one of the heirs of one Girish Chunder Banerjee, proposed sometime in 1898 to the Municipality of Howrah offering to give up a certain strip of land or such part thereof as might be necessary for the purpose of straightening a tortuous portion of a lane called Girish Banerjee Lane, lying between the bank and premises No. 15 Girish Banerjee Lane. It appears from the petition of appeal of the Legal Remembrancer that on the 3rd September 1898 the members of the Works Sub-Committee of the Howrah Municipality recommended to the Municipal Commissioners that the proposal of the heirs of Girish Chunder Banerjee should be accepted. The accused states that on the acceptance of his offer being communicated to him by the Municipality he caused a letter to be written to the Secretary of Howrah Municipality on the 14th December 1898. The contents of this letter have been set out in paragraph 15 of the petition of appeal. In 1914 it appears that owing to erosion of the bank of the tank, the lane in question became dangerous to the wheeled traffic and on the 16th May 1914 Mr. Hopkins, who was then the Chairman of the Howrah Municipality, wrote a letter to the accused asking him to have this tank fenced as early as possible. The accused wrote a letter in reply, dated 20th May 1914, in which he referred the Chairman to the Resolution No. 5 (1) of the Commissioners of the Howrah Municipality dated the 6th October 1898 and a letter dated 14th December 1898 by which he

SUPDT. AND REMEMBRANCER, LEGAL AFFAIRS, BENGAL, V. NARAYAN CHANDRA BANERJEE.

made over a strip of land on the east side of the tank in question on condition, as he alleged, that if any fencing was required on the side of the tank the Municipality would have to erect the same at their own costs. On receipt of this letter it appears that the Municipality caused certain departmental estimates to be prepared for fencing and for acquiring the extra strip of land on the side of the tank but that, inasmuch as the funds did not permit of this work being done at once, the work was left in abeyance. This is clear from paragraphs 10 and 11 of the petition of appeal of the Legal Remembrancer. Some time thereafter, that is, in September 1922, the requisition as referred to above was served on the accused under section 209 of the Bengal Municipal Act. The accused failed and neglected to carry out the works specified in the requisition and he was prosecuted before the Deputy Magistrate of Howrah who by his order dated 5th January 1923 acquitted the accused.

On behalf of the appellant it has been contended before us that the letter of the 14th December 1898, relied upon by the accused and a copy whereof has been tendered in evidence, being Exhibit (A), was a copy of a copy of a letter addressed to the Municipality by the accused and as such it was not admissible in evidence. Further, it has been argued that there are no materials from which it can be established that the Municipality had undertaken to fence the tank at their own costs and that assuming that the Municipality had so undertaken, that, by itself, did not and could not absolve the accused of his obligation to carry out the requisition which was served on him under the provisions of section 209 of the Bengal Municipal Act. Now, so far as the materials on the present record go, it is clear that, at any rate, from 1914 onwards, up to date, the accused has been insisting upon this, namely, that the land was originally made a free gift of to the Municipality on conditions such as to be found in the letter of the 14th December 1898. It has been suggested to us that in the archives of the Municipality at Howrah there is no such letter as the letter of the 14th December, set out in paragraph 15 of the petition

of appeal purports to be, and that what had really happened was that along with the letter of the 20th May 1914 written in reply to Mr. Hopkin's letter, a letter purporting to have been written on the 14th December 1898, was enclosed and that the accused had obtained a certified copy of that copy which he had enclosed in that letter. Now the document, Exhibit (A), does not by itself purport to be a certified copy of a copy of a letter. The witness to whom this letter was put in the course of his cross-examination does not describe it as a certified copy of a copy of a letter. He states that it is a certified copy of a letter bearing a date of the 14th December 1898 and we find on Exhibit A itself a note by the Magistrate that the letter itself of which it purports to be a copy was admitted by the Pleader for the prosecution.

In the third place, it is clear from the extract of the register of letters received by the Municipality of Howrah in the month of December 1898, that a letter purporting to come from the accused and bearing the date of the 14th December 1898, making a free gift of certain land on certain conditions was received by the Municipality. In the fourth place, it is apparent from the materials on the record that throughout the years 1914, 1915, 1916, and 1917, the accused had been consistently insisting upon the performance by the Municipality of the conditions which he had imposed upon them at the time when he made a free gift of the land to the Municipality in December 1898. Taking all these circumstances together, the cumulative effect thereof is, in our opinion, conclusive of the fact that the Municipality had received a letter such as has been set out in paragraph 15 of the petition of appeal of the Legal Remembrancer and that it is now too late for the Municipality to contend that no such conditions as are to be found in the letter, were ever imposed by the accused at the time when the free gift of the land was made to the Municipality. That being so, it follows, in our opinion, that Exhibit (A) was admissible in evidence and, secondly, that there are abundant materials on the record from which an affirmative conclusion may be drawn that the Municipality accepted a

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free gift of the land on conditions imposed by the accused. The question now arises whether, having regard to all the facts referred to above, the Municipality in 1922 was entitled by means of the requisition under section 209 of the Bengal Municipal Act, to call upon him to cause a fence to be erected on the side of the tank. The language of the section is only indicative of this, that there is power in the Municipality to require a person to cause a fence to be erected by the side of a tank. But, because the power is existent in the Municipality by virtue of statutory provisions, it does not follow that the Municipality cannot accept conditions such as were imposed by the accused in December 1898 when he made a free gift of certain land to the Municipality. There is nothing in the Municipal Act itself which can remotely suggest that the Municipality is incompetent to enter into a binding engagement of this description. If that is so, the Municipality is not, in our opinion, in the circumstances of a particular case, competent to require the accused to cause a fencing to be erected at his own cost. The circumstance that from the years 1915, 1916, and 1917 the question of sanction of a departmental estimate for the fencing of the tank was on the *tapis*, cannot be overlooked. It shows, in our opinion that the Municipality at that time was prepared to acquiesce in the contention put forward before it by the accused that the fencing, if it had to be done at all, had to be done at the expense of the Municipality. It was not until it was discovered that the funds did not permit the fencing in question to be erected at once that this prosecution started. On review of the entire circumstances before and after the prosecution started, we are of opinion, that there is no ground for our disturbing the order of acquittal.

The appeal is accordingly dismissed.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1413
OF 1922.

January 12, 1923.

Present.—Mr. Justice Abdul Raof.

KHAZAN SINGH—PETITIONER

versus

KIRPA SINGH AND OTHERS—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 195, 439—Penal Code (Act XLV of 1860), s. 182—Sanction for prosecution—Application to Appellate Court—Revision—Offence under s. 182—District Magistrate, power of, to grant sanction.

Where an application under clause (6) of section 195 of the Criminal Procedure Code is made to an Appellate Court against the order of the First Court refusing or granting a sanction to prosecute, the order of the Appellate Court is open to revision under section 439 of the Code. [p. 780, col. 1.]

Bishen Singh v. Amritsaria, 5 P. R. 1908 Cr. 17 P. W. R. 1908 Cr.; 103 P. L. R. 1908; 7 Cr. L. J. 281, (R. B.) followed.

Sarat Chandra Mandal v. Ram Sash Roy, 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265; (1923) A. I. R. (C) 451 23 Cr. L. J. 665, dissented from.

Although Police Officers in a district are generally subordinate to the District Magistrate, that is not the subordination contemplated by clause (a) of sub-section (1) of section 195 of the Criminal Procedure Code. That clause contemplates subordination to some superior Officer of Police. [p. 780, col. 2.]

Ramasory Lall v. Queen-Empress, 27 C. 452; 4 C. W. N. 594; 14 Ind. Dec. (N. S.) 297, relied on.

A District Magistrate has, therefore, no power to grant sanction for prosecution under section 195 (1) (a) of the Criminal Procedure Code in respect of an offence under section 182 of the Penal Code for giving false information to the Police. [p. 780, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Ambala, dated the 28th April 1922, refusing to set aside the sanction to prosecute the petitioner, granted by the District Magistrate of the Ambala District, dated the 23rd February 1922.

Mr. Ganpat Rai, for the Petitioner.

Mr. Anant Ram, for the Respondents.

JUDGMENT.—This is a petition for revision under section 439 of the Criminal Procedure Code against an order of the Sessions Judge, Ambala, refusing to set aside the sanction granted by the District Magistrate of the Ambala District. It appears that one Khazan Singh made a false and malicious report to the Police against Kirpa Singh and others. The First

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Information Report was dated the 4th November 1921, in which Khazan Singh alleged that his servant Sundar Singh had been assaulted and bound and that Kirpa Singh and others were looting his property. An inquiry was made by the Police into this matter and the facts alleged were found to be false and fabricated. The charge was, therefore, cancelled by the Police. Thereupon an application was made to the District Magistrate under section 195 for sanction to prosecute Khazan Singh under sections 211 and 193. That application was rejected by the District Magistrate who remarked in his order that there would be a good ground for sanctioning the prosecution under section 182 of the Indian Penal Code on a proper application being presented for that purpose. A petition was accordingly made under section 195 for permission to prosecute Khazan Singh under section 182, Indian Penal Code and the District Magistrate made an order granting the sanction prayed for.

Against that order Khazan Singh preferred an appeal to the Sessions Judge of Ambala. His appeal has been rejected by the learned Sessions Judge on the ground that as the District Magistrate is the head of the Ambala District Police his order must be taken to have been made in that capacity and not as a Magistrate and that, therefore, the sanction granted by him can be revoked only by an authority to which the head of the Ambala District Police is subordinate.

Khazan Singh has now come up in revision to this Court. Mr. Anant Ram for the opposite party has taken a preliminary objection to the hearing of the revision on the ground that only one appeal or rather one application in revision is contemplated by sub-section (6) of section 195 of the Criminal Procedure Code and that the Legislature has not intended in cases not covered by section 439, Criminal Procedure Code, to allow a succession of appeals or applications in revision. In support of this contention he relied upon the case of *Sarai Chandra Mandal v. Ram Sassi Roy* (1). This view of the Calcutta Court is, however, opposed

to the Full Bench decision of the Punjab Chief Court in *Bishen Singh v. Amritsar* (2). I accordingly overrule the objection and hold that the revision lies under section 439 of the Criminal Procedure Code.

The next question that I have to decide is whether the District Magistrate had authority to grant sanction in this case as the head of the Police of the Ambala District. In the case of *Ramasory Lall v. Queen-Empress* (3) it was held that, although Police Officers in a District were generally subordinate to the District Magistrate, the subordination contemplated by section 195 of the Criminal Procedure Code was not such subordination. That subordination contemplated some superior Officer of Police. This appears to be the correct view of the law and I must hold that the District Magistrate had no power to grant sanction under section 195 (6) of the Criminal Procedure Code. The view taken by the learned Sessions Judge cannot be supported.

I, therefore, accept the revision and revoke the sanction granted by the District Magistrate.

Z K.

Appeal accepted.

(2) 5 P. R. 1908 Cr.; 7 P. W. R. 1908 Cr.; 103 P. L. R. 1908; 7 Cr. L. J. 281 (F. B.).

(3) 27 C. 452; 4 C. W. N. 594; 14 Ind. Dec. (N. S.) 297.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 183 OF 1923.

April 24, 1923.

Present:—Mr. Justice C. C. Ghose and
Mr. Justice Cuming.

RAMAN BEHARI ROY *alias* RAMAN
BEHARI DAS — PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 415, 417—
Despatch of insured cover purporting to contain
notes, but in fact empty, whether cheating.*

(1) 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265 (1923) A. I. R. (C.) 45; 23 Cr. L. J. 665.

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Accused sent an insured cover to the complainant through the Post Office purporting to contain a number of Government Currency Notes. On receipt the cover was found to contain only a letter advising the despatch of the notes and some bits of waste paper:

Held, that the conduct of the accused did not amount to cheating inasmuch as the complainant was not subjected to any of the consequences detailed in section 415 of the Penal Code.

Rule against the order of the Deputy Commissioner, Sylhet.

Babus Mainmatha Nath Mukherjee and Nikunja Behary Roy, for the Petitioner.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This Rule was issued calling upon the Deputy Commissioner of Sylhet to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside on the ground that, on the facts alleged by the prosecution, no offence under section 417, Indian Penal Code, has been made out. We have heard Mr. Manmathanath Mookerjee in support of the Rule and Mr. Orr on behalf of the Crown and for the reasons given below, we are of opinion that Mr. Mookerjee's contention must prevail.

The facts alleged by the prosecution, shortly stated, are as follows:—

It is alleged that the accused sent to one Nobin Chandra Chowdhury an insured cover purporting to contain eight Government Currency Notes of Rs. 100 each. The envelope in question, it appears, was handed over by the accused in person to the Post Master at Nilambazar Post Office on the 16th November 1920. The cover was received at the Beliaghata Post Office on the 18th November 1920 and was delivered to an agent of the said Nobin Chandra Chowdhury. On the addressee opening the envelope, the same was found to contain a letter advising the despatch of a sum of Rs. 800 and several bits of waste paper. No Government Currency Notes were found inside the cover. Thereupon the Post Master of the Beliaghata Post Office was communicated with by the addressee and the Police were also called in.

These facts have been found to be correct by the learned Sessions Judge and, as stated above, the argument on behalf

of the petitioner is that, assuming that these facts are correct, no offence under section 417, Indian Penal Code has been made out.

Now, in order to find out the ingredients of the offence of cheating, we must turn to section 415, Indian Penal Code. The ingredients required by that section are:—

1. Deception of any person.
2. (a) Fraudulently or dishonestly inducing that person
 - (i) to deliver any property to any person, or
 - (ii) to consent that any person shall retain any property; or

(b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Now, in this case, having regard to the facts found, it is difficult for us to say that the person deceived has been induced to deliver any property to any other person or to consent that the said other person should retain any property, or that the person deceived has been induced to do or omit to do anything which he would not have done or omitted, if he were not so deceived, and which act or omission has caused or was likely to cause damage or harm to that person in body, mind, reputation, or property. All that the person deceived has been induced to do is that he has signed a receipt acknowledging the delivery of a cover. He has not acknowledged by that the receipt of any sum of money alleged to be contained in the cover. That being so, we are unable to say that the charge of cheating has been brought home to the accused in the circumstances which appear on the record before us.

The result, therefore, is that the Rule is made absolute. The petitioner will be discharged from his bail bond and the fine, if paid, will be refunded.

Z. K. & N. H.

Rule made absolute.

GANPAT RAI v. EMPEROR.

LAHORE HIGH COURT.CRIMINAL REVISION PETITION NO. 1715
OF 1922.

February 3, 1923.

Present:—Mr. Justice Moti Sagar.

GANPAT RAI AND OTHERS—ACCUSED—
PETITIONERS

VERSUS

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 257—Discretion of Magistrate to refuse to summon witnesses, extent of—Order directing deposit of expenses of witnesses, legal ty of.

The language of section 257 of the Criminal Procedure Code is imperative, and a Magistrate has no discretion to refuse to issue process to compel the attendance of any witness merely because he thinks that no useful purpose will be served by summoning him as a witness to attend the Court. The person who applies for their attendance is the best Judge of the matter and it is not for the Magistrate to say which witnesses shall and which shall not be of any use to him. The only grounds upon which an application for the summoning of witnesses can be refused are those enumerated in clause (1) of section 257 and a Magistrate is not entitled to refuse the application on any other ground. [p. 783, col. 2.]

Section 257 (2) of the Criminal Procedure Code fully empowers a Magistrate trying a case to order that the reasonable expenses required for the attendance of a witness shall be deposited in Court by the person applying for his attendance before the witness is summoned. [p. 782, col. 2.]

Qadu v. Queen-Empress, 7 P. R. 1898 Cr., dis-sented from.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the District Magistrate, Karnal, dated the 28th November 1922.

Mr. Shamair Chand, for the Petitioners.

Mr. C. H. Carden Noad, for the Respondent.

JUDGMENT.—The three petitioners, Mani Ram, Khushi Ram and Ganpat Rai, who were prosecuted under section 108, Criminal Procedure Code, made three separate applications to the District Magistrate of Karnal for the summoning of certain witnesses and production of certain records. The District Magistrate refused to summon some of the witnesses on the ground that the applications for summoning them had been made for the purpose of delay and vexation to those witnesses and some on the ground that no useful purpose would be served by summoning them to attend

as witnesses in the Court; while with regard to others he ordered that they could be summoned provided the petitioners deposited a certain sum of money in Court to cover the expenses of their attendance. In regard to the records he ordered that the petitioners should file copies of the documents out of those records upon which they wanted to rely and that if upon a perusal of the copies he found that the production of the original documents was necessary he shall send for those documents.

Against these orders the petitioners have filed an application for revision to this Court, and it has been contended on their behalf that the orders passed by the learned District Magistrate are improper and should be set aside. It will be convenient to deal with the orders passed on each of the applications separately:—

Mani Ram applied on the 27th November 1922, that the following three witnesses should be summoned on his behalf:—

- (1) Lala Beni Parshad, Pleader, Ambala.
- (2) Chaudhari Ghulam Bhik, Pleader Ambala, and
- (3) The Secretary, Provincial Congress Committee, Lahore.

The order of the District Magistrate upon this application was that the witnesses might be summoned provided the petitioner deposited a sum of Rs. 70 in Court to cover the expenses of their attendance. I do not think there is anything unreasonable or improper in this order, and I refuse to set it aside. Section 257 (2) of the Criminal Procedure Code fully empowers a Magistrate trying a case to order that reasonable expenses of a witness shall be deposited by the applicant in Court before he is summoned and it has not been shown why the District Magistrate should not have exercised this power in this particular case. Reliance has been placed by Counsel on *Qadu v. Queen-Empress* (1), in which it was held that an order by a District Magistrate refusing to summon witnesses for the defence without their expenses being paid by the accused should be passed very sparingly, and is an improper order in a case where the accused is unable or

(1) 7 P R. 1898 Cr.

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unwilling to deposit the money. With all respect to the learned Judge who was responsible for this judgment, I confess I am unable to see any impropriety in such an order. If the rule laid down in this authority was to be literally followed, section 257 (2) of the Criminal Procedure Code would become an entirely dead letter. I can hardly conceive of a case where an accused person would willingly deposit the expenses of his witnesses if he knew that he had only to express his unwillingness to entitle him to get his witnesses summoned at the expense of the Government. In my opinion the District Magistrate has not exercised his discretion in an improper or illegal manner, and I am, therefore, unable to interfere with the order in question. It has, however, been urged that Rs. 70 is an unreasonably large sum for the expenses required for the attendance of three witnesses only. It should be observed that two out of the three witnesses summoned are professional gentlemen living in Ambala while the third witness will have to come all the way from Lahore to Karnal. Having regard to the fact that the sum ordered to be deposited includes also the Railway fare of the witnesses summoned, I do not think that Rs. 70 is an unreasonably large amount.

The next case to be considered is that of Ganpat Rai. He summoned 48 witnesses and applied for the production of 21 records. The District Magistrate ordered that in addition to the Railway fare of all persons who will have to come from places other than Karnal itself the petitioner should deposit a sum of Rs. 5 per each witness to cover the expenses of his attendance in Court before the witnesses could be allowed to be summoned. It is urged on behalf of the petitioner that a sum of Rs. 5 for each witness is a little bit too much, but, having regard to the fact that some of the witnesses summoned are Pleaders and some are other respectable gentlemen from the town itself, I do not think that the sum required to be deposited is excessive. It is further urged that it will be impossible for the District Magistrate to examine all the 48 witnesses in one day, and that the petitioner will be put to a great deal of unnecessary expense if he is made

to summon all the witnesses for one date and the witnesses have to go back without their statements being recorded on that date. I think there is force in this contention, and I would, therefore, direct that the District Magistrate should summon only so many witnesses for one hearing as he thinks he will be able to examine on that hearing.

Khushi Ram summoned ten witnesses and wanted three records to be produced. The District Magistrate allowed only one witness to be summoned, and rejected the application in respect of the remaining nine witnesses. Counsel for the petitioner has stated before me that he does not want to examine the first four witnesses, namely,

- (1) the Commissioner of the Ambala Division.
- (2) the Tahsildar of Thanesar;
- (3) the Sub-Judge of Hissar; and
- (4) the Excise Inspector of Ambala,

and has withdrawn his application so far as these witnesses are concerned. The order of the District Magistrate, therefore, will be maintained with regard to these four witnesses. But I do not see any valid reason why the District Magistrate should have refused to summon the other five witnesses. The language of section 257, Criminal Procedure Code, is imperative and the Magistrate has no discretion to refuse to issue process to compel the attendance of any witness merely because he thinks that no useful purpose will be served by summoning him as a witness to attend the Court. The only grounds upon which an application can be refused are those enumerated in clause (1) of section 257 of the Criminal Procedure Code, and the Magistrate is not entitled to refuse the application on any other grounds. The District Magistrate has not refused the application in this case with regard to the five witnesses because he thinks that the application is frivolous or vexatious but on the ground that their evidence will not be of any material use to the applicant. The applicant is the best judge in this matter and it is not for the District Magistrate to say which witnesses shall, and which shall not, be of any use to that accused. I, therefore, allow the revision

GANODA DASSYA V. SRIMANTA GHOSH.

in so far as to hold that all the witnesses except those who have been given up by the petitioner in this Court shall be summoned by the District Magistrate if he so desires. With regard to the records it has been stated before me that their production is necessary, inasmuch as the petitioner wants to prove his presence in various Courts on the dates when he is alleged to have made certain objectionable speeches, and that the fact of his presence in those Courts is recorded in the records. It should be remembered that copies would be inadmissible in evidence when the original documents are in existence and it will be impossible for the witnesses to make statements as regards facts recorded in those documents unless they are before the Court. In these circumstances, I am of opinion that the records should have been allowed to be produced without the petitioners having been made to undergo the necessary expense of obtaining certified copies.

I allow the revision and modify the orders of the learned District Magistrate to the extent above specified.

Z. K.

Petition allowed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 75 OF 1923.

May 11, 1923.

Present.—Mr. Justice Ghose and
Mr. Justice Cuming.

GANODA DASSYA—ACCUSED—

PETITIONER

versus

SRIMANTA GHOSH—DEFENDANT—
RESPONDENT.

Criminal trial—Witness deaf but able to speak and write—Refusal to examine witness, effect of.

A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but who is able to speak and write, and such refusal, if prejudicial, vitiates the trial.

Reference by the Sessions Judge, Pabna and Bogra.

Babu Nishitha Nath Ghatak, for the Accused.

JUDGMENT.—This reference has arisen out of a case instituted under the provisions of section 488 of the Code of Criminal Procedure by a widow for orders as regards the maintenance of an illegitimate child of hers by one Srimanta Ghosh. The Deputy Magistrate directed that Srimanta Ghosh should pay a sum of Rs. 5 per month for the maintenance of the illegitimate child. Against this order an application for revision was made before the learned Sessions Judge of Pabna and Bogra. The learned Sessions Judge found on examination of the record that the trial had been vitiated by the refusal on the part of the Trying Magistrate to examine a witness who was said to be deaf, but who could speak and write, and further that the evidence in the case had not been recorded in the manner prescribed by the Code.

As regards this last point, it appears to us that the record of the evidence as it stands cannot be described as a memorandum of the evidence which the Magistrate under the provisions of the Code of Criminal Procedure was under an obligation to make. We think that the record of the evidence should have been fuller.

As regards the first point, it appears to us that the Trying Magistrate was clearly wrong in not examining one Nagendra Sircar, who is deaf but who can speak and write. We can see no reason why the examination of this witness should not have been proceeded with and we think that the refusal on the part of the Trying Magistrate to examine this witness has materially prejudiced the petitioner, Srimanta Ghosh. We think, therefore, that the matter should go back for a rehearing of the original petition presented under section 488, Criminal Procedure Code. The Magistrate after taking all the evidence that may be adduced by the parties, will pass orders according to law.

The result is that we accept the reference made by the learned Sessions Judge and set aside the order of the Trying Magistrate and direct a re-hearing in the light of the remarks made above.

Z. K. & N. H.

Reference accepted.

PALA RAM V. NOTIFIED AREA COMMITTEE, KOT ADDU, DISTRICT MUZAFFARGARH.

LAHORE HIGH COURT.

CIVIL REFERENCE NO. 9 OF 1922.

March 2, 1923.

Present:—Mr. Justice LeRossignol and
Mr. Justice Broadway.
PALA RAM—DEFENDANT—PETITIONER
versus

THE NOTIFIED AREA COMMITTEE,
KOT ADDU, DISTRICT MUZAFFAR-
GARH—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 242
(1) (a). *Notification under—Profession Tax—Naib*
Tahsildar, whether follows profession.

A public servant, such as a *Tahsildar* or a *Naib Tahsildar*, is appointed to, and holds, an office, and does not carry on a profession or calling such as would bring him within the purview of the Notification of the Punjab Government under section 242 (1) (a) of the Punjab Municipal Act imposing a Profession Tax.

Committee of Notified Area, Una v. Chatar Behari Narain, 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918, referred to.

Case referred under section 84 (2) of the Municipal Act by the Deputy Commissioner, Muzaffargarh, with his No. *nil* of 1922, for orders of the High Court.

ORDER.—Acting under section 242 of the Punjab Municipal Act, the Punjab Government imposed a Professional Tax in the Kot Addu Notified Area by Notification No. 320, dated 12th May 1915, which is to the following effect:—

“Under the provisions of section 242 (1) (a) of the Punjab Municipal Act (III of 1911), the Lieutenant-Governor is pleased to impose the following Profession Tax within the Notified Area of Kot Addu in the Muzaffargarh District with effect from 1st July 1915.”

“Description of Tax.

“Class of persons to be taxed—All persons exercising any profession or carrying on any trade or calling within the Notified Area of Kot Addu. . . .”

The tax was to be assessed by the Committee of the Notified Area and the assessment was subject to confirmation by the Deputy Commissioner of the Muzaffargarh District. The Committee considered that Lala Pala Ram, Settlement Tehsildar of Kot Addu, was liable to pay the tax and assessed him accordingly. He protested and the Deputy Commissioner of Muzaffargarh referred the question to the High Court under section 84 (2) of the Municipal Act

for a decision as to whether the expression “persons exercising any profession or carrying on any trade” covered or included a *Naib Tahsildar*. The matter came up before Harrison, J., who has referred the question to a Division Bench.

In an unreported case printed as *Committee of Notified Area, Una v. Chatar Behari Narain* (1) Scott-Smith, J., held that a Munsif could not be said to follow a profession, and this appears to be the only occasion when this point has come up before this Court. It seems to be clear that a *Tahsildar* or *Naib-Tahsildar* does not carry on any “trade,” nor can he be said to practice any “calling” in the Notified Area. A profession is defined in Webster’s Dictionary as “the occupation if not mechanical, agricultural, or the like, to which one devotes himself; the business which one professes to understand and to follow for subsistence; calling vocation and employment.”

A *Tahsildar* or a *Naib-Tahsildar* can scarcely be considered to carry on a profession in the above sense. It would be more appropriate to describe him as holding an office which term, according to Stroud’s Judicial Dictionary, is “a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging” and “has been sometimes confined to a public employment regulated by law”; while in Wharton’s Law Lexicon the term “office” is said to be “an employment, either judicial or municipal ‘civil’ military, or ecclesiastical.” A public servant such as a *Tahsildar* or *Naib-Tahsildar* is appointed to, and holds, an office and does not, in our opinion, carry on a profession or calling, such as would bring him within the purview of the Notification in question.

Our answer to the reference is, therefore, in the negative.

Z. K. & N. H. *Answered in the negative.*

(1) 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918.

SANT KAUR v. SHER SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1639 OF 1919.

February 13, 1923.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Efoide.Musammal SANT KAUR AND OTHERS—
DEFENDANTS—APPELLANTS
versusSHER SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.*Custom—Succession—Collaterals living in another village—Sisters v. Collaterals—Self-acquired property—Jats of Amritsar District—Riwaj-i-am, entry in, value of.**Prima facie*, the agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which land belonging to the deceased is situate. [p. 787, col. 1.]*Daya Ram v. Sohel Singh*, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.) and *Nanda v. Hira*, 41 Ind. Cas. 230; 47 P. R. 1917; 117 P. W. R. 1917, followed.

Among people following Customary Law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter, and she must in such matters be regarded as a sister of that proprietor and not as a daughter of his father. [p. 788, col. 1.]

Hamira v. Ram Singh, 134 P. R. 1907; 85 P. W. R. 1907 (F. B.), followed.

Among Jats of the Amritsar District the burden is on the sister to prove that she has a right to succeed to the self-acquired property of her brother in preference to his collaterals in the third degree. [p. 788, col. 1.]

(Case-Law discussed.)

An entry in the *riwaj-i-am* which is not opposed to general custom is a strong piece of evidence in support of the custom mentioned in it. [p. 789, col. 1.]*Beg v. Allah Ditta*, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), followed.

First appeal from a decree of the Subordinate Judge, Lyallpur, dated the 16th July 1919.

Mr. N. C. Pandit, for the Appellants.

Dr. G. C. Narang, Mr. Jivan Lal Kapur and Lala Devi Ditta Mal, for the Respondents.

JUDGMENT.—The pedigree-table of the parties to the suit out of which the present appeal arises will be found at page 74 of the printed paper-book.

The ancestral home of the parties is in the Amritsar District, but the property in dispute amounting to some 70 squares in

area was acquired by Sewa Singh in the Lyallpur District. He died on the 10th October 1918 and was succeeded by his son, Uttam Singh, who died 15 days later on the 25th October 1918. After the death of Uttam Singh mutation of the property in dispute was effected, with the consent of Musammal Sant Kaur and Musammal Dhan Kaur, in their names as well as in the name of Musammal Harbans Kaur, the daughter of Uttam Singh, and in the names of defendants Nos. 3 to 6, the sisters of Uttam Singh and the daughters of Sewa Singh, in equal shares. The plaintiffs, who are brothers and nephews of Sewa Singh, brought the present suit for a declaration that the alienation by way of mutation in favour of defendants, with the exception of Musammal Sant Kaur, should not affect their rights after the death or re-marriage of Musammal Sant Kaur. The lower Court having regard to the answer to question No. 70 in Mr. Craik's Customary Law of the Amritsar District, Art. 24 of Rattigan's Digest of Customary Law, and *Hamira v. Ram Singh* (1), was of opinion that the *onus* lay upon the defendants, and holding that they had not discharged it, gave the plaintiffs a decree that the alienation of 4/9ths of the land in dispute in favour of the defendants Nos. 3 to 6 should not affect the plaintiffs' rights of reversion on the death or re-marriage of Musammal Sant Kaur.

The defendants have appealed to this Court, and as there is practically no evidence on the record, the argument has mainly been as to which party the *onus probandi* lay on. Mr. N. C. Pandit, on behalf of the appellants, laid some stress on the fact that the plaintiffs lived in the Amritsar District, whereas the land which was acquired by Sewa Singh, was in the Lyallpur District where the plaintiffs themselves owned no land. In our opinion this fact in no way affects the plaintiffs' right of succession as agnates of Sewa Singh. It was held in *Daya Ram v. Sohel Singh* (2) that "it has not been laid down by *Lokha v. Hari* (3) and other rulings on the point that mere

(1) 134 P. R. 1907; 85 P. W. R. 1907 (F. B.).

(2) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.).

(3) 64 P. R. 1893.

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community of descent does not give agnates of a deceased land owner a right of succession to acquired land left by him in a village in which they do not own any land." This was followed in *Nanda v. Hira* (4) where in it was held that "*prima facie* agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situate." We, therefore, hold that the mere fact that the plaintiffs live in the Amritsar District while the land in dispute is in the Lyallpur District does not affect their rights of succession.

The next point urged by Mr. Pandit was in regard to the answer to question No. 70 in Mr. Craik's Customary Law of the Amritsar District. He points out that no instances are given in the answer and that the author on page VI of the preface states that "in the case of" questions in regard to which no particular case in point was cited by the people and no judicial decisions or mutations could be traced, the answers represent nothing more than the personal opinion of the persons consulted and cannot carry the same weight as answers supported by cases." It is, therefore, urged that as there are no instances cited in support of answer to question No. 70 the answer is valueless. In our opinion it cannot be said that no value attaches to this answer, but we agree that the same value does not attach to it as would have attached had there been instances cited in support of it. It certainly does not appear to be opposed to the general principle as laid down in Article 24 of Rattigan's Digest of Customary Law, and, therefore, the decision of their Lordships of the Privy Council reported as *Beg v. Allah Ditta* (5) is in point wherein it was held that an entry in the *riwaj-i-am* is a strong piece of evidence in support of the custom mentioned therein.

Counsel next referred to Article 24 of Rattigan's Digest and argued that that

Article really applied to cases where the property was ancestral. Some of the authorities, however, referred to under that Article deal with cases of acquired property. We have referred to these cases. The first one is *Sohna Singh v. Kahan Singh* (6) where it was found in a suit the parties to which were Dhariwal Jats of the Faziika Tahsil of the Ferozepore District, that no custom was established by which a sister and her son were entitled to inherit acquired landed property in preference to collaterals descended from the grandfather of the deceased owner. In that case the *riwaj-i-am* was against the sisters and it was held that they had not proved their claim. Then there is the case of *Harnamon v. Santa Singh* (7). There the conflicting claims to non-ancestral property of a sister and of a collateral in the 10th degree were considered, and the Judges were of opinion that *Hamira v. Ram Singh* (1) reinforced by *Gurditta v. Jai Singh* (8) showed that the onus lay on the sister.

The next case to which we were referred was that of *Hussain Bibi v. Nigahia* (9) in which it was held that in questions of succession to self-acquired property between collaterals of the 8th degree and sisters, the onus of proving that they have a preferential right is, in the first instance, on the latter. When that case first came up for hearing the Judge in Chambers discussed Article 24 of Rattigan's Digest and also the case of *Bholi v. Kahna* (10) and said that the question of onus was a somewhat difficult one. In *Bholi v. Kahna* (10) the parties were Muhammadans and the contest was between sisters and collaterals in the 6th degree and Clark, C. J., was of opinion that under the circumstances the onus was upon the collaterals who lived in another village.

In the case of *Hussain Bibi v. Nigahia* (9) also the parties were Muhammadans and the

(6) 113 P. R. 1892.

(7) 13 Ind. Cas. 711; 98 P. W. R. 1912; 122 P. L. R. 1912.

(8) 72 P. R. 1907; 31 P. L. R. 1908; 150 P. W. R. 1907.

(9) 55 Ind. Cas. 828; 1 L. J. 70 P. L. R. 1920; 34 P. W. R. 1920; 1 L. L. J. 89.

(10) 1 Ind. Cas. 695; 35 P. R. 1909; 45 P. L. R. 1909; 32 P. W. R. 1909.

(4) 41 Ind. Cas. 230; 47 P. R. 1917; 117 P. W. R. 1917.

(5) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 L. A. 89 (P. C.).

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collaterals were related in the 8th degree, and, therefore, the case of *Bholi v. Kahna* (10) supported the contention that the onus was upon the collaterals. In the present case, however, the personal law of the parties is the Hindu Law and under it the sisters are not heirs, or in any case they come in after collaterals related so nearly to the deceased as the plaintiffs in the present case. In *Bholi v. Kahna* (10) and in *Hussain Bibi v. Nigahia* (9) the parties were Muhammadans, and under their personal law sisters are preferred to collaterals and, therefore, those cases do not help the defendants in the present case. Moreover, in *Harnamon v. Santa Singh* (7), which followed *Hamira v. Ram Singh* (1), it was pointed out that the onus in such a case lies generally on the sisters.

Bearing these authorities in mind and also taking into consideration the answer to question No. 70 in Craik's Customary Law of the Amritsar District which certainly is evidence in favour of the plaintiffs, we are constrained to hold that the onus lay on the defendants' sisters, to prove that they have a better claim to succeed to the property in dispute than the plaintiffs.

It was held in *Hamira v. Ram Singh* (1) that among the parties following Customary Law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter, and she must, therefore, in such matters be regarded as a sister of that proprietor and not as a daughter of his father. That case was one where the property was not ancestral and it is, therefore, entirely on all fours with the present case. At page 646* of that volume the Judges said: "We are unable to see that any case is made out for departing from the ordinary order of succession of sisters." In other words they were of opinion that the onus was upon sisters. Mr. N. C. Pandit wished to argue that the decision of the Full Bench was unsound but we declined to allow him to do so.

Defendants-appellants have produced no evidence with the exception of a copy of a judgment of Mr. Rose, Additional Judge of Amritsar, dated the 6th March 1917,

which is obviously quite insufficient to shift the onus.

It was finally pointed out by Counsel for the appellants that after the death or re-marriage of *Musammam Sant Kaur*, *Musammam Dhan Kaur*, as the mother of the last male owner, *Uttam Singh*, would succeed to a life-estate. There is no doubt that under Customary Law the mother is entitled to a life-interest and the only point urged against this by Counsel for the respondents is that *Musammam Dhan Kaur* having consented to the mutation in favour of defendants Nos. 3 to 6 has lost any rights which she might otherwise have had. We are unable to agree with this, no doubt she was willing to allow mutation to be made in favour of her daughters, but if this mutation is held not to confer any rights upon them she may assert her own rights to a life-interest after the death or re-marriage of her daughter-in-law, *Musammam Sant Kaur*. We, therefore, think that there should be an amendment of the decree by adding the name of *Musammam Dhan Kaur* after that of *Musammam Sant Kaur*.

We dismiss the appeal but we direct that the decree be amended to this extent that the alienation of 4/7ths of the land in suit in favour of defendants Nos. 3 to 6 shall have no effect, on plaintiffs' right of reversion after the death or re-marriage of *Musammam Sant Kaur* and *Musammam Dhan Kaur*. As the case is a very hard one for the defendants we direct that the parties should bear their own costs in this Court.

Z. K.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL No. 42 OF 1922.
April 26, 1923.

Present:—Mr. Pison, J. C.

MURLI MAL—DEFENDANT—APPELLANT
versus—

VAISHNO DITTA AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Court-fees—Partition suit—Appeal—Deficiency
in Court-fees—Extension of time—Limitation

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Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), s. 149.

A plaint or a memorandum of appeal in a suit for partition must bear *ad valorem* Court-fees on the value of the share claimed by the plaintiff, whether the latter is out of possession or is in joint possession of the property in dispute. [p. 790, col. 1.]

Tara Chand Mukherji v. Afzal Beg, 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329, *Harcharan Das v. Sukhraj Das*, 62 Ind. Cas. 979, dissented from.

As a general principle, it is always advisable in the interests of justice that an appeal should be heard on its merits in preference to being rejected on any technical points of law. [p. 790, col. 2.]

Where there could have been no misapprehension as to the amount of Court-fees payable on a memorandum of appeal, and the memorandum is nevertheless deficiently stamped, the appellant cannot get any indulgence by way of extension of time under section 5 of the Limitation Act or section 149 of the Civil Procedure Code. [p. 791, col. 1.]

Further appeal from an order of the Divisional Judge, Peshawar, dated the 19th December 1921, affirming that of the District Judge, Peshawar, dated the 29th July 1921.

Mehta, *Mangal Sain*, for the Appellant.
Mr. *Diwan Chand*, R. S., for the Respondents.

JUDGMENT.—I have to decide on this appeal the following preliminary points:

(1) whether the Divisional Judge was right in holding that the appeal to his Court required a Court-fee stamp of Rs. 175 and whether he was justified in directing the defendant-appellant to make good the deficiency of Rs. 165;

(2) whether the present appeal to this Court can be filed by the defendant-appellant on a Court-fee of Rs. 10, and

(3) whether if the findings on the above two points go against the appellant, the present appeal to this Court must be rejected as barred by time.

The present suit is one for partition of three properties which are admittedly owned jointly by the parties to the suit. The suit was resisted by defendant No. 1 (the present appellant) on the ground that the parties held joint mortgagee rights in another house, and that partition could only proceed if that house also were included in the property to be partitioned. The two Courts below have concurred in finding that the said house was not the joint property of the parties and in decreeing

the plaintiffs' claim to partition of the property in suit. The suit was filed upon an *ad valorem* Court-fee calculated upon the value of plaintiffs' 1-3rd share in the subject-matter of the suit. The defendant, however, lodged his appeal in the Court of the Divisional Judge on a Court-fee of Rs. 10. He based his alleged right to do this upon the views taken by various High Courts in India that, in a suit for partition, where the plaintiff was already in joint possession of the property sought to be partitioned, the suit was governed by Art. 17, clause (6) of Schedule II of the Court-Fees Act. The learned Divisional Judge considered this question and held that, under the authority of the ruling of this Court published as Judicial Record No. 80, Court-fee must be paid on the value of the share claimed. He held, therefore, that the Court-fee on the appeal by the defendant must be calculated in the same manner, but under section 5 of the Limitation Act and section 149 of the Civil Procedure Code allowed the limitation to be extended and the Court-fee to be made good. He then proceeded to dispose of the appeal on its merits. Now, it is fully admitted by the learned Counsel for the appellant that the Divisional Judge had no alternative but to follow the interpretation of the law applicable to this Province enunciated in the Judicial Record No. 80. He contends, however, that, although the Divisional Court was bound to follow that authority, the present Court is not so bound, and that he is entitled to re-open the question and obtain a fresh adjudication upon this point of law. It cannot be denied that I have, in actual fact, authority to overrule the finding of my predecessor in this Court if sufficient cause for me to do so is shown. The learned Counsel, however, has entirely failed to convince me that there is any valid ground for me to disagree with the finding of this Court passed in the year 1915 and which has been accepted as settled law for this Province for the last eight years. I do not consider it necessary to discuss the various authorities for and against the view which was taken by Mr. Barton in 1915. There was, even then, no conflict of authority in the case of suits in which the plaintiff was actually out of possession of the property. There

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has always been a consensus of opinion that in such cases an *ad valorem* Court-fee is paid upon a plaint for partition. The conflict of authority exists in cases where the plaintiff is already in joint enjoyment of the property sought to be partitioned. In support of the contention that a suit of the latter kind is governed by Art. 17 clause (6) of Sch. II of the Court-Fees Act, *Tara Chand Mukerji v. Afzal Beg* (1) and *Harcharan Das v. Sukhraj Das* (2), among other authorities, have been quoted. In the ruling of this Court published as 80 Judicial Record, however, very full and complete reasons have been given for disagreeing with those authorities and the case-law upon the subject has been reviewed at length. I am in entire agreement with the finding of my predecessor upon this point, and it need hardly be remarked that I should in any case be slow to overrule a finding which has stood the test of eight years' experience in this Province. I find, therefore, on the first point for determination on this appeal, that the order of the Divisional Judge directing the deficiency in the Court-fee to be made good must stand.

It follows from the above and it is admitted that it is a necessary corollary to that finding that the Court-fee on the present appeal must follow the Court-fee payable upon the original suit, and that the appeal is, therefore, insufficiently stamped.

Upon the third point as to whether the present appeal must be rejected as barred by time, it is contended by the learned Counsel for the respondents that this is not a case where time can be justifiably extended by the Court under the provisions of section 5 of the Limitation Act, or that leave to make good the deficiency can justifiably be granted at this stage of the proceedings under section 149, Civil Procedure Code. The date of the decision of the appeal by the Divisional Court is the 19th of December 1921. The appeal to my Court was instituted on the 16th of March 1922. The appeal was taken up at a preliminary hearing on the 26th of October 1922. It is admitted by the learned Counsel for the appellant that unless time is extended by this Court under

the provisions of section 5 of the Limitation Act, the appeal is necessarily time-barred. Now, as a general principle it is always advisable in the interests of justice that an appeal should be heard upon its merits in preference to being rejected upon any technical point of law. I am constrained to think, however, that there are considerations in the present case which outweigh the advisability of accepting this principle. The appellant could have been under no misapprehension that, on the case-law as settled for this Province by Mr. Barton's ruling of 1915, an *ad valorem* Court-fee was payable upon this appeal. Not only was that ruling binding at the time upon all Courts in this Province, other than that of the Judicial Commissioner, but the point was considered and adjudicated upon in definite and unmistakeable terms in the Divisional Court. It has, further, been admitted that the Divisional Court had no alternative but to come to the decision which it came to. If, therefore, I were to extend the period for making good the deficiency in the Court-fee, I should be recognizing a precedent under which any appellant in a case of this nature, could institute an appeal to this Court upon an insufficient Court-fee on the ground that he had always a chance of inducing this Court to overrule the interpretation of the law hitherto accepted for this Province. Cases might arise in which the deficiency was overlooked by the presiding officer or by the responsible officials of the Court and was not brought to their notice by the other side. To hold that an appellant was within his rights in risking the occurrence of such a contingency or in relying upon the faint and unrealizable hope that the Court might lay down a new rule of law in this respect would be nothing more or less than to encourage a continual attempt to deprive the Government of legitimate revenue. Some finality in the interpretation of the law by the highest Court of this Province must be recognised by all concerned. I have not indeed been shown a single case where the interpretation of the law, now in question, has been successfully challenged by this Court, or any other Court in the Province, or even where it has been challenged at all. It appears to me, therefore, impossible in this case to condone the action of the appellant

(1) 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329.

(2) 65 Ind. Cas. 979.

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in deliberately attempting to appeal upon a deficient Court-fee. It appears to me to be one where the appellant has deprived himself of any leniency which could otherwise be extended to him by this Court. I consider that in this case the law must take its course as it now stands and I must decline to extend, under section 5 of the Limitation Act, the time allowed for the institution of this appeal, or to allow the deficiency in the Court-fee to be made good at the present stage under section 149, Civil Procedure Code.

On the above findings the present appeal is barred by time. It is, therefore, dismissed with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 227 OF 1923.

February 3, 1923.

Present.—Sir Shadi Lal, Kt.,

Chief Justice, and Mr. Justice Fforde.

ZIA-UD-DIN—DEFENDANT—APPELLANT
versus

FAKHR-UD-DIN AHMAD KHAN AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Denial of landlord's title, what amounts to—Ejectment—Forfeiture—Agricultural tenancy.

In order to succeed in a claim for possession of the lands comprised in a tenancy based on forfeiture resulting from a denial of the landlord's title by the tenant, the landlord must satisfy the Court, first, that there has in fact been a denial of the nature contemplated by law, that is to say, a distinct unequivocal renunciation of the tenancy; secondly, that the denial is in respect of the land sought to be recovered; and thirdly, that the principle of forfeiture is applicable to an interest in land of the nature held by the defendant. [p. 792, col. 1.]

In considering whether what has taken place amounts in law to a denial of the landlord's title, the Court must have regard not only to the language used and the circumstances under which it came to be used, but must also consider what the tenant intended by using the particular words under the particular set of circumstances. [p. 792, col. 2.]

Where a portion of the lands comprised in a tenancy was acquired by Government and in the Acquisition proceeding the tenant put forward the claim that he was the owner of the land acquired with a view to obtain the largest possible share of the compensation awarded:

Held, that this did not amount to a denial of the landlord's title, especially with regard to the remainder of the lands, so as to entitle the landlord to resume the possession on the ground of forfeiture. [p. 792, col. 2.]

Quære.—Whether the principle of forfeiture by denial of the landlord's title applies to an agricultural lease.

Second appeal from a decree of the District Judge, Jullundur, dated the 24th October 1919, affirming that of the Subordinate Judge, Second Class, Jullundur, dated the 7th April 1919.

Mr. B. D. Kureshi, for the Appellant.

Sheikh Niaz Muhammad, for the Respondents.

JUDGMENT.—The plaintiffs are the proprietors of certain lands in the village of Dhogri, and the defendant is what is known as a *sountjidar*, that is, a petty grantee of land who holds for life or for a term of years subject to the performance of certain services to be rendered to the grantors.

The service to be performed in the present case was that the defendant should tend a certain graveyard, and his tenure could only be put an end to on one or more of the following grounds:—

- (1) Death.
- (2) Departure from the place.
- (3) Immorality.
- (4) Failure to tend the graveyard.

The present suit has been brought to terminate the defendant's possession mainly on the ground that he has denied his landlord's title. Other grounds have been alleged but the issues framed upon them have been found in defendant's favour and may, therefore, be dismissed from further consideration.

The only question for our determination is whether or not the plaintiffs are entitled to resume possession of the land granted by reason of a denial of title.

The denial alleged is contained in the grounds of appeal drafted by Counsel employed by the defendant in an appeal in a Land Acquisition case, dated the 4th October 1915. These grounds allege that the de-

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defendant is the owner of the land acquired in the case. The claim of ownership which is made for the purpose of getting the largest possible compensation for the land acquired, is confined throughout to the particular land then acquired. The expressions made use of by the draftsman are "the land now acquired" "the land acquired in this case," and "the land in suit." These are the expressions relied upon by the plaintiffs as establishing a denial by the tenant of the landlord's title of such a character as to effect a forfeiture within the well-known rule of the Common Law of England which is also expressly enacted in section III (g) of the Indian Transfer of Property Act.

In order to succeed in their claim for possession based on forfeiture, plaintiffs have to satisfy us;

firstly, that there has in fact been a denial of the nature contemplated by law;

secondly, that the denial is in respect of the land now sought to be recovered; and,

thirdly, that the principle of forfeiture is applicable to an interest in land of the nature held by the defendant.

As to the first question, we are of opinion that the expressions used by Counsel in drafting the grounds to a memorandum of appeal do not amount to "a distinct unequivocal renunciation of the tenancy" which is essential to constitute a disclaimer such as the law contemplates. We have to bear in mind not only the nature of the document in which the expressions occur, but also to the nature of the proceedings in regard to which the document was drafted. It was not a pleading in a suit between the parties for possession of the land, but a formal document grounding an appeal against an award fixing the compensation price for land acquired by the Government under certain statutory powers. The parties were both concerned only with getting the highest sum possible for their respective interests in the particular area of land acquired, and Counsel in his discretion must have framed his grounds of appeal with that object only in view. We cannot hold that the expressions used by the Pleader in that document amounted to a renunciation by the client of his character of tenant in respect of the lands now in dispute. In considering whe-

ther what has taken place amounts in law to a denial of the landlord's title, the Court must have regard not only to the language used and the circumstances under which it came to be used, but must also consider what the tenant intended by using the particular words under the particular set of circumstances. The intention of the defendant can be more fairly gathered from the attitude he himself adopted throughout the proceedings in question than from the formal grounds framed by his Counsel, and throughout those proceedings the defendant never referred to himself otherwise than as a *sounjidar*, that is, a tenant of a particular type who renders services in lieu of rent.

Upon the facts of this particular case we are satisfied that the plaintiffs have not proved a denial of title by the defendant so as to entitle them to resume possession on the ground of forfeiture.

It has been further urged by Counsel for the defendant that the principle of forfeiture by denial of the landlord's title does not apply to a tenancy of this kind, as such a tenancy is a lease for agricultural purposes, and is accordingly exempted from the provisions of section III (g) of the Transfer of Property Act by section 117 of that Act which expressly provides that none of the provisions of the Chapter shall apply to such cases. It is argued that in Provinces to which this Act applies, the forfeiture clause has been held not to apply to agricultural holdings, and that, therefore, in a Province to which the Act does not apply agricultural lease-holders should be equally immune. It is urged, on the other hand, that the liability to forfeiture and the exemption of agricultural lease-holders from such forfeiture, are both statutory provisions contained in one and the same enactment; and that where there are no such statutory provisions the ordinary Common Law principle which makes no exception in favour of lettings for agricultural purposes must prevail.

In view, however, of the conclusion we have already come to it is not necessary for the purposes of this appeal to express an opinion on this further question which may be reserved for future decision should the net point come up for determination.

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For the reasons already expressed, the appeal must be allowed and the suit dismissed with costs.

Z. K.

*Suit dismissed.***MADRAS HIGH COURT.**

REFERRED CASE No. 24 OF 1922.

March 6, 1923.

Present:—Mr. Justice Oldfield and Mr. Justice Devadoss.

KANDOTH SANKARAN NAIR—

PLAINTIFF—DECREE-HOLDER

versus

KARAYI KUZHAKEPROTH ATCHUTHAN AND ANOTHER—DEFENDANTS—

JUDGMENT—DEBOTS.

Madras Village Courts Act (I of 1889), ss. 66, 67—Civil Procedure Code (Act V of 1908), s. 39—Village Court decree—Transfer for execution—District Munsif, power of.

A District Munsif receiving by transfer a decree of a Village Court under section 66 of the Madras Village Courts Act or withdrawing execution of a decree to his own file under section 67 of the Act has no jurisdiction to transfer it for execution to another District Munsif under section 39 of the Civil Procedure Code.

Case stated, under section 113 of the Civil Procedure Code, 1908, by the Additional District Munsif, Tellicherry, in S. C. Execution Petition No. 364 of 1922, in Suit No. 278 of 1921 on the file of the Court of the Village Panchayat, Tiruvangad, Kottayam Taluk, Malabar.

JUDGMENT.—The question referred to us is whether a District Munsif, receiving by transfer a decree of a Village Court under section 66 of the Madras Act I of 1889 or withdrawing execution of a decree to his own file under section 67 has or has no jurisdiction to transfer it for execution to another District Munsif's Court under section 39 of the Civil Procedure Code.

The learned District Munsif in referring this question has pointed out the great practical inconvenience of a negative answer to it; and we fully appreciate the considerations he has referred to. It is, however, our duty to deal with the matter with reference

to the law as it stands. Under section 48 "the decree shall be executed by the Village Court, which passed it, or by a Village Court or District Munsif, to whom it is sent for execution under provisions hereinafter contained." Under section 66 "any decree passed by a Village Court may on the application of the decree-holder, be transmitted for execution to the District Munsif," (who is defined earlier in the Act as the District Munsif within whose jurisdiction the Court is situate) who may execute the same, as if it were a decree passed by himself or may transmit it for execution to the Court of another village in which the defendant is represented to have moveable property and section 67 authorises the District Munsif to take on his own motion the action authorised by section 66. The result of these sections is not, in our opinion, to authorise the District Munsif to send a decree which has been withdrawn to his own file for execution, to another District Munsif for that purpose. There is first no explicit reference to such transmission. There is, next the explicit reference to a particular kind of transmission as open to a District Munsif a transmission to the Court of any other village in which the defendant is represented to have moveable property. In accordance with the ordinary canons of construction reference to this one kind of transmission is against an intention to authorise any other kind of transmission. The Act, as we understand it, is intended to supply a complete Code of Procedure for Village Courts; and there is, therefore, no reason for importing into that procedure the provision of another Statute, the Civil Procedure Code, the less so as the reference to transmission in section 66 is, in our opinion, against such importation.

We may add with reference to the applicability of the provisions of the Civil Procedure Code that in the amending Act II of 1920, when it was desired to make one of the provisions, section 60, applicable to the execution of Village Courts' decree, it was so made applicable by a special provision, section 23.

We must answer the reference in the negative. No one has appeared on

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either side on this reference. Therefore, no order as to costs is necessary.

V. N. V.

Answered accordingly.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL.

No. 3029 OF 1922.

April 21, 1923.

Present.—Mr. Justice Broadway.

H. JIWAN BAKHSH—DECREE-HOLDER—
—APPELLANT.

versus

MUBINAL, HUG—JUDGMENT-DEBTOR—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48 (1) (b)—Execution of decree—Order in execution placing compromise on record, whether order amending decree—Judgment-debtor, whether bound by compromise.

An order under section 48 (1) (b) of the Civil Procedure Code must be made by the Court which passed the decree and acting as that Court. [p. 795, col. 1.]

Jurawan v. Mahabir Dube, 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71, relied on.

An order made by an Executing Court placing a compromise arrived at between the judgment-debtor and the decree-holder on the record does not fall within the purview of section 48 (1) (b) of the Civil Procedure Code. [p. 795, col. 1.]

When an arrangement is entered into to pay a decree by instalments and is sanctioned by the Court executing the decree, the arrangement does not alter the original decree which still remains the decree to be executed, so far as the provisions of section 48 of the Civil Procedure Code are concerned. [p. 795, col. 1.]

Nanak Chand v. Anant Ram, 26 P. R. 1894 and *Chajju v. Gulab*, 61 P. R. 1886, followed.

Nawab Zada Muhammad Akbar Khan v. Dya Nath, 200 P. R. 1889, *Mon Mohun Roy v. Durga Churn Goode*, 15 C. 502; 7 Ind. Dec. (N. S.) 919, *Kashiram v. Pandu*, 27 B. I. 4 Bom. L. R. 688 (F. B.), *Badri Narayan v. Kunj Behari Lal*, 18 Ind. Cas. 731; 11 A. L. J. 224; 35 A. 178, *Nanku v. Jadu Nath*, 57 Ind. Cas. 591, *Muhammad Sulaiman v. Jhukki Lal*, 11 A. 228; A. W. N. (1889) 53; 6 Ind. Dec. (N. S.) 573, *Lodd Govinda Doss v. Rajah of Karvetnagar*, 30 Ind. Cas. 357; 29 M. L. J. 219 and *Lodd Govind-doss Krishna Doss v. Ramdoss Vishnadoss*, 28 Ind. Cas. 376; 17 M. L. J. 222; (1915) M. W. N. 225, distinguished.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Delhi, dated the 23rd October 1922.

Jala Sardha Ram, for the Appellant.

Sheikh Muhammad Monier, for the Respondent.

JUDGMENT.—The facts are briefly as follows:—One Alamgir Khan obtained a mortgage-decree against one Muhammad Mubinal Haq on the 31st March 1909. This decree was assigned to Jiwan Bakhsh some time after the 31st January 1913, the sum then due under the decree was Rs. 8,000 and Jiwan Bakhsh sought to recover this amount in execution.

On the 21st June 1921, he asked that the mortgaged property be brought to sale. The judgment-debtor (Mubinal Haq) contended that no order of execution could issue as the decree was more than 12 years old. Reliance was placed on section 48, Civil Procedure Code. Jiwan Bakhsh claimed that certain compromises entered into in 1914 and 1918 saved the situation but the Court below decided against him and rejected his application for execution. He has come to this Court in appeal through Mr. Sardha Ram while Mr. Muhammad Monier has addressed me on behalf of the respondent.

Mr. Sardha Ram has relied on the proceedings in 1914 and 1918 as saving limitation and has referred to no other order or adjustment. It has to be seen what these proceedings were and what effect they have on the question of limitation.

An application for execution had been dismissed in default on the 6th March 1914, and on the 7th March 1914, an agreement was entered into between the parties whereby the decretal amount was fixed at Rs. 4,150 which sum was to be liquidated as follows:—

Rs. 650 paid already to the decree-holder and the balance of Rs. 3,500 in instalments of

Rs. 1,500 on 15th May 1914;

Rs. 1,000 on 15th July 1914; and

Rs. 1,000 on 31st December 1914, in default of any instalment the whole balance was recoverable at once. Certain persons made themselves sureties for the payments. This compromise was embodied in an application made to the Executing Court and the statements of the parties were recorded and an order passed to the effect that the papers be placed on the record, the parties having compromised.

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It has been urged that this amounted to an order under section 48 (1) (b), Civil Procedure, Code and, therefore, saved limitation. Now, an order under this section must be made by the Court which made the decree and acting as that Court this was held to be the meaning of this section in *Jurawan v. Mahabir Dube* (1), and it, therefore, cannot be held that the order placing the compromise on the record was made under that section. I am unable to see that the decree was amended by this order and it is obvious that the Court was sitting as a Court of Execution only.

It was next contended that in any event it was an adjustment which could not be resiled from by the judgment-debtor, and reliance was placed on certain authorities.

In *Nawab Zada Muhammad Akbar Khan v. Dya Nath* (2), it was held by Rivaz, J., that a judgment-debtor could not be allowed to challenge the validity of an arrangement which was brought about by his own action. The arrangement in question had been proposed by the judgment-debtor himself.

In *Sardar v. Fattah Chand* (3) the above case was referred to by Rivaz, J., and it was held that it was only in special circumstances that a judgment-debtor would be estopped from pleading that the original decree had not been modified by a subsequent arrangement.

On the other hand, in *Nanak Chand v. Anant Ram* (4) it was held that when an arrangement had been entered into to pay a decree by instalments and sanctioned by the Court executing the decree the arrangement did not alter the original decree which still remained the decree to be executed. To the same effect is *Chajju v. Gulab* (5). I am unable to see the applicability of *Mon Mohun Roy v. Durga Churn Gooze* (6) or *Kashiram v. Pandu* (7) as in both cases the original decree provided for instalments. The same is the case in *Badr Narayan v. Kunj Behari Lal* (8). The

point of limitation was not in question in *Nanku v. Jadu Nath* (9); *Muhammad Sulatman v. Jhukki Lal* (10); *Lodd Govinda Doss v. Rajah of Karucnagar* (11) or *Lodd Govindoss Krishna Doss v. Ramdoss Vishnadoss* (12).

It seems to me that the proceedings in 1914 did not alter the decree and that it is the decree of 1909 alone which was to be executed. I further am unable to see any special circumstances or reasons such as existed in *Nawab Zada Muhammad Akbar Khan v. Dya Nath* (2), which could estop the judgment-debtor from denying that the original decree had not been altered. I, therefore, agree with the Court below so far as the proceedings in 1914 are concerned. In 1918 on the 22nd January after the decree had been executed to some extent a compromise was entered to fixing the amount then due at Rs. 800 which was to be paid in two instalments.

This compromise was placed before the Executing Court which directed it to be placed on the record. Here, again, there was no alteration of the decree and there are no circumstances which can be said to estop the judgment-debtor from maintaining that the original decree alone can be executed.

In this view of the case I dismiss this appeal with costs.

Z. K.

Appeal dismissed,

(9) 57 Ind. Cas. 591.

(10) 11 A. 228; A. W. N. (1889) 53; 6 Ind. Dec. (N. S.) 573.

(11) 30 Ind. Cas. 357; 29 M. L. J. 219.

(12) 28 Ind. Cas. 376; 17 M. L. T. 222; (1915) M. W. N. 225.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 368 OF 1922.

December 8, 1922.

Present.—Mr. Justice Broadway.

PURAN AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

LALA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Pleading—*Appeal*, *second*—*Inference from facts*—*Question of law*.

(1) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71.

(2) 200 P. R. 1889.

(3) 89 P. R. 1894.

(4) 26 P. R. 1894.

(5) 61 P. R. 1886.

(6) 15 C. 502; 7 Ind. Dec. (N. S.) 919.

(7) 27 B. 1; 4 Bom. L. R. 688 (F. B.)

(8) 18 Ind. Cas. 731; 11 A. L. J. 224; 35 A. 178.

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Although a decision by an Appellate Court as to the effect of the evidence produced in a case is final as to the facts, the soundness of conclusions may involve matters of law and may be questioned in second appeal. The proper legal effect of a proved fact is essentially a question of law. [p. 797, col. 1.]

Second appeal from a decree of the District Judge, Delhi, dated the 7th November 1921, affirming that of the Munsif, First Class, dated the 20th June 1921.

Mr. Ghulam Rasul, for the Appellants.

Mr. Dev Raj Sawhney, for the Respondents.

JUDGMENT.—The suit giving rise to this second appeal was instituted by Puran and Surjan, sons and Chandgi, grandson of Chhote. They are Jats of Shahpur in the Tahsil and District of Delhi. They claimed possession of 8 *bighas* 7 *biswas* of land which they said was ancestral and had been in possession of Lala and the two other defendants as non-occupancy tenants under Chhote. They further alleged that the defendants now claimed the property as having been gifted to them by Chhote under a mutation dated the 8th April 1909, and it was pleaded that this gift was without valid necessity and, therefore, not binding on them. The defendants pleaded they had been in possession of the land in suit as owners for a long time and that the gift by Chhote had been made with the consent of the plaintiffs. They further pleaded that the plaintiffs had by their silence acquiesced in the gift, and that the defendants had sunk a well at considerable expense.

The Trial Court found that the oral evidence for the parties was unreliable and that the plaintiffs' actual consent to the gift had not been proved. It was found, however, that the defendants had been in adverse possession for over 12 years and the plaintiffs' suit was accordingly dismissed. They preferred an appeal to the District Judge who, however, agreed with the view taken by the Trial Court and dismissed the appeal. The plaintiffs have now come up to this Court in second appeal through Mr. Ghulam Rasul and I have heard Mr. Dev Raj Sawhney for the defendants-respondents.

The earliest Revenue Records which have been produced show that in 1900-1901 this land was entered as being owned by Chhote, but in the cultivating possession

of the defendants. In the rent column it was entered that no rent was paid *ba iwaz muawaza irazi* (in lieu of compensation in land).

In 1904 a similar entry appeared, the defendants being shown as tenants who paid no rent *ba iwaz tabadala* and the same entry was repeated in 1905, 1906, the rent column showing that no rent was paid *ba ziria tabadala*. It is thus established that from 1900 to 1906 the defendants had been in possession as tenants paying no rent. On the 2nd February 1909, Chhote applied to the Revenue Authorities asking that the defendants be entered as owners of this land, and their names be so shown in the proprietary column. The original application has been lost or destroyed but the mutation records show that the transfer of ownership was due to a *hibba* or gift. This mutation was sanctioned on the 8th April 1909, and Chhote is recorded as having stated that the land in reality (*dar asal*) belonged to the defendants. From April 1909, therefore, according to the Revenue Records, the possession of the defendants became that of owners. The learned District Judge in agreement with the Trial Court has come to the conclusion that the proceedings in 1909 amounted to a rectification of the Revenue Records and that the gift had been made at a much earlier period. Mr. Ghulam Rasul urged that the Courts below had really set up an entirely new case for the defendants, inasmuch as Lala, defendant, as a witness, had definitely stated that the mutation had taken place some six months after the gift by Chhote. The date of the mutation being known this would mean that the gift had been made some time in August 1908 or within twelve years of the suit which was brought on the 17th December 1920 after the death of Chhote. According to Lala, defendant, Chhote had gifted this land to them in return for assistance rendered to him (Chhote) by the defendants in connection with some land which some person had usurped.

Mr. Dev Raj Sawhney contended that the Courts below having found that the gift had been made as far back as 1900 this was a finding of fact which cannot be examined in second appeal. In reply it is urged that the findings of the learned District Judge

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are not challenged so far as the actual facts are concerned but that what is attacked are the inferences which have been drawn from those facts. Now, it seems to me that although the defendants pleaded that they had been in possession of this land as owners for a very long period, the statement of Lala cannot and ought not to be ignored where he says that the gift had been made by Chhote some six months prior to the mutation. That he clearly intended to plead that the gift had been made by Chhote a short time prior to the mutation is also borne out by the fact that the defendants endeavoured to prove that the plaintiffs had given their active consent to the gift. This defence to my mind excludes the suggestion that the gift had been effected as far back as 1900. The learned District Judge having found that the defendants were in possession of the land in 1900 without paying any rent and that in 1909 Chhote stated that they were the real owners has inferred from this that the gift *must have* been effected as far back as 1900, for an inference which I find it a little difficult to make. Assuming that the defendants have been put in possession of this land in 1900 in lieu of services rendered there is nothing extraordinary in Chhote re-paying those services by remitting the rent payable for the said land. Indeed, had he intended to make a complete gift of it there is no reason why he should not have done so at the time and had the necessary entries made in the Revenue Records. It is easy to understand that after the lapse of several years Chhote could be induced to part with proprietary rights as well. In *Ramgopal v. Shaniskhaton* (1), it was held that while the District Court's decision as to the effect of the evidence must stand final as to the facts, the soundness of conclusions may involve matters of law and may be questioned by a Court of second appeal. Again in *Nasir Chandra Pal v. Shukur Shetkh* (2), it was held that the proper legal effect of a proved fact is essentially a question of the law; and it seems to me that in this case it is open to me to examine the conclusions arrived

(1) 20 C. 93; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).
(2) 51 Ind. Cas. 769; 46 C. 189; 9 I. W. 552; 45 I. A. 183; 23 C. W. N. 345 (P. C.).

at by the learned District Judge from the facts found.

I am unable to see that there has been any acquiescence or silence on the part of the plaintiffs, one of whom is still a minor, which would estop the plaintiffs from challenging this gift. *Dhanpat Rai v. Guran Ditta Mal* (3) cited by Mr. Dev Raj Sawhney does not afford any assistance as the facts are quite different.

The Courts below have concurred in finding that the defendants have sunk a well at a cost of Rs. 1,000. This finding has not been disputed. I, therefore, accept this appeal and decree the plaintiffs' suit and direct that they are entitled to possession of the property on payment of Rs. 1,000 to the defendants. The parties, in the circumstances, will bear their own costs throughout.

W. C. A.

Appeal accepted.

(3) 64 Ind. Cas. 520; 2 L. 258; 10 P. L. R. 1922.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1559 OF 1922.

January 30, 1923.

Present:—Mr. Justice Abdul Raof.

AZIM KHAN—PLAINTIFF—APPELLANT.

versus

SEWA RAM AND OTHERS—DEFENDANTS
—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 4—Pre-emption right, nature of—Qualification for pre-emption whether must be retained till date of suit.

The right of pre-emption in the Punjab is given by the Punjab Pre-emption Act, which provides that on a sale being effected a right of pre-emption arises in favour of certain classes of persons. [p. 798, col. 2.]

Dictum of Shah Din, J. in Dhanna Singh v. Gurbakhsh Singh, 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.), followed. [p. 798, col. 1.]

A person, therefore, who is entitled to pre-empt a sale on the date of the sale is entitled to enforce his right notwithstanding the fact that on the date on which he brings the pre-emption suit he has lost the qualification which gave him his right. [p. 798, col. 2.]

Sanwal Das v. Gur Parshad, 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909, *Dhanna Singh v. Gurbakhsh Singh*, 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.) and *Hira v. Bansi Lal*, 52

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Ind. Cas. 557; 90 P. R. 1919; 27 P. W. R. 1919, followed.

Fateh Singh v. Sant Singh, 27 Ind. Cas. 29; 43 P. R. 1915; 47 P. W. R. 1915; 125 P. L. R. 1915, dissented from.

Janki Prasad v. Ishar Das, 21 A. 374; A. W. N. (1899) 126; 9 Ind. Dec. (N. S.) 947, distinguished.

Second appeal from a decree of the District Judge, Miranwali, dated the 27th February 1922, reversing that of the Munsif, First Class, Bhakhar, District Mianwali, dated the 14th November 1921.

Lala Har Gopal, for the Appellant.

Lala Jagan Nath, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for pre-emption under the following circumstances :—

Wasa Ram sold 10 *kanals* 15 *marlas* of land situate in *Manza* Shahani to Sewa Ram and Niamat Ram for Rs. 250 by a sale-deed dated the 1st of May 1919. The plaintiff Azim Khan instituted this suit for pre-emption on the 30th of April 1920 on the ground that he was an *ala malik* in the village and as such had a superior right to that of the vendees. He also alleged that the price mentioned in the sale-deed was fictitious and that, as a matter of fact, only Rs. 120 had been paid. The defendants resisted the suit on the main ground that the plaintiff's ancestors had mortgaged their *ala malkiyyat* right in the village to the ancestors of the defendants more than sixty years ago and as the mortgage had not been redeemed the plaintiff's right of redemption had been extinguished and that the defendants had become the *ala maliks*. The price entered in the sale-deed was alleged to be genuine and it was further pleaded that the sale-deed had been obtained with the consent of the plaintiff and that the latter had, therefore, lost his right of pre-emption by waiver. Both the Courts below have held the price entered in the sale-deed to be real and have also held that the plaintiff had not waived his right by consenting to the sale. The real question to be decided was whether the plaintiff was still an *ala malik* in the village or the defendants have become the *ala maliks* owing to the plaintiff's right of redemption being extinguished by efflux of time. At the date of the sale only 59 years and 2½ months had expired since the date of the mortgage. The plaintiff, there-

fore, admittedly was an *ala malik* at the date of the sale. The suit was instituted on the 30th of April 1920 when the sixty years had expired. The Trial Court, relying upon the rulings in *Hira v. Bansi Lal* (1), *Sanwal Das v. Gur Parshad* (2) and *Dhanna Singh v. Gurbakhsh Singh* (3), held that the plaintiff was entitled to maintain the suit and granted him a decree.

The lower Appellate Court has dismissed the suit holding that, in order to succeed in the pre-emptive suit, the plaintiff ought to have shown that he had a right of pre-emption not only at the date of the sale but also at the date of the suit. In support of this view the learned Judge relied upon the ruling reported as *Fateh Singh v. Sant Singh* (4). This ruling is mainly based upon the decision of the Allahabad High Court in *Janki Prasad v. Ishar Das* (5). In the Full Bench ruling reported as *Dhanna Singh v. Gurbakhsh Singh* (3), Mr. Justice Shah Din pointed out that the right of pre-emption in this Province is given by the Pre-emption Act which provides that on a sale being effected the right of pre-emption arises in favour of a certain class of persons. In the Province of Agra the right of pre-emption is based on the rule of justice, equity and good conscience, and the principles applicable to pre-emption cases under the Muhammadan Law are freely applied to pre-emption cases in that Province.

According to Muhammadan Law if a claimant for pre-emption is found to be a stranger at the date of the suit he cannot be given a decree for pre-emption. The ruling in *Janki Prasad v. Ishar Das* (5) cannot, therefore, apply to cases of pre-emption arising under the Pre-emption Act in this Province. In my opinion the view taken by the Trial Court was correct.

I, therefore, accept the appeal and setting aside the decree of the lower Appellate Court restore that of the Court of first instance with costs.

Z. K. & N. H.

Appeal accepted.

(1) 52 Ind. Cas. 557; 90 P. R. 1919; 27 P. W. R. 1919.

(2) 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909.

(3) 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.).

(4) 27 Ind. Cas. 29; 43 P. R. 1915; 47 P. W. R. 1915; 125 P. L. R. 1915.

(5) 21 A. 374; A. W. N. (1899) 126; 9 Ind. Dec. (N. S.) 947 (F. B.).

BRIJ RAJ SARAN v. JOTI PRASHAD.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 158 OF 1922.

May 21, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Martineau.BRIJ RAJ SARAN, MINOR, THROUGH
MUSAMMAT GANPATI DEVI AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

JOTI PARSHAD—PLAINTIFF—

RESPONDENT.

Stamp Act (II of 1899), s. 36—Document held to be admissible in appeal—Decision, whether can be questioned in Letters Patent Appeal.

A suit was brought to recover a certain sum of money on the basis of a document which was held by the Trial Court to be a promissory-note, but which was not, as such, properly stamped. On appeal to the High Court it was held by a Single Judge that the document was not a promissory-note and was admissible in evidence on payment of the necessary stamp-duty and penalty. On an appeal being preferred against this decision under the Letters Patent:

Held, that the order of the Single Judge amounted to an admission of the document in evidence within the meaning of section 36 of the Stamp Act, and, consequently, could not be questioned in appeal. [p. 800, col. 1.]

Mongal Sain v. Gobind Das, 139 P. R. 1890, followed.

An appeal under the Letters Patent is a stage of the suit for the purposes of section 36 of the Stamp Act. [p. 800, col. 1.]

Ramasami Chetti v. Ramasami Chetti, 5 M. 220; 2 Ind. Dec. (N. S.) 153; and *Mela Ram v. Prem Kaur*, 71 Ind. Cas. 42; (1923) A. I. R. (L) 143, referred to.

Letters Patent Appeal from an order of Mr. Justice Broadway, passed in Civil Appeal No. 2638 of 1921, dated the 6th June 1922, and published as 68 Ind. Cas., 461, reversing that of the Senior Subordinate Judge, Karnal, dated the 7th October 1921.

Pandit Sheo Narain, R. B., and Lala Jagan Nath, for the Appellants.

Mr. Shamair Chand and Lala Fakir Chand, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought for money due on a document bearing a one-anna stamp, which contained a promise to pay Rs. 11,891-15-3 and interest. The plaintiff described the document in the plaint as an agreement, but the defendants pleaded that it was a promissory-note and, being insufficiently

stamped, was inadmissible in evidence. The lower Court upheld the defendants' contention, but held that the plaintiff was entitled to fall back on the original transactions entered in his books and as those transactions had taken place outside the local limits of its jurisdiction it returned the plaint for presentation to the proper Court. On appeal to this Court it has been held by a Single Judge that the document in question is not a promissory-note and he has returned the case to the lower Court for disposal according to law. The present appeal has been preferred from his order under the Letters Patent, and it is contended on behalf of the appellants that the document is a promissory-note and is, therefore, inadmissible in evidence under section 35 of the Stamp Act.

It has, however, first to be seen whether the appellants are not precluded from putting forward this contention by section 36 of the Act, which provides that where an instrument has been admitted in evidence such admission shall not, except as provided in section 67, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. In this connection two questions arise for consideration, one whether the instrument on which the suit is based has been admitted in evidence, and the other whether this appeal is a stage of the suit.

With regard to the first point it is urged for the appellants that the instrument, though held by the learned Judge not to be a promissory-note is nevertheless, as an agreement, under-stamped and is not admissible in evidence without payment of the full stamp-duty and the penalty prescribed by section 35. This is true, but throughout the proceedings the only dispute between the parties has been whether or not the instrument is a promissory-note. If it were a promissory-note it would be altogether inadmissible. The decision of the Single Judge lets in the instrument, subject only to the plaintiff paying the prescribed duty and penalty, which it has never been suggested he is not prepared to do. *Mongal Sain v. Gobind Das* (1) is a

(1) 139 P. R. 1890.

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case in point. There also the First Court had held that the instrument sued on was a promissory-note and inadmissible in evidence, but the Court of Appeal held that it was not a promissory-note and was admissible on payment of the duty as an agreement. Plowden, J., regarded the instrument as having been admitted in evidence by the Court of Appeal, and ruled that the admission could not be called in question. In our opinion, therefore, the instrument in suit in the present case has, for the purpose of section 36 of the Stamp Act, been admitted in evidence by the judgment now under appeal, even though the full stamp-duty and penalty have yet to be paid.

As to the second question, it is not disputed that where an instrument has been admitted in evidence by the Court of first instance section 36 prevents the admission from being called in question in the Court of Appeal. On this point there are several rulings, of which *Mela Ram v. Prem Kuar* (2) is one of the most recent. It is thus evident that a first appeal is regarded as a stage of the suit for the purpose of section 36. A second appeal was similarly regarded in *Ramasami Chetti v. Ramasami Chetti* (3), in which it was held that the admission by the lower Appellate Court of a *hundi*, which the First Court had held to be inadmissible, could not be objected to in second appeal, and the decision in *Mangal Satn v. Gobind Das* (1), which has been cited above, is to the same effect.

We can see no reason why an appeal under the Letters Patent should not in like manner be considered as a stage of the suit for the purposes of section 36 of the Stamp Act.

We hold, therefore, that, in accordance with the provisions of that section, the appellants are not entitled to call in question the learned Judge's admission in evidence of the document which forms the basis of the suit. The appeal consequently fails and we dismiss it with costs.

Z. K.

Appeal dismissed.

(2) 71 Ind. Cas. 421 (1923) A. I. R. (L.) 143.

(3) 5 M. 220; 2 Ind. Dec. (N. S.) 153.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 37 OF 1921.

October 23, 1922.

Present.—Mr. Justice Martineau and Mr. Justice Moti Sagar.

WALI DAD KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Execution of decree—Money-decree—Judgment-debtor's estate taken over by Court of Wards—Instalments, whether should be allowed.

The mere fact that the estate of a judgment-debtor has been brought under the management of the Court of Wards is not a reason for allowing him to pay by instalments the amount of a money-decree obtained against him.

First appeal from the decree of the Senior Sub-Judge, Jhang, dated the 5th October 1922.

Mr. C. H. Oertel, for the Appellants.

Mr. Nanak Chand, for the Respondents.

JUDGMENT.—A decree for Rs. 5,790 has been passed on a bond executed by the defendants, and all that the latter urge in their appeal is that they should have been allowed instalments. It is pointed out that their estate has this year been brought under the management of the Court of Wards, but this is not a reason for allowing instalments.

The defendants are, as pointed out by the lower Court, not poor and impecunious, but own considerable property, and they have not yet paid a single pie of what they owe to the plaintiffs. The rate of interest charged is moderate, and the lower Court was, in our opinion, right in refusing instalment.

We dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

BHURE MAI, V. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 93 OF 1923.

April 11, 1923.

Present.—Mr Justice Daniels.

BHURE MAI,—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 435, 439—Penal Code (Act XLV of 1860), s. 188—Order under s. 144—Extension of period by Local Government, limits on—Reasons for extension—Disobedience of order—Offence—Revision—Ground, new, whether can be urged before High Court.

The Local Government when extending the period during which an order under section 144 of the Criminal Procedure Code is to remain in force, is not concerned with the reasons given by the Magistrate for the order, but with the actual order passed by him, and if the Local Government considers that there is danger to human life, health or safety or a likelihood of a riot or an affray in allowing the act which has been prohibited by the Magistrate, it is perfectly competent under clause (5) of section 144 to extend the period of the order. [p. 801, col. 2; p. 802, col. 1.]

The Legislature has not seen fit to limit the time for which the force of an order under section 144 of the Criminal Procedure Code may be extended by the Local Government under clause (5) of the section, and under the terms of the clause it is competent to the Local Government to extend the order so long as the danger which it apprehends continues to exist. [p. 802, col. 1.]

There is nothing in clause (5) of section 144 of the Criminal Procedure Code which requires the Local Government to state its reasons for extending the period of the order or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends and it is not open to the High Court to add to the section a condition not imposed by the Legislature. [p. 802, col. 1.]

Under section 188 of the Penal Code, if the Court finds that the order, disobedience of which is sought to be punished, was a legal order, it has only to see whether the accused disobeyed the order; and, if so, whether such disobedience caused or tended to cause the effects specified in the second and third paragraphs of the section. [p. 802, col. 2.]

The object of requiring an application for revision to be presented first to the District Magistrate or to the Sessions Judge is, that the High Court in dealing with the matter may have before it a reasoned opinion of the two Courts on the points at issue, and this object will be largely defeated if applicants are allowed to take in the High Court points which they did not press before the lower Appellate Court. [p. 802, col. 1.]

Criminal revision from an order of the Sessions Judge, Bareilly, dated the 23rd of October 1922.

Mr. U. S. Bajpai, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against the conviction of the applicant for an offence under section 188 of the Indian Penal Code. The charge against the applicant was, that he took part in an unlawful procession which had been prohibited by an order lawfully passed under section 144 of the Criminal Procedure Code. The District Magistrate of Bareilly originally issued an order forbidding any procession whatever to pass down certain streets in Bareilly. This order could only remain in force for two months unless the period was extended by the Local Government under sub-section (5). Before the expiry of the period of the order the Local Government passed an order which was duly notified in the *Gazette* directing that the order should remain in force until cancelled by a Notification in the *United Provinces Gazette*.

Four grounds of revision have been urged, three of them attacking the legality of the order passed by the Local Government and the fourth alleging that, even if the order was legal, the offence under section 188 was not proved.

The first contention of the applicant is, that the order could only have been extended lawfully with reference to religious processions. The learned Counsel relies on the preamble to the order in which the learned District Magistrate sets forth his reasons for passing it. The District Magistrate considered that as these particular streets were narrow in the extreme, the taking of processions through them might cause constant risk of obstruction, annoyance and injury to persons pursuing their lawful occupations, and that, further, on the occasion of religious festivals there was the added danger of riot or affray. The operative part of the order was, however, a prohibition against any procession of any kind passing down the streets in question. The Local Government was not concerned with the reasons given by the Magistrate but with the actual order passed by him, and if the Local Government considered that there was danger to human life, health or safety or likelihood of a riot or affray in allowing processions to pass down these streets the Local Government

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was perfectly competent, under sub-section (5), to extend the period of the order and was not limited to any particular kind of procession.

The second objection taken is to the form in which the order is passed, namely, that it should remain in force until cancelled by a Notification in the *Gazette*. Reliance is placed on the heading of the Chapter which refers to temporary orders in urgent cases of nuisance or apprehended danger, and it is argued that the Local Government had only power to extend the order for a definite and very limited time. The Legislature has, however, not seen fit to limit the time for which the force of the order may be extended and under the terms of the section it was competent to the Local Government to extend the order so long as the danger which it apprehended continued to exist.

The third objection is, that the Local Government in extending the period of the order has not stated the danger which it apprehended and which led to the Notification being issued. Here, again, there is nothing in the section which requires the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends, and it is not open to this Court to add to the section a condition not imposed by the Legislature.

The last point pressed is, that it is not shown that the disobedience on the part of the accused caused or tended to cause danger to human life, health or safety or a riot or affray within the meaning of the third paragraph of section 188. This point was not taken in the application in revision presented to the learned Sessions Judge. The object of requiring an application in these cases to be presented first to the lower Appellate Court is that this Court in dealing with the matter may have before it a reasoned opinion of two Courts on the points at issue, and this object will be largely defeated if applicants are allowed to take in this Court points which they did not press in their application in revision in the Court below. Both Courts have, however, as a matter of fact, addressed their minds to this point. The Trial Court considered that organised flouting of standing orders of this nature, and it had no doubt that the

disobedience was organised, involved considerable risk of coming into conflict at any rate with the Police, and it would be not difficult to find instances in which such conflict had led to bloodshed. The learned Sessions Judge says that to urge that there was no danger of a riot or affray in the present case appeared to him to be trifling with realities. I may point out, further, that the fine imposed was one which could have been imposed under the second paragraph of the section. It is urged that this paragraph could not apply because the Local Government could only have issued its Notification in the *Gazette* on the ground that a riot or affray or danger to life, health or safety was apprehended. This is an entirely distinct consideration. The question whether the order was a legal order is an entirely distinct question from the question whether an offence has been committed in disobeying it. If the order promulgated was a legal order the Court has only to see whether the accused disobeyed that order and whether, if so, such disobedience caused or tended to cause the effects specified in the second and third paragraphs of section 188. All the grounds of revision, therefore, fail and I dismiss the application.

The question of sentence was not originally argued but at the time of delivering judgment the learned Counsel asked the Court to reduce the sentences. I do not think, however, that the fines imposed were excessive in the circumstances and I decline to interfere.

Z. K.

Application rejected.

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 33 OF 1923.
May 3, 1923.

Present:—Justice Sir John Bucknill, Kt.

CHANDRIKA KOERI—ACCUSED

versus

BUDHU DUSADH—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 133—Public nuisance—Obstruction to public path—Bona fide claim of right—Jurisdiction—Magistrate issuing rule whether competent to make it absolute on report of another Magistrate.

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In a proceeding under section 133 of the Criminal Procedure Code for the purpose of compelling the removal of an obstruction from a public way, where a *bona fide* question as to the way being public is raised, there is no jurisdiction to make an order under the section, and the question should be left for determination by the Civil Court. To have this effect, however, the claim must be *bona fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim is *bona fide* or not. [p. 804, col. 1.]

Queen-Empress v. Bissessur Sahu, 17 C. 962; 8 Ind. Dec. (N. S.) 914, relied on.

A Magistrate who issues a conditional Rule under section 133 of the Criminal Procedure Code is competent to make the Rule absolute upon the evidence recorded and report submitted to him by another Magistrate to whom he had referred the matter under the last paragraph of clause (1) of section 133. [p. 804, col. 1.]

In re Narasimha, 9 M. 201; 10 Ind. Jur. 185; 2 Weir 60; 3 Ind. Dec. (N. S.) 537, relied on.

Reference made by the Sessions Judge, Shahabad.

JUDGMENT.—This was a reference made to this Court by the Sessions Judge of Shahabad under the provisions of section 438 of the Criminal Procedure Code. The circumstances under which this reference is made are somewhat unusual. It would appear that a certain Budhu Dusadh, *Chaukidar* of Mauza Atan, complained by petition to the Sub-Divisional Magistrate of Buxar, purporting to do so under section 133 of the Criminal Procedure Code. The complaint was to the effect that one Chandrika Koeri and others had obstructed a public village path by using a portion of it for their *khalihans*. The Sub-Divisional Magistrate thereupon asked the Sub-Inspector of Police to report, after making an enquiry, as to whether the road was a public road and whether there had been encroachment. It would seem that the Writer Head-Constable held a local enquiry and submitted a report on the 17th December last to the effect that Chandrika and others mentioned had not encroached on the public road and he recommended that no action should be taken. However, on the 4th January, Budhu Dusadh filed a further petition impugning the correctness of the Police report and praying that the Magistrate, that is to say, the Sub-Divisional Officer, should personally hold an enquiry. Apparently, the Sub-Divisional Officer after reading through the petition, passed the following order:—

"I am not satisfied with the report. Draw proceedings under section 133 and fix 21st January 1923 for appearance before the Deputy Magistrate for moving to have the order set aside or modified."

The Deputy Magistrate then proceeded to hold an enquiry. Chandrika Koeri duly appeared and filed a written statement in which he alleged *inter alia* that he had held his *khalihans* upon the locality in question for a very long time; that he had acquired a right of easement over the portion of the property, and that the Criminal Court had no jurisdiction to deal with the matter under the provisions of section 133. The Deputy Magistrate found, however, that the path was a public path and that it had been to some extent obstructed by Chandrika Koeri on account of his having placed there his *khalihan* and also some sugar machine. The Deputy Magistrate made a report to the Sub-Divisional Magistrate recommending Chandrika's prosecution under section 133 of the Criminal Procedure Code and removal of the obstruction referred to. The Sub-Divisional Magistrate on the 23rd February makes the following order which is now the subject-matter of the present reference:—

"I have read the evidence adduced on both sides and have seen the Deputy Magistrate's report. I am satisfied that there has been an obstruction on a public path.

"The Rule under section 133 is made absolute. Chandrika Koeri and others are ordered to remove the obstruction within a week."

Now, the matter was then taken to the Sessions Judge and two points, both of considerable importance, were argued before him. In the first place, it was urged that the Sub-Divisional Magistrate had no authority to make the Rule absolute upon the evidence recorded and upon a report submitted by the Deputy Magistrate. There is, however, little doubt that the Sub-Divisional Magistrate was certainly entitled under the provisions of the section to order, after making the conditional order, the party against whom that order was operative, to appear before either himself or some other Magistrate of the First or Second class. The question, however, as the Sessions

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Judge points out, is as to what officer should pass the final order, that is to the say, whether it is the Magistrate who issued the conditional Rule or the Magistrate before whom the petitioner was ordered to appear. The learned Sessions Judge refers to the authority of *In re Narasimha* (1) which seems to lay down that it is not illegal, although it is undesirable, for a First Class Magistrate to call on the officer who reports on a nuisance in his administrative capacity to decide judicially whether there has been a nuisance or not. He deduces, and I think rightly, from this that the Sub-Divisional Magistrate was competent to make the conditional Rule absolute upon the evidence recorded and the report submitted to him by the Deputy Magistrate to whom he had referred the matter under the last paragraph of clause (1) of section 133 of the Criminal Procedure Code.

The second point which was urged before the learned Sessions Judge appears, however, to present somewhat greater difficulty. It is that the Sub-Divisional Magistrate had no jurisdiction to make the conditional order absolute because there was a *bona fide* claim by Chandrika Koeri of private right. There is no doubt that in his written statement he put forward this claim and, according to the Sessions Judge, there is equally no doubt that certain witnesses who were examined on behalf of Chandrika depose that Chandrika had had this so-called obstruction on this land for a considerable length of time.

Now, it is laid down, in the case of *Queen-Empress v. Bissessur Sahu* (2) that in a proceeding under section 133 of the Criminal Procedure Code, for the purpose of compelling the removal of an obstruction from a public way where a *bona fide* question as to the way being public is raised, there is no jurisdiction to make an order under the section and the question should be left for determination by the Civil Court. To have this effect, however, the claim must be *bona fide* and not mere pretence to oust jurisdiction and it is for the Magistrate

to say whether the claim be *bona fide* or not.

Now, in this case, the Sessions Judge is at some pains carefully to point out that, although it was evidently strongly urged before the Magistrate that there was a claim of right on behalf of Chandrika yet the Magistrate did not come to any finding as to whether it was or was not a *bona fide* claim. He may have, it is true, and no doubt did, by inference drawn from the fact that he found that the road was a public one and that there had been encroachment, come to the conclusion that Chandrika's claim of right was not substantial, but he did not record any finding at any time as to whether Chandrika's claim was so or a pretence to oust jurisdiction of the Magistrate. The learned Sessions Judge, therefore, considers that this was irregular and that the present order making the Rule absolute should be set aside and that the Magistrate should be directed after notice to both the parties to investigate the complaint *de novo* and to record a finding as to whether Chandrika's claim is a *bona fide* one or not; whether it is a correct one is another matter. If his claim is a *bona fide* claim the matter cannot be dealt with under the provisions of section 133 of the Criminal Procedure Code. If it is not a *bona fide* claim, but merely a pretext to oust the jurisdiction of the Magistrate under the provisions of that section, then the fact should be recorded. This reference must, therefore, be accepted. The order of the Sub-Divisional Magistrate of Buxar dated the 23rd February last must be set aside and the matter must be investigated *de novo*.

Z. K.

Reference accepted.

(1) 9 M. 201; 10 Ind. Jur. 185; 2 Weir 60; 3 Ind. Dec. (N. S.) 537.

(2) 17 C. 562; 8 Ind. Dec. (N. S.) 914.

HUKUM CHAND *v.* EMPEROR.**ALLAHABAD HIGH COURT.**

CRIMINAL REVISION NO. 101 OF 1923.

March 28, 1923.

Present:—Mr. Justice Ryves.

HUKUM CHAND—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XL V of 1860), s. 426—Mis-
chief—Removal of earth by tenant in exercise of
bona fide right—Dispute of civil nature—Criminal
Courts, duty of.*

Criminal Courts are not meant to decide ques-
tions which are of a civil nature between a land-
lord and his tenants.

Accused removed some earth from a plot of
land belonging to his landlord in the exercise
of an alleged customary right under which
all residents of the village were entitled to
remove earth when they wanted it. He was con-
victed under section 426 of the Penal Code:

Held, that the dispute, if any, between the
accused and his landlord was of a civil nature and
the conviction of the accused was not, therefore,
justified.

Criminal revision against an order of
the Magistrate, First Class, Shahjahanpur,
dated the 29th of August 1922.

Mr. Saila Nath Mukerji, for the Appli-
cant.

The Assistant Government Advocate, for
for the Crown.

JUDGMENT.—In this case Hukum Chand
was fined Rs. 10 under section 426
of the Indian Penal Code for having
removed some earth from two plots
of land, one described as *banjar*
and the other a grove, which were
in the possession of the *zemindar* of the
village, without his consent. We are not
informed as to how much earth was taken.
But evidently there was more than a mere
handful or so because in the grounds of
appeal in the Court below there is no ground
taken to the effect that section 95 of the
Indian Penal Code would cover the case.
The gravamen of the charge, of course, is
that the applicant took this earth without
getting the consent of the *zemindar* and the
zemindar's *karinda* has brought this charge
in support of the sacred rights of the *zemindar*.
The defence was that the accused
was only following the custom of the vil-
lage and taking earth as every body else
did when they wanted it. I do not think
that the Criminal Courts were meant to
decide questions which are really of a civil
nature between the landlord and his tenants.

DEVI DIAL *v.* EMPEROR.

This is a very petty matter. But, however,
to discourage Criminal Courts from taking
up such cases, I set aside the conviction
and sentence and direct the fine to be re-
funded if paid.

Z. K.

*Conviction set aside.***LAHORE HIGH COURT.**CRIMINAL REVISION PETITION NO. 1038
OF 1922.

November 27, 1922.

Present:—Mr. Justice Martineau.

DEVI DIAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XL V of 1860), ss. 342, 500—
Defamation—Evidence as to reputation of complain-
ant, admissibility of—Publication, proof of—Prosecu-
tion, duty of—Examination of accused, value of.*

In an action for damages for libel or slander
evidence may be given in mitigation of damages
to show that the plaintiff has a general bad charac-
ter. [p. 806, col. 1.]

Scott v. Sampson, (1882) 8 Q. B. D. 491; 51 L. J.
Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P.
408, relied on.

Similarly, in a criminal prosecution where it is
essential, in order to constitute the offence of de-
famation, that the person who makes or publishes
the imputation complained of should intend to
harm, or know or have reason to believe that the
imputation will harm, the reputation of the per-
son concerning whom it is made or published, the
question what reputation the complainant has
is relevant. [p. 806, col. 2.]

Where the imputation complained of is
that the complainant, an official, had com-
pelled the accused to pay him a bribe, the
accused is entitled to prove that the
complainant has a notoriously bad reputation
as a bribe-taker, so that the imputation
made as to his having taken a bribe on the particular
occasion in question, even if false, could not dam-
age his reputation as he had none to lose. In any
case, proof of the complainant's bad reputation
would affect the sentence to be passed in case of
a conviction. [p. 806, col. 2.]

It is the duty of the prosecution in every case to
make out its case by evidence and a gap in the
evidence cannot be filled up by any statement
made by the accused in his examination under
section 342 of the Criminal Procedure Code. [p.
806, col. 1.]

Moh'deen Abdul Kadir v. Emperor, 27 M. 238;
2 Weir 408; 1 Cr. L. J. 566, relied on.

A Magistrate is not entitled under section 342
of the Criminal Procedure Code to put questions
to the accused if the prosecution has not let in evi-
dence implicating him in the offence with which

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he is charged, and answers to questions put by a Magistrate in contravention of that section are not admissible in evidence against the accused.

[p. 806, col. 2; p. 807, col. 1.]

In re Abibulla Rowethan, 30 Ind. Cas. 447; 39 M. 770; (1915) M. W. N. 413; 2 L. W. 939; 16 Cr. L. J. 623, relied on.

Where in a prosecution for defamation no evidence is let in on behalf of the prosecution to prove the making or the publishing by the accused of the imputation complained of, the accused is entitled to an acquittal, and the prosecution cannot claim to have proved their case by virtue of any admission made by the accused in his examination. [p. 807, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Gujranwala, dated the 30th June 1922, affirming that of the District Magistrate, Gujranwala, dated the 1st March 1922.

Dr. G. C. Narang, for the Petitioner.

Lala Amar Nath Chona, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Gujranwala affirming the conviction of the petitioner for having defamed the complainant, an Extra Assistant Commissioner, by publishing an imputation that the latter had compelled him to pay a bribe of Rs. 1,000 in order to avoid a prosecution for a certain offence.

The grounds urged in support of the application are (1) that the petitioner was not allowed to produce evidence as to the complainant having taken bribes on other occasions and general evidence as to the complainant's reputation, (2) that publication of the libel has not been proved, and (3) that part of the evidence for the defence was not considered by the learned Sessions Judge.

Evidence as to the complainant having taken bribes on specific occasions other than the one which forms the subject of this case would, in my opinion, be irrelevant, but I agree with the arguments that the petitioner was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker. It is settled law that in an action for damages for libel or slander evidence may be given in mitigation of damages to show that the plaintiff had a general bad character (*Scott v. Sampson* (1) and *Odgers on Libel* and

(1) (1882) 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

Slander 5th Edition, page 402.) Similarly, in a criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had is relevant. If the petitioner in the present case were able to prove that the complainant had a notoriously bad reputation as a bribe-taker it might reasonably be argued that the imputation made as to his having taken a bribe on the particular occasion in question, even if false, could not damage his reputation as he had none to lose; and in any case proof of the complainant's bad reputation would affect the sentence to be passed in case of conviction. I hold, therefore, that the evidence which the petitioner wished to adduce in proof of the complainant's bad reputation was wrongly excluded.

It is, however, not necessary to send the case back for that evidence to be recorded as the application for revision must succeed also on the second of the three grounds mentioned above. Admittedly, no evidence was given by the prosecution to prove that the petitioner made or published the imputation complained of, but the Courts below have held the publication to be proved because the petitioner when examined admitted the publication. This is an erroneous view of the law. The prosecution must make out its case by evidence and a gap in the evidence cannot be filled up by any statement made by the accused in his examination under section 342 of the Criminal Procedure Code. This has been so held in *Mohideen Abdul Kadir v. Emperor* (2) which is a case exactly in point. Further, it has been held in *In re Abibulla Rowethan* (3) that the Magistrate is not entitled under section 342 of the Code to put questions to the accused if the prosecution has not let in evidence implicating him in the offence with which he is charged, and

(2) 27 M. 233, 2 Weir 403; 1 Cr. L. J. 556.

(3) 30 Ind. Cas. 417; 39 M. 770; (1915) M. W. N. 413; 2 L. W. 939; 16 Cr. L. J. 623.

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that answers to questions put by a Committing Magistrate in contravention of that section are not admissible in evidence against the accused at the trial.

As no evidence has been given to prove that the petitioner made or published the imputation concerning the complainant the conviction cannot be sustained and I accordingly accept the application, set aside the conviction and sentence, and acquit the petitioner. The fine, if paid, will be refunded.

Z. K.

*Application accepted.***CALCUTTA HIGH COURT**

CRIMINAL REVISION NO. 304 OF 1923.

April 19, 1923.

Present:—Mr. Justice Buckland and Mr. Justice Cuming.

KEDAR NATH DEY—PETITIONER*versus***MOHAMED SIDDIK AND OTHERS—****ACCUSED—OPPOSITE PARTY.**

Criminal breach of trust—Property in possession of third person—Order directing detention of property, legality of.

In a case of a criminal breach of trust in respect of a motor car which, it appeared, had been sold by the accused to a third person the Magistrate made an order directing that the car should remain in Court until further orders:

Held, that as regards the purchaser of the car there was a gross abuse of the process of a Criminal Court by utilising criminal proceedings to which he was not a party for the detention of property which he had bought and of which he was in possession, whether or not the seller had a right to sell it to him. [p. 807, col. 1.]

Application against an order of the Chief Presidency Magistrate, dated the 14th March 1923.

Babu Manmatha Nath Mukherjee, for the Petitioner.

Babu Probode Chandra Chatterjee, for Opposite Party No. 1.

Babu B. B. Mukherjee, for Opposite Party No. 2.

JUDGMENT.

Buckland, J.—This is an application made on behalf of one Kedar Nath Dey against an order of the Chief Presidency

Magistrate, dated the 14th March 1923, directing that a certain motor car should remain in Court until further orders. That order was made in criminal proceedings instituted by Mohamed Siddik against a person of the name of Rigby in which the latter is charged with criminal breach of trust in respect of the motor car. Those criminal proceedings themselves as between the parties are not before us and we are only concerned with the order made against Kedar Nath Dey for the return of the car. But from Siddik's petition of complaint it appears there were arrangements embodied in an agreement between him and Rigby with reference to this motor car. The petition of complaint further states that he learnt on enquiry that Rigby had sold the car to Kedar Nath Dey contrary to the terms of the agreement. The position, therefore, is that there was a dispute about this car resulting in criminal proceedings between Mohamed Siddik and Rigby. Kedar Nath alleges that these proceedings are collusive for the purpose of securing the car from him for the benefit of the parties. That is hardly a matter we can go into, but I may say, without prejudging the criminal proceedings now pending between Mohamed Siddik and Rigby, that from the petition of complaint it is obvious that, even as regards those proceedings, it may be a matter for consideration as to whether or not the questions involved are matters for a Criminal or a Civil Court. But as regards Kedar Nath Dey I have not the slightest hesitation in saying that there has been a gross abuse of the process of a Criminal Court by utilising criminal proceedings to which Kedar Nath Dey is not a party for the detention of property which he professed to have and had admittedly bought, and of which he was in possession, whether or not the seller had a right to sell it to him. I can only suppose the object is to endeavour to obtain the judgment of the Criminal Court upon a question which clearly ought to be determined in a civil suit. The car may be detained for a period of several months in which time it will probably seriously deteriorate. Though the car should not be detained until the conclusion of the criminal case

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I think some order should be made safeguarding the rights of Siddik, if he has any, until the question of the ownership of the car or any other such questions of a civil nature to which the facts may give rise have been decided by a Court competent to deal with them if proceedings are instituted within a reasonable time for that purpose.

The order, therefore, is that on Kedar Nath Dey giving an undertaking in writing to this Court to produce the car whenever called upon to do so either by this Court or by the Court of the Chief Presidency Magistrate until the proceedings before him have terminated and upon Kedar Nath Dey giving security in the sum of rupees ten thousand by his own bond and by one surety to the satisfaction of the Chief Presidency Magistrate, the car in question will be returned to him.

On the undertaking to this Court being given it will be certified by an officer of this Court to the Chief Presidency Magistrate so that he may act upon such certificate when he has taken the security ordered. When the above directions have been carried out the order of the Chief Presidency Magistrate dated the 14th March 1923, directing the car to remain in Court will be set aside and on the criminal proceedings now pending between Siddik and Rigby before the Chief Presidency Magistrate being concluded Kedar Nath Dey will be discharged from his bond and undertaking and his surety also will be discharged. This order is without prejudice to any order that may be made in relation to this car by any Civil Court of competent jurisdiction at any date hereafter.

Cuming, J.—I agree.

B. N.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 959 of 1922.

January 24, 1923.

Present:—Mr. Justice Campbell.

CHHAPROLIA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 337, 494—Approver—Discharged accomplice—Corroboration of evidence—Penal Code (Act XLV of 1860), s. 400—Association for habitually committing dacoity—Evidence of accomplice.

An accomplice witness against whom the case has been withdrawn under section 494 of the Criminal Procedure Code is less reliable than one to whom a pardon has been tendered under section 337 of the Code. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have given false evidence on any point. Moreover, there is at least one previous statement by which his veracity can be tested. On the other hand, the accomplice witness, who has not received a conditional pardon, is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material, by the fear of prosecution for perjury if his deposition in Court does not correspond exactly with that previous statement. [p. 809, col. 1.]

In any case, the evidence of an accomplice must be regarded as tainted, particularly of an accomplice who has been discharged under section 494 of the Criminal Procedure Code, and it must be corroborated in material particulars before it can be acted upon. [p. 809, cols. 1 & 2.]

When persons are charged with belonging to a gang associated for purposes of habitually committing offences, the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasions, but the man who gives evidence of habitual association for a particular purpose must almost inevitably be an accomplice. [p. 809, col. 2.]

Criminal appeal from an order of the Special Magistrate, First Class, with section 30 powers, Delhi, dated the 31st July 1922.

Diwan Ram Lal, for the Government Advocate, for the Respondent.

JUDGMENT.—This judgment will dispose of the separate appeals of 13 persons out of 17 convicted by Lala Gopal Das, Special Magistrate, with section 30 powers, Delhi, of an offence under section 400. Of these persons Gopal Chamar, Shola, Khatik, Badam Khatik, Babbam Khatik, Babu Khatik, and Siyya, Jaga, have appealed through Counsel Mr. Rustumji. The other

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appellants, Harsa, Chhaprolia, Zahria, Belia, Rai Singh, *alias* Ashrafi Lal, Ajab Singh and Ram Chand have appealed through Jail. Of this second group, the last named is also a Khatik, and the others are members of criminal tribes being described as Bhatu Sansis with the exception of Chhaprolia who is described as a Kanjar Sansi. Of the three persons who have not appealed Harnam is a Kanjar Sansi and Ram Dial and Kala are Bhatu Sansis.

The principal prosecution witnesses are three approvers Jahangir, Bhatu Sansi, Ram Lal, Kanjar Sansi, and Bannun Kanjar Sansi.

These three approvers were not given conditional pardons but the cases against them were withdrawn by the Public Prosecutor with the leave of the Court under section 494, Criminal Procedure Code, and they were then tendered as witnesses. Mr. Rustomji has raised the objection, that they were not competent witnesses, but authority is against him on this point and all that he can point to is the opinion of the minority Judge in the Full Bench decision *Queen-Empress v. Hussein Haji* (1).

It can, of course, be argued with reason that an accomplice witness, against whom the case has been withdrawn under section 494, is less reliable than one to whom a pardon has been tendered under section 337. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have given false evidence on any point. Moreover, there is at least one previous statement by which his veracity can be tested. On the other hand, it might be claimed that the accomplice witness who has not received a conditional pardon is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material, by the fear of prosecution for perjury if his deposition in Court does not correspond exactly with that previous statement.

In any case, however, an accomplice's evidence must be regarded as tainted, particularly in such a case as is now before me, and it must be corroborated in material particulars before it can be acted upon.

(1) 25 B. 422; 2 Bom. L. R. 1095.

In regard to the extent of corroboration necessary it must be remembered, as the learned Counsel for the Crown has pointed out, that when persons are charged with belonging to a gang, associated for purposes of habitually committing offences, the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasions, but the man who gives evidence of habitual association for a particular purpose must almost inevitably be an accomplice.

The approver witness is Jahangir who has made a very long statement implicating all the appellants and describing 33 dacoities or thefts committed by the gang of which he himself was the leader. He is corroborated by one or other of the other two approvers in regard to all but five of the occurrences. Twenty-nine of these occurrences have been proved to have taken place by the evidence of independent witnesses who make it quite clear that the offences were committed by a gang. The existence of a gang is fully established, and the discovery of stolen property, which has been duly identified, in the possession or control of the three approvers furnishes satisfactory corroboration of their own statements that they were members of the gang.

In support of the Magistrate's finding, that each of the appellants was an accepted member of the gang, the following evidence is relied upon to corroborate the direct evidence of the approvers:—

1. Proof that certain of them were arrested on the evening of the 14th of June 1921, in a garden at Meerut of which Jahangir, approver, was the lessee, that they endeavoured to escape, when the Police raided the place, that the approvers were present with them, that the next day some stolen property was found in the garden, and that ten days later other stolen valuables were dug up in the garden on information given by one of the approvers.

2. Evidence of association in other places.

3. In the case of two of the appellants direct evidence of participation in a specific offence of dacoity.

4. Evidence of arrest in places other than the garden.

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5. Evidence of previous convictions for theft and kindred offences in the cases of some of the appellants.

6. Evidence that some of the appellants were absconders from Criminal Tribes Settlements.

The incident immediately responsible for the prosecution of the appellants was the capture of Rai Singh, appellant, on the 1st June 1921, in the course of what Jahan-gir, approver, has described as occurrence No. 29. A gang, of which he was a member and some of the members of which carried firearms, attacked and looted some huts on the banks of the Jamna. The people of these and other neighbouring huts gathered and forced the dacoits to retreat across the river. One of the gang, a man named Dalla, was drowned and Rai Singh was so exhausted that his companions had to leave him behind and thus he fell into the hands of the pursuers who made him over to the Police. From Rai Singh was ascertained the name of one of the prosecution witnesses, Chhajju, who confessedly was an accomplice with the gang but who was not placed on trial as having been a member thereof. Chhajju gave information which led to the raid on Meerut garden and to the discovery of stolen property there. Other information was obtained from the approvers and other persons captured in the garden.

Mr. Rustomji, for the appellants above named as his clients, does not contest the evidence of the existence of the gang or of the membership thereof of the approvers and this evidence, in my opinion, is not rebutted by anything on the record. It is to be seen in the case of each appellant whether he is proved to have belonged to the gang. It has been stated already that the evidence of the three accomplice witnesses, whom I have designated approvers implicates all the appellants and what I proceed to discuss is the evidence supporting or contradicting the statements of those three men.

Shola.—This man is a Khatik, and Mr. Rustomji, who appears for him, concedes that the case against him is very strong. He is said to have been, what the learned Counsel for the Crown has described as the head of the disposals branch of the gang. A quantity of stolen property was

found in his house which has been proved satisfactorily to represent four offences by evidence to rebut which no attempt has been made. There is also a good deal of evidence of association with the approvers and other appellants against whom I find the charge to be established and there are no reasons for interfering either with the conviction of this man or with the sentence imposed upon him of five years rigorous imprisonment. His appeal is dismissed.

Badam and Babbam.—These are two Khatik brothers who are found by the Magistrate to be step-brothers of Shola. They were not arrested in company of any of the other appellants, and the only evidence of how they were arrested is a statement that they were arrested by the Meerut Police. They are said by Muhammad Din to have been seen by him in the Meerut garden with the other accused, but Muhammad Din is only a boy of 14 and his identification is not to be relied upon implicitly without the support of other independent evidence. Another witness Hira (P. W. No. 72), who has been produced to speak also of association in the Meerut garden does not mention these persons. Two witnesses, Budha and Astam Khan, mention their being seen at Shola's shop in Meerut with the other accused. But if they were relatives of Shola, it is quite possible for them to have been there for innocent purposes, and the mere fact of their relationship cannot create a presumption that they were associated with Shola in crime. The corroborative evidence against these persons in my opinion is insufficient. I accept their appeals, set aside their convictions and sentences and order, that they be released.

Babu.—This man also is a Khatik and was arrested at Shola's shop with Shola and Ram Chand, appellants. The evidence of Muhammad Din that he was seen at the Meerut garden with the other appellants is corroborated by Hira whom there is no reason to disbelieve. It has already been remarked that this Meerut garden is proved to have been the head-quarters of the gang by reason of the discovery in it of the proceeds of several robberies. Another witness, Budha, deposes to having seen the appellant on more than one occasion at

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Shola's shop with other accused persons. He is corroborated by Astam Khan (P. W. No. 91). It is true, as argued by Mr. Rustomji, that the ear-ring found in Babu's possession is not proved to have been stolen property by evidence other than that of the approvers, but there is, in my opinion, sufficient corroboration of the approvers' statements that he was a member of the gang. I dismiss his appeal.

Ram Chand.—This is another Khatik and his case is similar to that of Babu. He was arrested with Shola and Babu at Shola's house. It is true, that Budha (P.W. No. 92) says, that he was not one of the persons whom he saw frequenting Shola's shop; but Hira and Muhammad Din depose to his having been on various occasions in the Meerut garden, and there is no explanation of why he, a Khatik should go there and consort with Sansis. The evidence of the witnesses who prove him to be of good character does not rebut the prosecution case and I dismiss his appeal.

Gopal.—He is a Chamar who is alleged by the approvers to have participated in one substantive offence only. He is stated by Astam Khan (P.W. No. 91) to have been seen at Shola's shop, but this witness is not clear that he was in the company of other accused. Muhammad Din, the boy, says that he used to come to the Meerut garden; but may have been mistaken. The defence is, that Gopal was arrested by mistake for another man named Gopal, and it is conceded by the learned Counsel for the Crown that the corroborative evidence against this man is very slight. I accept his appeal, set aside the conviction and sentence and order that he be released.

Sirya.—He is described as a Jaga and there is direct evidence of his being concerned in a substantive offence under section 395 for which he is under trial in the Sessions Court at Meerut. His defence was mainly directed to proving an *alibi* in regard to that offence, but, as the learned Magistrate has held, there is no apparent reason for disbelieving the evidence of *Musammāt* Rammo, Achpal and *Musammāt* Mathri, who are his own relatives that he was one of the offenders. There is also evidence that he consorted

with the approvers and the other accused at Shola's shop and in the garden. There are no grounds for interference with his conviction, but I do not see why he should have been given a more severe sentence than Shola. He is alleged by the approvers to have been a prominent member of the gang, but there is no corroboration of special prominence and he is not a previous convict. I accept his appeal to the extent of reducing the sentence to one of five years' rigorous imprisonment with three months' solitary confinement.

Belia.—According to the approvers this man participated in a large number of offences. He was arrested in the Meerut garden. He is proved to have absconded on the 3rd of August 1920, from a Settlement of Criminal Tribes. There is evidence of association on other occasions and he makes no allegations against the approvers. He has been once on security under section 110 but he is not a previous convict. At the same time, the fact that he absconded from the Settlement corroborates the other evidence that he deliberately devoted himself to a career of crime. There is no reason to interfere with this man's conviction. As regards sentence, he has been classified with other appellants who are previous convicts and I do not appreciate the necessity of giving him a more severe sentence than Shola and Sirya. I accept his appeal to the extent of reducing the sentence to one of five years' rigorous imprisonment with three months' solitary confinement.

Zahrta alias Balwanta.—This man also absconded from a Criminal Tribes Settlement and he also was arrested in the garden. There is corroborative evidence of association on other occasions. He has two previous convictions, one under section 379 and the other under section 392, Indian Penal Code. In his petition of appeal he alleges, that he is old and feeble; but he was medically examined in the Court below and found sound and healthy for his age. There are no grounds for interference with his conviction or with his sentence, and I dismiss his appeal.

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Rai Singh alias Ashrafi Lal.—This man, as already stated, was arrested red-handed and his statement to the contrary is not supported by any evidence. He escaped from a Criminal Tribes Settlement with Hansa, appellant, on the 18th May 1921, and the date of his arrest is 1st June. It might be questioned whether in this short time, he could be held to have become a regular member of the gang. On this point there is evidence that Hansa, who was arrested on the 14th June in the garden, stuck to the gang up to the end, and it is a reasonable explanation of the escape of the two men from the Settlement, that they intended to embark upon a systematic career of crime. There is evidence that he was associated with the other accused for a day or two before his capture, and the connection between the approvers and certain articles left behind by the offenders at the time when Rai Singh was captured is established. These circumstances corroborate the approvers' evidence of his membership of the gang, and the fact of his two previous convictions under section 379, Indian Penal Code, is also to be borne in mind. There are no grounds for interference in this case and I dismiss the appeal. His plea of blindness raised in his petition of appeal was dealt with in the lower Court by medical examination. He was found to be developing senile cataract, but at the time of the examination he could see quite well enough for all ordinary purposes.

Hansa.—As stated above, this man absconded from a Criminal Tribes Settlement with Rai Singh on the 18th May 1921. He was arrested in the garden in the raid of the 14th June 1921. There is other evidence of association, notably the statement of Chhajju, (P. W. No 194), who although an accomplice has been independently corroborated in most important details of his evidence. Hansa is a previous convict under section 380, and I consider the approver's evidence to be sufficiently corroborated. I dismiss his appeal.

Chhaprolia.—This appellant absconded from the Dhariwal Criminal Tribes Settlement from the 29th March 1921 on which date he was given leave and did not re-

turn. He is a previous convict, having one conviction under section 380. He was arrested in the Meerut garden and there is a good deal of evidence of his association with the approvers and the other appellants on other occasions. The defence evidence produced by him supported the case for the prosecution in that it showed that he was not at the Dhariwal Settlement on the dates of the offences in which he was alleged by the approvers to have participated. He alleged enmity with Jahangir, approver, but failed to prove it. I dismiss his appeal.

Ajab Singh alias Baldeva.—This man has three previous convictions, two under section 379, and one under section 401, Indian Penal Code. When the garden was raided he was found to have hidden in a cook-house and was captured there. According to his own statement he absconded from a Criminal Tribes Settlement, but there is no other evidence to that effect. Several witnesses testify to his association with Jahangir, approver, and the others at the garden and at Shola's shop. He now alleges, that he was on bad terms with the approver Jahangir, but he did not state this in the Court below. The case against him is sufficiently corroborated and I dismiss his appeal.

Z. K.

*Appeal dismissed.***BOMBAY HIGH COURT.**

CRIMINAL REFERENCE NO. 29 OF 1922.

August 17, 1922.

Present:—Sir Lallubhai Shah, Kt.,
Chief Justice, and Mr. Justice Crump.

EMPEROR—PROSECUTOR*versus***SHIVLINGAPPA BASAPAA—ACCUSED.**

Criminal Procedure Code (Act V of 1898), ss. 407, 422, 439—S. 407, appeal under hearing of—Notice to officer appointed by Local Government not given—Illegality—Acquittal—Revision—High Court, when will interfere.

Where an appeal under section 407, Criminal Procedure Code, is heard by a Magistrate specially empowered to hear such appeals, it is incumbent on the Magistrate to give notice of such hearing

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under section 422 of the Code, to the officer appointed by the Local Government in that behalf and an omission to give such notice before hearing the appeal cannot be treated as an irregularity. The disposal of such an appeal without notice to the officer is not a legal disposal of the appeal.

Although the High Court will not, under section 439 of the Criminal Procedure Code, ordinarily interfere with an order of acquittal, it will do so where such an order is invalid, as where it is passed in an appeal under section 407 of the Code of the hearing of which the officer appointed by the Local Government in that behalf had no notice.

Criminal reference made by the District Magistrate, Sholapur.

Mr. D. G. Dalvi, for the Accused.

Mr. S. S. Palkar, Government Pleader, for the Crown.

JUDGMENT.—In this case five persons were tried by the Second Class Magistrate of Sholapur and convicted of hurt under section 323, Indian Penal Code. There was a charge under section 147, Indian Penal Code, but as there is some difference between the parties as to what the correct interpretation of the charge as framed was, I do not desire to express any opinion as to whether the charge also related to the offence under section 323, Indian Penal Code, I have referred to the charge to show what the nature of the proceeding was.

The accused appealed to the Sub-Divisional Magistrate under section 407, Criminal Procedure Code, who was authorised to hear appeals from the Second Class Magistrates. Without giving any notice to the District Magistrate, he proceeded to decide the appeal, and acquitted the accused. The case has been brought to our notice on a reference by the District Magistrate and the learned Government Pleader has appeared to support the contention that the appeal has not been legally disposed of in so far as it was heard and decided without giving notice to the District Magistrate as required by section 422, Criminal Procedure Code. That section provides that "if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his Pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard." The officer appointed by the Local Government

in this behalf is the District Magistrate and though this provision would not apply so far as the District Magistrate is concerned when the appeal is filed in his Court, it is clear that under the provisions of section 422, Criminal Procedure Code, the notice of appeal should have been given to the District Magistrate in the present case. The section is imperative and we do not think that the omission to give such a notice could be treated merely as an irregularity. It is true that under section 439, Criminal Procedure Code, we do not interfere ordinarily with orders of acquittal; but this is a case in which it is pointed out to us that there has been no legal disposal of the appeal, and the order which is made without a proper hearing cannot be accepted as a valid order. We, therefore, set aside the order of acquittal made by the Sub-Divisional Magistrate and direct that the appeal be heard and disposed of by him according to law.

W. C. A.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1537
OF 1922.

February 2, 1923.

Present:—Mr. Justice LeRossignol.

GHASITA—CONVICT—PETITIONER

versus

EMPEROR, THROUGH THE MUNICIPAL
COMMITTEE, SIALKOT—

RESPONDENT.

*Punjab Municipal Act (III of 1911), s. 175—
Notice to remove structure—Failure to tender compensation, effect of.*

The language of section 175 of the Punjab Municipal Act indicates that the requisition open to the Municipality is subject to the payment of compensation, that is, the tender of compensation must accompany the notice. This procedure affords the person concerned an opportunity of

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appealing to the Deputy Commissioner on the subject of the reasonableness of the tender and also for securing an assessment of the value of the obstruction before it ceases to exist.

A notice under section 175 of the Punjab Municipal Act calling upon a person to remove a structure unaccompanied with the tender of compensation is bad.

Petition, under section 439 of Criminal Procedure Code, for revision of an order of the District Magistrate, Sialkot, dated the 31st August 1922, modifying that of the Magistrate, Second Class, Sialkot, dated the 19th May 1922.

Mr. J. G. Sethi, for the Petitioner.

Sheikh Niaz Ali, for the Respondent.

JUDGMENT.—The petitioner was ordered by the Municipal Committee, Sialkot, to demolish a roof. The notice to him issued under section 175 of the Municipal Act of the Punjab which runs.

"The Committee may subject to the payment of reasonable compensation, by notice require the owner...to remove."

The petitioner has been convicted for failing to comply with this notice and urges that the conviction is bad inasmuch as no compensation was assessed far less paid before or simultaneously with the service of the notice.

In my opinion the contention has force. Respondent has referred to *Nauna Mal v. Municipal Board of Hathras* (1) and to *Chippal v. Municipal Committee of Simla* (2), but these authorities are not *in pari materia* and refer to other Statutes of which the language differs from that of the Municipal Act now under consideration.

The language of section 175 indicates that the requisition open to the Municipality is subject to the payment of compensation; i. e., the tender of compensation must accompany the notice.

This procedure affords the person concerned an opportunity for appealing to the Deputy Commissioner on the subject of the reasonableness of the tender and also for securing an assessment of the value of the obstruction before it ceases to exist.

I accept the petition and acquit the petitioner. The fine, if already recovered, shall be remitted.

Z. K.

Petition accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 328 OF 1923.

May 11, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

HATEMALI CHAPRASI—PETITIONER

versus

OSIMADDY AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Evidence, necessity of.

A Magistrate has no jurisdiction to make an order under section 145 of the Criminal Procedure Code without any evidence being adduced before him.

Babu Suresh Chandra Taluqdar, for the Petitioner.

JUDGMENT.—In this case, as the record shows, there was no evidence adduced at all before the Magistrate. That being so, the order of the Magistrate holding that the second party is entitled to possession of the property in dispute is one which must be set aside. It has been repeatedly held by this Court that a Magistrate has no jurisdiction to make an order under this section without any evidence being adduced before him.

Accordingly the order complained of is set aside.

The Rule is accordingly made absolute.

Z. K.

Rule made absolute.

(1) 20 Ind. Cas. 4051, 11 A. L. J. 486; 14 Cr. L. J. 421; 35 A. 375.

(2) 24 P. R. 1890 Cr.

PIR BUKHSH V. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 923 OF 1922.

January 23, 1923.

Present:—Mr. Justice Muti Sagar.

PIR BUKHSH—CONVICT—APPELLANT

VERSUS

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 401—Associating for habitually committing theft, requisites of—Proof.

To sustain a conviction on a charge under section 401 of the Penal Code, it is necessary to prove,—

(1) that there existed a gang of persons;
(2) that those persons were associated for the purpose of committing theft or robbery;
(3) that theft or robbery was to be committed habitually; and

(4) that the accused was a member of such gang. [p. 816, cols. 1 & 2.]

Beja v. Emperor, 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 33; 223 P. L. R. 1915; 63 P. W. R. 1913 Cr., followed.

The associating and the purpose of the association may be proved by direct evidence, such as that the accused or the accused and others met and determined to join together for the purpose of habitually committing theft or robbery. In the absence of direct evidence, the associating and the purpose of the association may be established by proof of acts from which these may reasonably be inferred. [p. 816, col. 2.]

Public Prosecutor v. Bonigiri Pottigadu, 2 Ind. Cas. 307; 32 M. 179; 9 Cr. L. J. 567; 5 M. L. T. 100, relied on.

For instance, the commission of a large number of thefts by the accused within a comparatively short time gives rise to an inference that they must have been associated for the purpose of habitually committing theft. [p. 816, col. 2.]

Appeal from an order of the Additional District Magistrate, Delhi, dated the 4th September 1922.

Dr. Sir Muhammad Iqbal, Kt., for the Appellant.

JUDGMENT.—These are four appeals from a judgment of the Additional District Magistrate of Delhi, dated the 4th September 1922, convicting the four appellants of the offence of being members of a gang of persons associated for the purpose of habitually committing theft, and sentencing them under section 401 of the Indian Penal Code to various terms of imprisonment.

Thirteen persons were originally charged with this offence and sent up for trial by the Police under section 401, Indian Penal Code. Out of these 13, one Shah Nawaz Khan eventually turned an approver, and was accordingly discharged. Another person, Sakhawat, who is alleged to have come

to Delhi from Rohtak with the approver, was found by the learned Magistrate not to be a member of the gang and was also discharged. The following six persons, Yara, Chand Khan, Rahmat Ullah, Bahadur Ali, Ibban and Ganneshi were eventually acquitted because the purchasers of the stolen property were not able to satisfactorily identify them and also because it was not satisfactorily proved that they were habitual thieves. The remaining five persons, namely, Wahad Yar, Munshi Lal, Muhammad Khan, Munshi (Nabi Karim) and Pir Bukhsh were convicted and sentenced to imprisonments as follows:—

Wahad Yar to five years' rigorous imprisonment, including three months' solitary confinement; also to Police surveillance for two years after release.

Munshi Lal to three years' rigorous imprisonment, including two months' solitary confinement.

Mohammad Khan to three years' rigorous imprisonment, including two months' solitary confinement.

Munshi (Nabi Karim) to five years' rigorous imprisonment, including three months' solitary confinement also to Police surveillance for two years after release.

Pir Bukhsh to three years' rigorous imprisonment, including two months' solitary confinement.

From these convictions four separate appeals have been filed three through the Jail Authorities and one through Dr. Iqbal who has addressed me on behalf of Pir Bukhsh.

No appeal has been filed by Munshi (Nabi Karim). The convictions are founded mainly upon the evidence of the approver, who has given a detailed history of the various thefts in which he and his associates were implicated and the sole question for determination is whether his evidence is corroborated in material particulars by other independent evidence on the record. It appears that in the course of a month-and-a-half, from the 1st of March to the 15th of April 1922, twenty-seven thefts were committed in the City of Delhi in which the present appellants with certain other persons, who have either been discharged or acquitted for want of proof, took part. Pir Bukhsh is alleged to have taken part in sixteen thefts, Muhammad Khan in twelve, Wahad

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Yar in four and Munshi in three. There is ample evidence on the record in support of the fact that all of these thefts were committed and that all the four appellants along with the approver were implicated therein. A number of stolen articles have been recovered and have been produced in evidence. These stolen articles have been sufficiently identified by the victims of the various thefts and there is no reason why the testimony of these witnesses should not be believed. It is alleged by the prosecution that the thieves were carrying on a systematic trade in the stolen articles. Most of the persons to whom the things were sold have been traced and produced in evidence. They have testified to their having purchased those articles from the appellants, and I am satisfied that they are stating the truth. It is unnecessary to refer in this judgment to the various witnesses who have identified the stolen articles or who have identified the accused. It is sufficient to say that their evidence is quite convincing and fully establishes the identity of the accused. It is contended by Dr. Iqbal that most of these thefts were not reported to the Police and that the evidence as to the identification of the stolen articles is not satisfactory. I do not think there is any force in this contention. The thefts which these accused committed, were petty thefts and the victims may not have thought it worth their while to report them to the Police. As to the identification of the stolen articles the evidence, as already observed, is quite satisfactory and fully establishes the guilt of the accused. In my opinion the testimony of the approver has been sufficiently corroborated in material particulars and the conclusion at which the learned Magistrate has arrived is correct.

The next question to be considered is whether the appellants or any of them belonged to a gang of persons associated for the purpose of habitually committing theft. It has been laid down in *Beja v. Emperor* (1) that to sustain a conviction on a charge under section 401, Indian Penal Code, it is necessary to prove:

(1) that there existed a gang of persons;

(2) that those persons were associated for the purpose of committing theft or robbery;

(3) that theft or robbery was to be committed habitually;

(4) that the accused was a member of such gang, and the question for decision is whether the prosecution have succeeded in establishing that the appellants were associated together for these purposes. In *Public Prosecutor v. Bonigiri Polligadu* (2) it was held that the associating and the purpose of the association may be proved by direct evidence such as that the accused or the accused and others met and determined to join together for the purpose of habitually committing an offence. In the absence of direct evidence, the associating and the purpose of the association may be established by proof of acts from which these may be reasonably inferred. In the present case in addition to the direct evidence of the proprietors of the various *Chandukhanas* where these accused used to meet together there is the evidence of this latter character, namely, the large number of thefts committed by these accused within a comparatively short time which necessarily gives rise to an inference that the appellants must have been associated for the purpose of habitually committing theft. In my opinion this proof is sufficient for the conviction of the appellants under section 401, Indian Penal Code, and I dismiss the appeals.

Z. K.

Appeals dismissed.

(2) 2 Ind. Cas. 307; 32 M. 179; 9 Cr. L. J. 567; 5 M. L. T. 100.

(1) 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 331 223 P. L. R. 1915; 63 P. W. R. 1913 Cr.

MUHAMMAD DIN v. ILAM DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 751 OF 1921.

January 26, 1923.

Present.—Mr. Justice Martineau.

MUHAMMAD DIN—PLAINTIFF—

APPELLANT

*versus*ILAM DIN AND OTHERS—DEFENDANTS—
RESPONDENTS.*Indian Soldiers (Litigation) Act (IX of 1918), s. 11, applicability of—Plaintiff who has ceased to be a soldier on date of suit, whether can claim benefit of section.*

Under section 11 of the Indian Soldiers (Litigation) Act the time during which a plaintiff has been serving under War conditions is to be excluded in computing the period of limitation for the suit only in a case in which the plaintiff is an Indian Soldier. The section does not apply to the case of a plaintiff who has been a Soldier but has ceased to be one at the time when he brings his suit.

Second appeal from a decree of the District Judge, Gujranwala, dated the 27th December 1920, reversing that of the Munsif, First Class, Gujrat, dated the 31st August 1920.

Dr. Shuja-ud-Din, for the Appellant.

Mr. Mukand Lal Puri, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for pre-emption. The first Court passed a decree in the plaintiff's favour but the lower Appellate Court reversed it on the ground that the suit was barred by limitation, having been instituted more than one year after the date on which the vendee got possession of the land and also more than one year after the date of the mutation.

The contention on behalf of the appellant is that under section 11 of Act IX of 1918 the time during which he was serving under War conditions, namely, from the date of the sale to the 7th June 1919, is to be excluded in computing the period of limitation and that, therefore, the suit which was instituted on the 21st November 1919 is within time. But under section 11 of Act IX of 1918 the time during which a plaintiff has been serving under War conditions is to be excluded only in a case in which the plaintiff is an Indian Soldier. In this case the plaintiff is not a Soldier as he was discharged from the Army in June 1919 before the suit was instituted.

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Section 11 of the Act does not apply to the case of a plaintiff who has formerly been a Soldier but has ceased to be one at the time when he brings his suit. The time during which the appellant was serving under War conditions cannot, therefore, be excluded and the suit is time-barred.

The appeal is dismissed with costs.

Z. K.

*Appeal dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL NO. 948 OF 1922.

November 9, 1922.

Present.—Mr. Justice Broadway.

DEOK RAM AND OTHERS—PLAINTIFFS

—APPELLANTS

*versus*DULI CHAND AND ANOTHER—
DEFENDANTS—RESPONDENTS.*Pleadings—Appeal—New case.*

The Zemindars of a village sued for possession of a house alleging that it was a *Thakardwara*, where the villagers worshipped and that it had recently been unlawfully taken possession of by the defendant. The suit was dismissed on the finding that the place had long ceased to be a *Thakardwara* and that the defendant had been in adverse possession for over twelve years. In appeal the plaintiffs gave up their previous position and sought to urge that on the house ceasing to be a *Thakardwara*, it became *shamilat* or common property of the village and that, therefore, the possession of the defendant could not be adverse.

Held, that this amounted to setting up an entirely new case which could not be permitted to be done in appeal.

Second appeal from a decree of the District Judge, Karnal, dated the 31st January 1922, affirming that of the Mansif, Sonapat, dated the 24th January 1921.

Mr. Nanwa Mal, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—Deok Ram and others, zemindars of Mauza Lahrara, Tahsil Sonapat, in the District of Rohtak, instituted a suit against Duli Chand for possession of a house, alleging that it was an *asthal* or *thakardwara* where the villagers worshipped and that the de

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defendants had taken unlawful possession of it some ten days before suit and had commenced building thereon. The defendants contended that the property in question was theirs and that they had been in possession for a very long period. The Trial Court found that it had been a *thakarwara* at one time and that one Lachman Das had been in charge of it but that the defendants had proved that Lachhman Das died in 1892 and that soon after his death the idols had been removed from the house after which the defendants and their predecessors had taken possession of it and been in possession ever since, the possession extending to a period of over 12 years. The suit was accordingly dismissed and the plaintiff preferred an appeal to the District Court in which all the grounds attacked the findings of the learned Munsif as to the property having ceased to be used for religious purposes for a period of 12 years. At the time of arguments the learned Vakil for the appellants admitted that Lachhman Das had died in 1892. He then wished to argue that as soon as the property ceased to be the subject of dedication for religious purposes it became *shamilat* or common property of the whole village and that, therefore, the possession of the defendants could not be adverse. The learned District Judge held that this was setting up an entirely new case which he refused to allow. Without examining the other grounds of appeal he affirmed the decree of the Court of first instance. The plaintiffs have now come up to this Court in second appeal through Mr. Nanwa Mal.

It is urged by Mr. Nanwa Mal, Counsel for the appellants, that the judgment of the learned District Judge does not comply with the provisions of O. XXI, r. 31, Civil Procedure Code. While admitting that the judgment under appeal might have been more detailed, it seems to me that no grounds have been made out for my interference in second appeal. As I read the judgment, the learned District Judge agreed with the learned Munsif in holding that the possession of the defendants had existed for a period of over 12 years. The plaintiffs case from the outset had been that the property in suit was still the subject of religious dedication and had

only recently been unlawfully taken possession of. The appellants' learned Vakil obviously gave up that position and sought to attack the defendants upon an entirely new and different ground. The cause of action was clearly not the same and the decision of the learned District Judge was, in my opinion, correct. I accordingly dismiss the appeal with costs.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2118 OF 1918.

May 16, 1922.

Present:—Mr. Justice Martineau and
Mr. Justice Harrison.AMIR AND DAULAT, SONS AND LEGAL
REPRESENTATIVES OF SARANG, DECEASED
—DEFENDANTS—APPELLANTS.

VERSUS

Mali KAHAN CHAND, FOR LAKHPAT
RAI FOR SELF AND MINOR GHULAM
MUHAMMAD AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Hindu manager, alienation by—Declaratory suit by co-parceners, whether competent—Decree for possession on payment of Court-fees—Hindu Law—Joint family—Alienation by manager, suit to set aside—Purchase-money partly raised for binding purposes—Decree, form of.

A Hindu co-parcener is not competent to sue for a mere declaration, that a sale of the family property by the manager is not binding on the family. He must sue for possession as well. Nevertheless, even if he has asked for a mere declaratory decree, he can be given a decree for possession on his payment of the necessary Court-fees.

In a suit by a Hindu co-parcener to set aside an alienation made by the manager, where part of the purchase-money is found to have been raised for purposes binding on the family, the Court should make the decree for possession conditional on the payment of the amount.

Koer Hasmat Rai v. Sunder Das, 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1013, followed.

Second appeal from a decree of the District Judge, dated the 15th April 1918, setting aside the decree of the Senior Sub-Judge, dated the 23rd July 1917.

Mr. Mohammad Rafi, for the Appellants
Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—This judgment will dispose of three appeals Nos. 2118, 2119 and 2176 of 1918, which arise out of two suits brought by the plaintiffs for a declaration that two

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sales of land effected by Kanhaya Lal, the father of one plaintiff and the grandfather of the other, in 1905 and 1909, respectively, shall not affect their reversionary rights. The sale of 1905 was for Rs. 2,720 in favour of Devi Das and Gurditta Ram, whose rights afterwards passed under pre-emption decrees to the appellants in Appeal No. 2119. The sale of 1909 was for Rs. 4,500 in favour of Jalal and Muhammad Shah, whose rights have passed under a pre-emption decree to Sarang and Ghulam Ali Shah, the appellants in Appeals Nos. 2118 and 2176. The land sold is ancestral, as it is shown in the settlement Records as held by Kanhaya Lal's father Devi Das. The plaintiffs contended that sales were invalid under Hindu Law and custom, although they alleged that they followed custom. The Subordinate Judge found that they followed Hindu Law, and the correctness of this finding is not now disputed. On the question of necessity he found that Kanhaya Lal was heavily in debt, that he had to part with the land in order to discharge the debts and that the debts were not shown to be tainted with immorality. He accordingly dismissed both the suits.

On appeal the District Judge, after pointing out that the purposes for which the land was sold were not mentioned in the deeds, found that necessity for the sales was not proved, and he accepted the appeals and passed decrees in the plaintiff's favour. Second appeals have been filed in this Court.

It is contended for the appellants that the lower Appellate Court has ignored the evidence adduced by them to prove Kanhaya Lal's indebtedness, but this contention is not borne out by a perusal of the lower Appellate Court's judgment. The learned District Judge enumerated the various circumstances mentioned by the First Court as showing necessity, but found that no part of the evidence connected the consideration for the sales with any family necessity or just antecedent debts. Counsel for the appellants lays stress principally on the fact that Kanhaya Lal was prosecuted in an embezzlement case, which began sometime in 1905, and contends that he incurred heavy expenditure in defending himself. But it is by no means clear whether the defraying of the expenses in that case was

one of the purposes for which the sales were effected. Devi Das, one of the vendees in the sale of 1905, advanced money to Kanhaya Lal for the case, but it was not till November 1905 that he began making the advances, whereas the first sale-deed had been executed on the 28th August 1905. The criminal case ended in 1907 long before the second sale-deed was executed. No creditor has stated that any particular sum was due or was paid to him about the time when either of the sales was effected. The appellants have to connect the debts incurred by Kanhaya Lal with the sales that he effected; and this, on the District Judge's finding, they have failed to do. That finding is one of fact and cannot be contested in second appeal. Mr. Muhammad Rafi has, however, argued on behalf of the appellants that as the plaintiffs have been found to be governed by Hindu Law, they were co-parceners with Kanhaya Lal and are not competent to sue only for a declaration of their title, but must sue for possession. This contention is correct and, although it was not raised in the lower Courts, or in the memoranda of appeal in this Court, we think it is right to entertain it, the point being an important one of law which clearly arises on the finding that the plaintiffs are not governed by custom. Kanhaya Lal has died since the appeals were filed, so that the plaintiffs, who at the time of the institution of the suits were entitled only to ask for joint possession, are now entitled to claim exclusive possession. Nevertheless, although declaratory decrees were asked for, the plaintiffs can be given decrees for possession of the land if they pay the Court-fees required for possessory suits. Such decrees would, however, in accordance with the ruling of the Calcutta High Court reported as *Koer Hasmat Rai v. Sunder Das* (1), which we think should be followed, be conditional on payment by the plaintiffs of the purchase-money which has not been shown to have been raised by Kanhaya Lal for immoral purposes.

We accordingly accept the appeals, set aside the decrees of the lower Appellate Court, and in lieu thereof pass a decree in each case for possession of the land in suit

(1) 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.

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on payment of the purchase-money to the appellants, that is to say, on payment of Rs. 2,720 to the appellants in Appeal No. 2119 for the land which was sold by Kanhaya Lal on the 28th August 1905 and on payment of Rs. 4,500 to Sarang and Ghulam Ali Shah, the appellants in Appeals Nos. 2118 and 2176, for the land sold by Kanhaya Lal on the 8th February 1909. These decrees will be conditional on the plaintiffs paying into the Trial Court the Court-fees necessary for suits for possession of the land within three months from this date. If the Court-fees are paid within that period the parties will bear their own costs throughout, otherwise the suits will stand dismissed with costs throughout.

N. H.

*Appeal accepted.***LAHORE HIGH COURT.**

MISCELLANEOUS FIRST CIVIL APPEAL

No. 811 OF 1922.

November 30, 1922.

Present.—Mr. Justice Harrison.**GHULAM MUSTAFA—DEFENDANT—****APPELLANT***versus***GHULAM SADIQ AND OTHERS—PLAINTIFFS****—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), s. 104 (f), Sch. II, para. 21—Arbitration—"Order filing award" what is—Appeal.

An "order filing an award" within the meaning of section 104 (f) of the Civil Procedure Code, does not mean the order by which the arbitrators are directed to send their award or bring it to Court before any objections have been lodged or disposed of. It means the order passed after the objections have been disposed of, and against this order an appeal lies under section 104 (f) of the Code, notwithstanding the provisions of para. 21 (2) of Schedule II to the Code.

Ram Ditti v. Amar Singh, 10 Ind. Cas. 512; 123 P. R. 1912; 103 P. W. R. 1911; 172 P. L. R. 1911, followed.

Miscellaneous first appeal from the decree of the Senior Subordinate Judge, Amritsar, dated the 7th February 1922.

Messrs. *Abdul Aziz and Badar-ud-din Kureshi*, for the Appellant.

Sheikh Niaz Ali, for the Respondents.

JUDGMENT.—The plaintiffs applied under Art. 20 of the Second Schedule of the Civil Procedure Code to have an award given by arbitrators filed. The defendants raised various objections. These were gone into by the Senior Subordinate Judge and disposed of in his order dated the 7th February 1922, which concluded as follows:—

"I accordingly grant a decree in terms of the award and order defendant to pay to plaintiff a sum of Rs. 32 as costs of these proceedings."

From this order the defendant Ghulam Mustafa has lodged this appeal under section 104 (f). Mr. Niaz Ali raises a preliminary objection that the appeal does not lie and that if it does, it is barred by time. He points out that there is no appeal from the decree which was eventually drawn up. He contends first that the order filing the award must mean the order by which the arbitrators were directed to send their award or bring their award to Court before the objections had been lodged or disposed of. In the second place, he objects that there is no order in so many words filing the award.

The first point is disposed of by the wording of paragraph 21 of Schedule II, which makes it quite clear that the order filing an award is passed after the objections have been disposed of. His second objection is technically correct and it would obviously have been better if the Senior Subordinate Judge had consulted the Code and passed an order in the correct terms. There can, however, be no doubt that his order is tantamount to an order filing the award and that this is what he meant by saying, "I grant a decree in terms of the award."

Mr. Niaz Ali further contends that under paragraph 21 (2), as no appeal lies from a decree there can be no appeal from the order. This question has been exhaustively gone into in *Ram Ditti v. Amar Singh* (1), and it has been decided that an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. The judgment of Rattigan, J., explains the difficulty which arises

(1) 10 Ind. Cas. 512; 123 P. R. 1912; 103 P. W. R. 1911; 172 P. L. R. 1911.

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from there being apparently two contradictory provisions in the Code, and as one must be ignored he explains that the provisions of section 104 (f) should be observed and paragraph 21 (2) of the Code should be treated as a dead letter.

In arguing on the merits of his appeal Mr. Abdul Aziz has confined himself to three points and has dropped the remaining grounds of appeal. The first is, that the terms of the reference were clear and directed the arbitrators to give an award regarding the property, moveable and immovable, left by the two brothers, Abdul Rahman and Muhammad Ali, whose descendants are now disputing over the partition. They came to a finding that Abdul Rahman in his lifetime had sold his one-half share to his son and nephew and Counsel urges that this was beyond the scope of the reference inasmuch as they were not empowered to hold that before his death Abdul Rahman had parted with his property. There is, in my opinion, no force whatever in this contention. They had to deal with the property which had belonged to the two brothers and they were quite right in coming to the decision, if satisfied with the correctness of the same, that one of the brothers had parted with the whole or a part of his share during his lifetime.

The second point was that, although there were seven parties to the reference the shares of two only have been defined. The remaining five are the younger brothers and sisters of Ghulam Ali, all of whom are represented by Mr. Niaz Ali. They are quite satisfied that their shares should be left joint, and, therefore, the present appellant has no grievance and the matter is no concern of his.

The third point pressed is that the award did not go far enough and did not deal with certain shares in a shop held by the descendants of the two brothers. It does consider this shop inasmuch as it explains that this is *naya karibar* and was not included in the property held by the two brothers. It was, therefore, outside the scope of the reference and the arbitrators were quite right in leaving it alone.

The other grounds of appeal, including the alleged misconduct of the arbitrators have been definitely given up.

Finding that there is no force whatever in the appeal, I dismiss it with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 474 OF 1922.

January 16, 1923.

Present:—Mr. Justice Scott-Smith.

LOK NATH AND OTHERS—PLAINTIFFS—

—PETITIONERS

versus

Musammal SATTAN BAI AND OTHERS—
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 141; O. IX, r. 9, O. XLIII, r. 1 (c)—Suit dismissed for default—Application for restoration dismissed for default—Application for restoration of dismissed application, whether lies—Appeal.

Where an application for restoration of a suit dismissed in default is itself dismissed in default, an application lies under O. IX, r. 9 of the Civil Procedure Code for restoration of the dismissed application. If, however, this second application is rejected, no appeal lies against the order of rejection.

Bevin Behari Saha v. Abdul Barik, 35 Ind. Cas. 613; 44 C. 950; 21 C.W.N. 30; 24 C. L. J. 446, referred to.

Under O. XLIII, r. 1 (c) of the Civil Procedure Code an appeal lies from an order under O. IX, r. 9, of the Code rejecting an application for an order to set aside the dismissal of a suit. This cannot be interpreted to mean that an appeal lies from an order under r. 9, O. IX rejecting an application for an order to set aside the dismissal of an application.

Petition, under section 44 of the Punjab Courts Act, for revision of an order of the District Judge, Multan, dated the 21st December 1921, affirming that of the Munsif, First Class, Khanewal, District Multan, dated the 3rd May 1921.

Lala Amar Nath Monga, for the Petitioners.

Mr. Anant Ram, for the Respondents.

JUDGMENT.—The plaintiff-petitioner's suit for possession of land was dismissed in default of his appearance on the 4th of October 1920, under O. IX, r. 8, Civil Procedure Code. On the 3rd of November 1920 he made an application for restoration

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of the case under O. IX, r. 9, Civil Procedure Code. The application was dismissed in default on the 7th of February 1921. On the same date he made a fresh application for re-admission of the case and stated at the end of it that the said application might be considered as one for review. This application was dismissed, without making any inquiry, on the 3rd of May 1921. From this order the plaintiff appealed to the District Judge who dismissed it on the ground that no appeal lay. Plaintiff has now applied for revision to this Court.

It is contended that an application lies under O. IX, r. 9, Civil Procedure Code, for re-admission of an application dismissed in default and in support of this contention a reference is made to *Bepin Behari Saha v. Abdul Barik* (1). That was a case where a Small Cause Court suit had been dismissed in default and an application had been made under O. IX, r. 9, Civil Procedure Code, for the restoration of the suit. That application was also dismissed for the plaintiff's default in the presence of the defendant's Pleader and he again made an application under O. IX, r. 9, and it was held that an application under O. IX, r. 9, Civil Procedure Code, lay. Having regard to section 141, Civil Procedure Code, I am clearly of opinion that an application lay to restore the former application which was dismissed in default. At the same time, I am of opinion that when that application was rejected no appeal lay from the order of rejection. Order XLIII, r. 1 (c) shows that an appeal lies from an order under r. 9, O. IX, rejecting an application for an order to set aside the dismissal of a suit. This cannot, I think, be interpreted to mean that an appeal lies from an order under r. 9, O. IX, rejecting an application for an order to set aside the dismissal of an application. I think, however, that the present petition for revision may be treated as one for revision of the order of the First Court dated the 3rd May 1921. The application of the 7th February 1921 should, in my opinion, be considered on its merits as one for restoration of the previous application to re-admit the suit which was dismissed for default.

(1) 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 301 24 C. L. J. 446.

I, therefore, allow the revision and setting aside the order of the Trial Court, dated the 3rd of May 1921, remand the case thereto in order that it may dispose, after such inquiry as is necessary, of the application of the 7th February 1921. No order as to costs in this Court.

Z. K.

Revision allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 205 OF 1922.

April 16, 1923.

Present :—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Rao Bahadur MAN SINGH—PLAINTIFF
—APPELLANT
versus

Maharani NAWLAKHBATI AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Guardian and ward—Ward, whether can question act of guardian after disability ceases—Hindu Law—Succession—Ancestral property—Daughter's son, position of—Survivorship—Widow—Surrender, requisites of—Bengal Court of Wards Act (IX of 1879), s. 60, applicability of, to surrender by Hindu widow of life-estate—Estoppel—Incomplete transaction—Conduct—Pardah nashin lady, transaction with—Undue influence—Independent advice—Burden of proof.

A person under disability is bound by the act of his guardian by whom he is represented in a proceeding, but such a person can re-open the proceeding after the disability ceases, if he satisfies the Court that the act of the guardian has prejudiced him. [p. 828, col. 2.]

The doctrine of survivorship, as understood by the Mitakshara Law, is not limited to unobstructed succession and to the succession to the joint property of re-united co-parceners. [p. 837, col. 1.]

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Under the Mitkashara Law the right of survivorship will not prevail in favour of a survivor as against the male issue of the deceased. [p. 837, col. 1.]

"Ancestral property," in its technical sense in the Hindu Law, means property which descends upon one person in such a manner that his issue acquire certain rights in it as against him. [p. 837, col. 2.]

It is true that under the Hindu Law it is only the persons who offer the funeral cake to the owner of the property that are regarded as having an interest in the property by birth. But it is well-established that as each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. [p. 837, col. 2.]

Whatever the position of a daughter's son may have been under the Hindu Law, before the appointment of a daughter to raise up issue for her father became obsolete, under the present form of that law he is a member of his own father's family and cannot be regarded as a member of his maternal grandfather's family. [p. 837, col. 2.]

Though actual transfers by Hindu widows have, in many cases, been supported by reference to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or renunciation of the world by her afterwards, or some act by her which might, in the eye of the law, justify the inference that the widow is civilly dead. It is only where the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner. On the other hand, there are cases which are called cases of relinquishment but which are in fact not cases of relinquishment at all, where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity; and it does not follow that, because where a widow renounces the world the next reversioners take the estate by operation of law, there is also a succession by operation of law, where, as a result of a transaction not amounting to relinquishment of properly so-called but capable of being supported by reference to the theory of relinquishment, the estate comes to the next reversioners. [p. 829, col. 2.]

For instance, a Hindu widow may sell for valuable consideration the entire estate of her husband to the next reversioner or to an entire stranger with the assent of the next reversioner. The transaction will be upheld by applying the analogy of a relinquishment of her estate by the Hindu widow; but it cannot be argued that there is relinquishment, properly so-called, in such a case, or that the title of the reversioner arises by operation of law. [p. 830, col. 1.]

The law on the subject has grown from precedent to precedent and it cannot be argued that because a certain legal incident is true of a certain proposition, it must also be true of every proposition which may have been logically

drawn from the first proposition or which is capable of being supported by reference to the first proposition. [p. 830, col. 1.]

It is one thing to say that because, upon the death of a widow, either actual or civil, the estate would at once vest by operation of law in the next heir of her husband, therefore, the widow can operate her own death by conveying absolutely the estate of her husband to one who, at the moment of the conveyance, is the next heir of her husband; and it is quite another thing to say that, when the widow does convey the estate to the next reversioner, the reversioner takes the estate by operation of law and not by virtue of the conveyance. In other words, it does not follow that, because the heir takes by operation of law where there is real relinquishment by the widow, that is to say, when she elects to die a civil death, he also takes by operation of law when, as a result of a transaction which may be supported by reference to the theory of relinquishment, but which is in fact not relinquishment, the estate is carried from the widow to the heir or to a stranger with the consent of such heir. [p. 830, col. 2; p. 831, col. 2.]

In a case of disclaimer by a Hindu widow at the time of the death of her husband or of relinquishment, properly so-called, afterwards, the title of the heir would arise by operation of law, and if the widow happens to be a ward of Court at the time of relinquishment section 60 of the Bengal Court of Wards Act would not, in such a case, operate to the prejudice of the heir. But wherever the transaction is one, not of relinquishment, but capable of being supported by reference to the theory of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow, and if the latter is a ward of Court, on the date of the transaction, the transaction comes within the prohibition contained in section 60 of the Bengal Court of Wards Act. [p. 832, col. 2.]

A deed of surrender executed by two Hindu widows in favour of the next heirs of their husband of their husband's estate after reciting that the widows being old were desirous of spending the remainder of their lives in Divine Worship at the holy City of Benares, stipulated for a substantial monthly allowance for the widows for their lives which was to be a first charge on certain properties. Certain other duties were imposed upon the heirs and the deed provided that if the heirs neglected the performance of those duties the widows would be entitled to enforce them. On the date of the execution of the deed of relinquishment the widows were wards of Court, but the sanction of the Court of Wards to the deed was not obtained:

Held, that the transaction did not amount to a relinquishment, properly so-called, but operated as a conveyance in favour of the heirs and fell within the prohibition contained in section 60 of the Bengal Court of Wards Act. [p. 834, col. 2.]

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A relinquishment by a Hindu widow becomes operative only when the widow acts upon the declaration and withdraws herself from the estate. [p. 835, col. 1.]

Though a party has complete power to resile from an incomplete engagement, such a power will be denied when the actings and conduct of the parties have carried the incompletely executed engagement into effect. But in order to exclude the plea of *locus penitentiae*, a party must base his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and conduct of the parties. [p. 835, col. 1.]

The jurisdiction of Courts of Law to afford protection to *pardah nashin* ladies rests on a presumption of the imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *pardahnashin* lady to show that the deed was explained to her and understood by her. [p. 830, col. 2.]

Starting from the elementary principle that every person taking a document from a *pardah nashin* lady is bound to show affirmatively that the document is her document, that is to say, that she understood the nature of the transaction and the effect of it, Courts of Law have laid down certain rules for assisting them in determining the point; but the rules so laid down are rules of prudence rather than rules of law, and their application depends on the particular facts of each case. There is a grave risk of a failure of justice if these rules are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication. [p. 840, col. 1.]

A Court when called upon to deal with a deed executed by a *pardah nashin* lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. [p. 840, col. 1.]

Cases in which these questions arise fall broadly into two groups, *viz.*, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases, where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The Court must in such cases have regard to the intellectual attainments of the lady concerned and will be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. [p. 840, cols. 1 & 2.]

What is meant by independent advice in this connection is that a *pardah nashin* lady should receive advice as to the legal effect of a particular document which she is about to execute and her position under it as compared with the position which she would occupy if she does not execute the document. [p. 850, col. 1.]

Pardah nashin ladies have a claim to special consideration where they deny on oath an effectual knowledge of documents which they are said to have executed. [p. 852, col. 2.]

Where the question is whether a *pardah nashin* lady has operated her civil death, which she was not bound to do, the Courts will act with great caution; and will not deprive her of her property unless compelled to do so. [p. 852, col. 2; p. 853, col. 1.]

(Case-law on all points discussed.)

Appeal from an order of the Additional Subordinate Judge, Bhagalpur, dated the 5th June 1922.

Messrs. Sultan Ahmad, S. M. Mullick, N. C. Sinha, Subal Chandra Mazumdar and A. Sen, for the Appellant.

Messrs. K. B. Dutt, C. C. Das, L. L. Jha and P. Dayal, for the Respondents.

JUDGMENT.

Das, J.—Maharaja Sir Harballabh Narain Singh, K. C. I. E., was the owner of a considerable Zemindari known as the Sonbarsa Raj. He was murdered on the 1st of April 1907 by an unknown assassin and he died leaving him surviving two widows, Maharani Tarabati and Maharani Nawlakhbati, a daughter, Maharaj Kumari Padmabati, and two grandsons, the sons of Maharaj Kumari Padmabati, Rao Bahadur Gobind Singh, known as Baria Lal, and Rudra Pratap, known as Chotey Lal. Maharaj Kumari Padmabati died in May 1915, Rao Bahadur Gobind Singh died in October 1919, and Maharani Tarabati died in August 1920. The plaintiff, the appellant before us, is the son of Gobind Singh, and he seeks as against Maharani Nawlakhbati and Chotey Lal, to recover possession of an eight-anna share of the Sonbarsa Raj.

On the 18th December 1918, the two widows of the late Maharaja executed a deed of surrender in favour of their grandsons, Gobind Singh and Rudra Pratap. At the time of the execution of the deed of surrender the Maharanis were wards of the Court of Wards, and the main questions in this appeal are, first, whether the Maharanis were competent to execute the deed of sur-

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render without the concurrence of the Court of Wards; secondly, whether the plaintiff, in the circumstances of the case, can claim under the deed of surrender, and, thirdly, whether the deed of surrender was intelligently executed by Maharani Nawlakhbati and whether she had independent advice in relation to the execution of that document.

The admitted facts are as follows:—Chotey Lal was suspected of the murder of the late Maharaja, and under an executive order of the Government he was externed from the District of Bhagalpur directly after the murder. The order of externment was not removed until sometime in 1920. On the 30th April 1907, the Maharanis applied to the Collector of Bhagalpur to be declared disqualified proprietors under section 6 of the Court of Wards Act, so that the estate might be managed by the Court of Wards. On the 15th May 1907, the Maharanis addressed another letter to the Collector of Bhagalpur. They alleged in that letter that the late Maharaja before his death expressed a desire that Chotey Lal should succeed him as the proprietor of the Sonbarsa Raj and that, in obedience to the wishes of the late Maharaja, they were willing to surrender their estate in favour of Chotey Lal. The petition was signed not only by the two Maharanis but also by their daughter, Padmabati, and their eldest grandson, Barra Lal, in token of their assent to the proposal made by the Maharanis. Mr. Lyle, the Collector of Bhagalpur, interviewed the Maharanis on the 23rd of May, and it appears that he pointed out to the Maharanis "the grave objections that exist in so important a matter of any precipitate or imperfectly considered action." The Maharanis agreed to postpone the execution of the deed of relinquishment for some months, and the interview came to an end. On the 27th May 1907, the estate was taken over by the Court of Wards and, thereupon, the Maharanis became wards of the Court of Wards. On the 4th February 1916, the Maharanis, it appears, addressed a letter to the Collector of Bhagalpur proposing to surrender their estate in favour of Barra Lal. The letter is not on the record, but is recited in another letter, dated the 4th March 1918, addressed by

the Maharanis to the Collector of Bhagalpur. The last mentioned letter sets out the legal difficulty in executing the proposed deed of surrender in favour of one only of their two grandsons and states that to obviate all future difficulty and prospective litigation they have decided that the surrender should be in favour of both the grandsons. To this letter they annexed a draft deed of surrender in substitution of the one which they had sent to the Collector in February 1916 and asked the Collector to obtain the sanction of the Court of Wards to the new deed which would be executed in favour of both the grandsons. In their letter the Maharanis entered into an elaborate defence of Chotey Lal and asserted that there was no evidence to justify the Police theory that Chotey Lal had any concern, direct or indirect, in the murder of the late Maharaja. They asserted, further, that the late Maharaja had affection for Chotey Lal and wanted to make him the sole heir of the Sonbarsa Raj and that, "during the few minutes that he survived the dastardly and murderous attack which resulted in his death, he actually wrote with his own hand a Will bequeathing the entire Sonbarsa Raj to the said Rudra Pratap Singh" but that, "unfortunately, he did not survive long enough to sign the Will and get it legally attested." They also prayed that the Government might be pleased to withdraw the order prohibiting the return of Chotey Lal to the District of Bhagalpur. This letter was, obviously, forwarded through the Commissioner of Bhagalpur to the Board of Revenue, and on the 25th October 1918 the Board of Revenue wrote to the Commissioner stating that it could not accord sanction to the Maharanis to surrender their estate in favour of their grandsons. Notwithstanding the adverse decision of the Board of Revenue, the Maharanis, on the 18th December 1918, executed a deed of surrender in favour of their grandsons. On the 23rd December 1918, the Maharanis wrote another letter to the Collector of Bhagalpur intimating that they had executed and registered a deed of surrender in favour of their grandsons and requesting the Collector "to take steps to make over the charge

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and management of the said properties to Rao Bahadur Gobind Singh and Rudra Pratap Singh if the Court of Wards do not think fit to retain management under section 13 (a) of Act IX of 1879 (B. C.).” On the 15th April 1919, the Maharanis were informed that the Board of Revenue considered that the deed of relinquishment executed by them in favour of their grandsons was invalid. Barra Lal then applied for registration of his name in the Land Registration Department. The Court of Wards, on behalf of the Maharanis, contested the application of Barra Lal and the application of Barra Lal was refused. Barra Lal died in October 1919 and on the 17th January 1921 the suit, out of which this appeal arises, was instituted by the appellant, the son of Barra Lal, for a decree for possession in his favour and in favour of Chotey Lal whom he cited as defendant second party in the action, and in the alternative for a decree for possession of eight-annas share in the Sonbarsa Raj. The plaintiff’s case is, that the Maharanis were competent to, and did in fact, execute a deed of surrender in favour of his father and Rudra Pratap on the 18th December 1918 and that, upon the execution of the deed of surrender, the estate of which the Maharanis were then in possession as Hindu widows, vested absolutely in his father and in Rudra Pratap. According to him, the Collector of Bhagalpur put undue pressure upon the Maharanis to compel them to agree to the Court of Wards taking charge of the estate and that the assumption by the Court of Wards of the management of the estate was contrary to the provisions of law and did not give it any right to object to the execution of the deed of surrender by the Maharanis. The Court of Wards, on behalf of Maharani Nawlakhbati, put in a written statement in which it contested the claim of the plaintiff. It denied that any pressure was put on the Maharanis to compel them to agree to the Court of Wards taking charge of the estate and it asserted that, as the late Maharaja was heavily involved in debts, the liabilities amounting to about ten lakhs of rupees and as the Maharanis, being *pardah nashin* ladies, were unable to protect their interest, the Maharanis applied for the protection of the Court of Wards, and that the

Maharanis were declared disqualified proprietors upon their own application. In the 6th paragraph of the written statement there is an admission that in 1916 the Maharanis expressed their desire to relinquish their estate in favour of Barra Lal, and there is a suggestion that the deed of relinquishment sued upon was not executed by them intelligently. Then, there is an added paragraph which runs as follows:— “That the defendant No. 2, of whom the Maharanis were very fond, was ordered by the Government to leave the district owing to his suspected complicity in the murder of the late Maharaja Bahadur. The plaintiffs have represented to the Maharanis that it was necessary to have a deed executed by them, so that the Government might be induced to allow the defendant No. 2 to return to Bhagalpur and the Maharanis, on that misrepresentation, without any proper and independent advice, signed the alleged deed of surrender without properly understanding its effects. This defendant submits that, in the circumstances, the deed is legally invalid and inoperative.” The 7th paragraph raises a question of law, namely, whether the deed of surrender was valid, inasmuch as the sanction of the Court of Wards was not obtained by the Maharanis. The 8th paragraph alleges that the deed of surrender was not acted on by the Maharanis and that “the Maharanis continued in enjoyment of the same rights as before the execution of the alleged deed of surrender.” The defendant second party also put in a written statement in which he charged Barra Lal with having procured the execution of the deed of surrender by false representation. The case adds, that Barra Lal took advantage of the fact that the Maharanis were fond of Chotey Lal and that he induced them to execute the deed of surrender by representing to them that the execution of the deed would secure the withdrawal of the order of excommunication against Chotey Lal.

The learned Subordinate Judge who tried the case framed the following issues:—

1. Is the suit maintainable?
2. Whether non-compliance with the provisions of section 80 of the Civil Procedure Code bars the suit?
3. Whether the deed of surrender, dated the 18th December 1918, was executed

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by the Maharanis, widows of Maharaja Sir Harballabh Narain Singh Bahadur, under misrepresentation without getting any independent advice and without knowing or understanding its contents? Is it legally valid or operative?

4. Whether the said deed of surrender amounts to a surrender of the entire interest of the Maharanis in the Sonbarsa estate?

5. Is the deed of surrender valid, having regard to the provisions of section 60 of the Court of Wards Act (IX of 1879 B.C.)?

6. Did the plaintiff's father and defendant second party accept the surrender and gave consent to it?

7. Did the aforesaid deed of surrender accelerate the succession of plaintiff's father and defendant second party the next reversioners to the said estate and vested in them and did they (the plaintiff and defendant No. 2) acquire a right, title to the said estate in equal shares and become entitled to possess it by virtue of the said surrender?

8. Whether the plaintiff has got any right or title to a moiety of the Sonbarsa estate, and is he entitled to succeed to it and get possession, if so, under what terms?

9. Whether the *ekrarnama* set up by the plaintiff was caused to have been executed under misrepresentation and fraud as alleged by defendant second party?

10. Is the plaintiff entitled to get any mesne profits, if so, to what amount?

11. To what relief or reliefs is the plaintiff entitled?

12. Was any pressure brought to bear on the Maharanis to agree to make over the Sonbarsa Estate to the Court of Wards?

Issues Nos. 1 and 2 were not pressed before him and he answered those issues in favour of the plaintiff. In regard to Issues Nos. 3 and 9 he came to the conclusion that there was no misrepresentation in the case and that there was an intelligent execution of the deed of surrender by the Maharanis. He thought that independent advice was not necessary but that there were circumstances in the case which suggested the inference that the Maharanis had independent advice in regard to the execution of the deed of surrender. He decided these issues in favour of the plaintiff. He found no difficulty in answering Issue No. 4 in favour

of the plaintiff. The question raised in that issue was, whether the surrender could be regarded as a surrender of the entire interest of the Maharanis, having regard to the fact that they retained a substantial interest in the estate for their maintenance. The learned Subordinate Judge thought that the provision of a monthly allowance to the Maharanis for their maintenance did not affect the validity of the deed of transfer. Issue No. 12 was not very seriously pressed before him and he decided that issue against the plaintiff. He lastly considered Issue No. 5 and he thought that section 60 of the Court of Wards Act constituted a prohibition on the right of the widows to surrender their estate without the concurrence of the Court of Wards. He answered this issue against the plaintiff and in the result he dismissed the suit.

Before dealing with the arguments that have been advanced to us it is necessary to mention a matter as to which there has been some discussion before us. The hearing of the suit began on the 10th May 1922; and from the 10th May 1922 up to the 31st May 1922 Maharani Nawlakhbati was represented in the record of the suit by the Court of Wards and by the Officiating Government Pleader in Court. The Court of Wards made no attempt to examine Maharani Nawlakhbati as a witness on her behalf but she was examined as a witness on behalf of the defendant second party. While she was being examined on commission, Babu Debta Charan Mukherji, the Officiating Government Pleader, stated to the Commissioner that, under instructions from the Court of Wards, he would not press Issue No. 3 on behalf of Maharani Nawlakhbati and that he would not examine the Maharani as a witness in support of her written statement. Issue No. 3, it will be remembered, raises the very important question of fact, namely, whether the deed of surrender was intelligently executed by the Maharanis and whether they had any independent advice in regard to the execution of this document. The Maharani as the ward of the Court of Wards was completely bound by the act of the Court of Wards on her behalf; and it appears that the Court of Wards intended to raise one

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point and one point only on her behalf, namely, whether she was competent to execute the deed of surrender, having regard to the fact that the sanction of the Court of Wards had not been obtained. It was obviously a matter of great prejudice to the Maharani that her real defence was not allowed to be raised on her behalf by the Court of Wards; but she was bound by the act of the Court of Wards, and, so long as she remained a ward of the Court of Wards, she had no right, under the Court of Wards Act, to raise any defence on her behalf. The Court of Wards, however, retired from the management of the estate on the 27th April 1922 after the evidence had been recorded in the case and the arguments heard in part. On the 31st May 1922, Babu Debta Charan Mukherji presented a petition stating that the Maharani was no longer a ward of the Court and that the Government Pleader had no further authority to represent her in the suit. On the 1st June 1922, Maharani Nawlakhbati appeared through another Pleader and filed a petition in which she prayed that the written statement filed by the defendant second party might be considered as her written statement; and she intimated to the Court that she desired to press Issue No. 3. This application was opposed on behalf of the plaintiff. The position taken up by the plaintiff was, that the learned Government Pleader representing Maharani Nawlakhbati having given up Issue No. 3, he, the plaintiff, did not adduce evidence in support of his case that the deed of surrender was intelligently executed by the Maharanis and that they had independent advice in regard to the execution of that document. The learned Subordinate Judge thought that there was great force in the contention of the plaintiff and he considered that any attempt on the part of Maharani Nawlakhbati to re-open Issue No. 3 would seriously prejudice the plaintiff. He held that Maharani Nawlakhbati could not be allowed to re-open Issue No. 3.

When this appeal was opened before us, we came to the conclusion that it was not right and proper that Maharani Nawlakhbati should be debarred from presenting a case to the Court which she has undoubtedly made in her written statement. The learned Government Advocate, appearing

on behalf of the plaintiff, strenuously contended that she was completely bound by the act of the Court of Wards and that to allow her to resile from the position conceded by the Court of Wards, would operate as a great hardship on his client. A person under disability is, no doubt, bound by the act of the guardian, but it is well-established that such a person can re-open the proceedings after the disability ceases, if he satisfies the Court that the act of the guardian has prejudiced him. In our opinion, it is far better that she should be allowed to re-open the matter now than that she should come to us afterwards, if we should decide the appeal against her on the question of law raised on her behalf, and invite us to deal with the whole case on the footing that the document was not read and explained to her, and that she had no independent advice in relation thereto. We accordingly came to the conclusion that it was open to her to press Issue No. 3, and that the learned Subordinate Judge should have allowed her to re-open that issue and to have met any case of prejudice by adjourning the hearing of the suit and giving an opportunity to the plaintiff to adduce such evidence as he thought necessary. Mr. Sultan Ahmad then pressed before us that if we allowed Maharani Nawlakhbati to re-open Issue No. 3, we should give him an opportunity to examine certain witnesses who are material witnesses on this issue. We recognised the force of Mr. Sultan Ahmad's contention and gave him leave to cross-examine Maharani Nawlakhbati on Issue No. 3 and to examine Mr. B. C. Sen, the Commissioner of the Patna Division, who was the Collector of Bhagalpur from April 1916 to September 1918; Mr. Nil Money Dey, who was the manager of the Sonbarsa Estate from 1914 till July 1920; Mr. Muhammad Abdus Samad, who was the manager of the Sonbarsa Estate under the Court of Wards at the time when the written statement was filed on her behalf; Mr. Surja Prasad, the Government Pleader of Bhagalpur, and Babu Anirudh Prosad Singh, a Zemindur and a Pleader, who is alleged to have taken a prominent part in the matter of the execution of the document by the Maharanis. The plaintiff has examined all these witnesses before us except Babu Anirudh Prosad Singh and we

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have considered their evidence in deciding Issue No. 3.

It will be convenient, first, to deal with the questions of law which have been raised by the defendants in this litigation. The contention which found favour with the learned Subordinate Judge is that section 60 of the Court of Wards Act constitutes a prohibition on the power of a Hindu widow to relinquish the estate (of which she may be in possession as a Hindu widow) without the concurrence of the Court of Wards. It is not disputed that, at the time when the Maharanis purported to relinquish their estate in favour of their grandsons, the estate was under the management of the Court of Wards, and that the Maharanis were wards of the Court. On the 4th March 1918, the Maharanis forwarded to the Collector of Bhagalpur a draft deed of surrender which they proposed to execute in favour of their grandsons and asked him to obtain the sanction of the Court of Wards "to the new deed which will be in favour of both the daughter's sons." The Collector forwarded the application of the Maharanis to the Board of Revenue, through the Commissioner of the Bhagalpur Division, and on the 25th October 1918, the Board wrote to the Commissioner to say that it agreed "with the Collector that the execution of the deed of surrender by the Maharanis during their lifetime in favour of their grandsons will complicate matters and create difficulties in the way of the Court's management." It accordingly directed "that things should be allowed to go on for the present as they are." On the 13th December 1918, the Collector conveyed the decision of the Board of Revenue to the Maharanis. On the 18th December 1918 with full knowledge of the decision of the Board of Revenue, the Maharanis executed the deed of surrender by which they relinquished their widow's estate in favour of their grandsons.

Section 60 of the Court of Wards Act provides as follows:— No ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in, his property or any part thereof, or to assign over or charge any allowance to be received by him from the Court." The question at once arises, whether by relinquishing her estate in favour of her

husband's reversioners, a Hindu widow creates an interest in her estate. It has been contended on behalf of the plaintiff that the substance of the transaction is the withdrawal of the widow's estate, and the consequent acceleration of the interest of the heirs who succeeded to the properties, not by virtue of any act done by the widow, but by operation of law. I am quite willing to admit that a Hindu widow may, under certain circumstances, effectively divest herself of her interest in her husband's estate without coming within the prohibition of section 60 of the Court of Wards Act; but I am not prepared to admit that, under no circumstances, would section 60 operate to prevent a Hindu widow from relinquishing her estate in favour of her husband's next reversioners.

It is well to remember that, though actual transfers by Hindu widows have, in many cases, been supported by references to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or the renunciation of the world by her afterwards, or some act by her which might, in the eye of law, justify the inference that the widow is civilly dead. It is only when the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner; and just as the Court of Wards Act cannot prevent the widow from dying, so it has no operation if the widow desires to turn *byragee* or renounce the world. But there are cases in the books which are called cases of relinquishment but which are in fact not cases of relinquishment at all, where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity; and it does not follow that, because where a widow renounces the world the next reversioners take the estate by operation of law, there is also a succession by operation of law, where, as a result of a transaction not amounting to a relinquishment, properly so-called, but capable of being supported by reference to the theory of relinquishment, the estate comes to the next reversioners. To take a

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simple case, a Hindu widow may sell for valuable consideration the entire estate of her husband to the next reversioner or to a stranger with the assent of the next reversioner. The transaction will be upheld by applying the analogy of a relinquishment of her estate by the Hindu widow; but it can hardly be argued that there is relinquishment, properly so-called, in such a case, or that the title of the reversioner arises by operation of law. The truth is, that the law on the subject has grown from precedent to precedent and it is impossible to argue that, because a certain legal incident is true of a certain proposition, it must also be true of every proposition which may have been logically drawn from the first proposition or which is capable of being supported by reference to the first proposition.

A discussion of some of the leading cases will, I think, make good my point. In 1856, the question arose before the Supreme Court in the case of *Jadomoney Dabee v. Sarodaprosono Mookerjee* (1) whether a Hindu widow could, for good consideration, convey her estate, inherited by her from her son, in favour of the next heir then living. In answering the question in the affirmative, Colvile, C. J., pointed out that it was "but another way of doing that which in former times was continually done without violence to the letter or spirit of Hindu Law, though in a manner shocking to humanity, by means of the rite of *Suttee*," and he took note of the fact that a "widow can by adopting a certain form of religious life divest herself of the estate and then accelerate its devolution on the next heir in her lifetime." The case before the Supreme Court was a case of conveyance, pure and simple, but arguing from the analogous cases of widows committing suicide or adopting a religious life and thus accelerating the devolution of the estate on the next heir, the Court came to the conclusion that there was nothing inherently wrong in the widow conveying the estate of her husband for consideration to one who would take the estate by inheritance if she were to die at the date of the conveyance. But it is one

thing to say that because, upon the death of a widow, either actual or civil, the estate would at once vest by operation of law upon the next heir of her husband, therefore, the widow can operate her death by conveying absolutely the estate of her husband to one who, at the moment of the conveyance, is the next heir of her husband, it is another thing to say that, when the widow does convey the estate to the next reversioner, the reversioner takes the estate by operation of law, and not by virtue of the conveyance.

Jadomoney's case (1) was decided in the Supreme Court in 1856, and between 1855 and 1884 the law was firmly established in Bengal that a Hindu widow by relinquishing her rights in favour of the heir of her husband's estate could accelerate his inheritance, and that the effect of a conveyance by her and such heir was to convey the absolute estate. In 1884, in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (2) the question was raised whether a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person who at the time is the next reversioner would conclude another person not a party thereto who is the actual reversioner upon the death of the widow, from asserting his title to the property. The facts were these: the widow executed a conveyance of the property in favour of a stranger, reciting necessity. The High Court took the view that there was not a sufficient finding in the judgment of the Appellate Court as to whether there was legal necessity for the conveyance or not, and the whole case was argued on the footing that there was no necessity for the conveyance. The person who at the time was the next reversioner executed a separate document in which he assented to the conveyance by the widow, and covenanted on behalf of himself and his heirs, that he would not lay claim to the property at any future time. That reversioner died, and the person entitled to succeed on the death of the widow was another person who was in no way bound by the covenants executed

(1) 1 Boul. 120; 3 Ind. Dec. (O. S.) 72.

(2) 10 C. 1102; 5 Ind. Dec. (N. S.) 737 (F. B.).

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by the previous reversioners. The Division Bench conceded that the widow might retire in favour of the next reversioner and that, if she did so, that is, if she abandoned her interest in his favour, the next reversioner would have as complete and absolute a title to the property as he could have on her death. It also conceded that there might be a transfer by the widow to the reversioner, and a second transfer by the reversioner to the stranger; but it did not see how the effect of a double transfer could be given to two documents different in their nature and contents. The learned Judges accordingly referred the question for the determination of the Full Bench.

Sir Richard Garth, in delivering the judgment of the Full Bench, pointed out that if the widow died a natural death, her husband's heirs would at once succeed to the estate; or if she were to become a *byragee* or otherwise die a civil death, the result would be the same; and he thought that just as she might have disclaimed her estate when her husband died, there was nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heir for the time being; after she had once accepted it. So far the position was perfectly clear; but then the question had to be faced whether the widow and the next heir could agree to make an alienation of the estate without any legal necessity to support it. On this question, Sir Richard Garth said as follows:—"But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make." The learned Chief Justice recognised the essential distinction between a case of relinquishment, properly so-called, and a case of sale, without any legal necessity, merely with the consent of the next male heir; but he thought that there was such a long course of authority in favour of the power of the widow to alienate the estate with the consent of the next heir that the Full Bench could not decide the contrary without disturbing the titles which had been

acquired on the strength of that authority. Sir Lawrence Jenkins in *Debi Prosad Chowdhry v. Golap Bhagat* (3) summed up the decision in *Nobokishore's case* (2) in these words: "Starting then from the established position that the next heir's succession can be accelerated by relinquishment, it was determined in *Nobokishore's case* (2) as a logical consequence that the widow, with the next heir's consent, could alienate without any legal necessity." And the learned and distinguished Chief Justice said as follows:—"The road to the decision in *Nobokishore's case* (2) was not without its difficulties, but the learned Judges felt it had to be travelled that titles might be quieted." It seems to me clear beyond dispute that the extension of the doctrine was more or less forced upon the Court; the Court upholding the extension on the ground that it was the logical consequence of the right conceded to the widow either to disclaim the estate at the time of the death of her husband or to turn *byragee* or otherwise die a civil death afterwards and thus accelerate the succession of her husband's heir. The decision of Sir Richard Garth points out the real distinction between a case of relinquishment, properly so-called, and a case of alienation capable of being supported by reference to the theory of relinquishment; and it seems to me that it does not follow that, because the heir takes by operation of law when there is real relinquishment by the widow, that is to say, when she elects to die a civil death, he also takes by operation of law, when, as a result of a transaction which may be supported by reference to the theory of relinquishment, but which is in fact not relinquishment, the estate is carried from the widow to the heir or to a stranger with the consent of such heir.

It is not necessary for our present decision to discuss any of the subsequent decisions *Behari Lal v. Madho Lal Ahir Gayawal* (4) recognizes that the widow can accelerate

(3) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

(4) 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.).

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the estate of the heir by conveying absolutely and destroying her life-estate. In the Full Bench case of *Debi Prosad Chowdhri v. Golap Bhagat* (3) it was laid down that, to uphold an alienation by the widow on a ground other than that of legal necessity or of the equitable extension founded on legal necessity, it should be shown that there was a consent of the next heir to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire estate and consequent acceleration of the interest of the consenting heir, provided the alienation is of the whole estate. The question involved in the Full Bench case was whether a widow could alienate a portion of her estate with the consent of the next reversioner. Sir Lawrence Jenkins pointed out that, if the alienation was to be supported by reference to the theory of the relinquishment of the widow's entire interest, the alienation must be of the entire estate, for, as the Judicial Committee afterwards said in the case of *Rangasami Gounden v. Nachiappa Gounden* (5), "there cannot be a widow who is partly effaced and partly not so." The decision of Sir Lawrence Jenkins makes it perfectly clear that the Courts have been obliged to have recourse to the theory of relinquishment for the purpose of deciding cases which are not cases of relinquishment, in order that title acquired on the faith of a long series of decisions may not be disturbed.

I have come to the conclusion that it cannot be laid down as an inflexible rule applicable to all cases that the heir takes by operation of law whenever as a result of a transaction to which the widow and the heir are parties, the entire estate becomes vested in the heir or goes to a stranger with the consent of the heir. In a case of disclaimer by the widow at the time of the death of her husband, or of relinquishment, properly so-called, afterwards the title of the heir would undoubtedly arise by operation of law, and, in my opinion, section 60

of the Court of Wards Act would not operate to the prejudice of the heir, assuming that, at the date of the relinquishment, the widow were a ward of the Court. But a case of relinquishment must be carefully distinguished from a case which is not one of relinquishment, but which is capable of being supported by reference to the theory of relinquishment. A true case of relinquishment arises when there is the renunciation of the world by the widow and the abandonment of the estate by her or some act by her which might, in the eye of law, justify the inference that she is civilly dead. But where the widow sells the estate for valuable consideration to the heir or to a stranger with the consent of the heir or enters into an engagement with the heir which has the effect of carrying the estate to the heir or to a stranger with the consent of the heir; in other words, whenever the transaction is one, not of relinquishment, but one capable of being supported by reference to the theory of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow and the transaction would come within the prohibition of section 60, assuming that the widow were a ward of the Court, and the sanction of the Court were not obtained to the transaction.

I have now to consider whether the transaction of the 18th December 1918 operated as a relinquishment or as an alienation. Now, the transaction is evidenced by two documents, one executed by the Maharanis in favour of the grandsons, and the other executed by the grandsons in favour of the Maharanis. The deed of surrender is described as an indenture to which the Maharanis and the grandsons are parties, and the deed executed by the grandsons is described as an agreement to which the grandsons and the Maharanis are parties. The deed of surrender recites that the Maharanis were each getting a monthly allowance of Rs. 625 from the Court of Wards and that, as they were growing old and were desirous of remaining aloof from the concerns of the world and of spending their latter days in Divine Worship and meditation in

(5) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

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the holy City of Benares with an allowance for their maintenance befitting their rank and position, they wished to surrender and relinquish their Hindu widow's estate in the property left by their husband to their grandsons who were the next heirs of their husband who had undertaken to pay them or the survivor of them the monthly sum of rupees two thousand out of the income and profits of the estate and ask to defray the expenses of the daily and periodical worship of the family deities. The document then asserts that the grandsons "have agreed to all the terms aforesaid," and proceeds to provide as follows:—

1. That the first party Maharani Tara-bati and Maharani Nawlakhbati do hereby relinquish and surrender all their rights in the property, moveable and immoveable, left by their husband, the late Maharaja Hirballabh Narain Singh Bahadur, K.C.I.E., commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the second party Rao Bahadur Gobind Singh and Rudra Partap Singh, the next heirs of the said Maharaja Bahadur under the Hindu Law, and in pursuance thereof the first party do hereby make over the entire property aforesaid to the second party in full extinction of their rights as Hindu widows.

2. That the second party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's son succeeding to the property of their maternal grandfather under the Benares School of Hindu Law, the share of each being a moiety of the said property.

3. That the second party will be entitled to have their names entered as proprietors in equal shares in respect of the revenue-paying or revenue-free estates included in the said property by removing the names of the first party now recorded in the Registers maintained under Act VII of 1878 (B. C.).

4. That the first party will at once inform the Court of Wards of this surrender and request the Court to make over the charge and management of the said property to the second party subject to the Court's retaining the management, if it thinks fit,

under section 13 A of the said Act IX of 1879 (B. C.).

5. That the first party, or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, from the second party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the second party undertake to keep up and maintain the daily and periodical worship of the family deities Lachmi Narain Jeo, Ram Chandra Jeo and Radha Krishna Jeo, installed at the Sonbarsa House left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem and should they omit or neglect to carry out this undertaking the first party will be entitled to enforce the fulfilment thereof.

The agreement executed by the grandsons in favour of the Maharanis contains all the recitals that are to be found in the deed of surrender, and provides as follows:—

The first party, therefore, in consideration of the premises, do hereby agree of their own free-will and accord that from that day they became the proprietors of the said Sonbarsa Estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the second party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (Rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any month (which is to be taken as an English month) on the first day of the following month, the second party will be at liberty to enforce the payment thereof, with simple interest at the rate of 12 per cent. per mensem by process of Court, and the said arrears of allowance, with interest and the costs of the suit, if any, to enforce the payment thereof, shall be the first charge on the property mentioned in the schedule hereto annexed which forms a part of the estate surrendered by the second party as mentioned above. And the first party further, agree that from the day aforesaid they shall keep up and maintain the daily and

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periodical worship of the family deities Lachmi Narain Jeo, Ram Chandra Jeo and Radha Krishna Jeo installed at the Sonbarsa House left by the said Maharaja Bahadur at a cost of Rs. 100 (Rupees one hundred) per mensem (the month being taken as an English month) and should they omit or neglect to carry out this agreement, the second party will be entitled to enforce the fulfilment thereof.

What, then is the substance of the transaction between the Maharanis and their grandsons? In the first place, it is an agreement an indenture, as the parties themselves describe the document. In the second place, the desire of the Maharanis to retire from the world is not unconditional, but is subject to two important conditions, first, that the grandsons will pay them or the survivor of them a sum of money for their maintenance "befitting their rank and position," that is to say, a sum of Rs. 2,000 per month which, let it be remembered, is a sum much in excess of what the Maharanis were actually receiving from the Court of Wards, and, secondly, that the grandsons will defray the expenses of the daily and periodical worship of the family deities at a cost of Rs. 100 per month. In the third place, the Maharanis are sufficiently alive to their worldly interest to stipulate that their maintenance allowance at Rs. 2,000 per month with interest on arrears at 12 per cent. per month shall form a first charge upon certain specific properties belonging to the estate. In the fourth place, they retain a sufficient interest in the estate of their husband by reserving to themselves the liberty to enforce the fulfilment of the condition as to *debsheva*.

Now, I do not desire to throw the slightest doubt upon the numerous cases which have decided that transactions similar to the one which I am considering are capable of being supported by reference to the theory of the relinquishment of the widow's entire interest. I have not the slightest doubt that, had the Court of Wards not stood in the way, the transaction would have carried the estate from the Maharanis to the grandsons; but, in my opinion, the estate would have been carried, not by operation of law, but by the act of the Maharanis. In *Jadomoney's case* (1) the widow relinquished her estate in favour of the next reversioner

in consideration of a yearly allowance of Rs. 44,000 to be paid her. The transaction was described by the learned Judges as a conveyance for good consideration. In the case before us, the Maharanis entered into the transaction in consideration of the promise on the part of the grandsons to pay them a sum of money much in excess of what the Court of Wards was paying them. I find it impossible to hold that the act on the part of the Maharani was an act of the renunciation of the world or an act which in the eye of law would justify the inference that they were civilly dead. In my opinion, the transaction operated as a conveyance and fell within the prohibition of section 60 of the Court of Wards Act, and the learned Subordinate Judge was right in dismissing the plaintiff's suit on this ground.

My conclusion on the question which I have just discussed is sufficient for the disposal of the appeal, but as the case is likely to be carried to the Judicial Committee it is necessary that I should express my views on the questions which have been raised before us on behalf of the defendants. It was argued that, assuming that section 60 of the Court of Wards Act did not prevent the Maharanis from surrendering their estate in favour of their grandsons, the deed of surrender, standing by itself, could not carry the estate from the Maharanis to their grandsons, and, as possession still remained with the Maharanis, the transaction was incomplete, and there was a power in Maharani Nawlakhbati to resile from an incomplete engagement. The basis of the argument is that, in order to accelerate the succession of the next heir, there must be a relinquishment in fact, and not merely a paper declaration to that effect. As I have shown before, the present law on the subject of relinquishment is merely the extension of the rule of Hindu Law which permitted a widow to renounce the world and abandon the property. It was determined in the case of *Debi Prosad Choudhri v. Golap Bhagat* (3) that if logic was to have any place in our system of law, relinquishment must be of the entire estate, and not of a portion of it. And so it is argued that if the analogy is to hold good, there must be an abandonment in fact in

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order that the heir-at-law may step into the inheritance.

I think that the contention is right and ought to prevail. A relinquishment, in my opinion, becomes operative only when the widow acts upon the declaration and withdraws herself from the estate. It is difficult to understand how a widow can be said to have withdrawn her life-estate, if, notwithstanding her paper declaration she continues to be in possession of the estate. It was pointed out by the Judicial Committee in *Rangasami Gounden v. Nachlappa Gounden* (5) that "it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date." In my opinion, the effacement must be founded on fact, and so long as the widow does not in fact efface herself, she has the right to say—since she is not bound to efface herself "I have changed my mind, and I do not intend to give effect to my declaration."

The learned Government Advocate does not dispute the correctness of the proposition which I venture to think is at the very foundation of the doctrine of relinquishment. But he asserts that circumstances have arisen which make it inequitable for her to change her mind. Now, I quite agree that, though a party has complete power to resile from an incomplete engagement, such a power will be denied when the actings and the conduct of the parties have carried the incompletely executed engagement into effect. But, in order to exclude the plea of *locus penitentiae* a party must base his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and the conduct of the parties. But here the engagement was incomplete because possession was retained by the Maharanis and if possession was retained by the Maharanis there could be no equity upon which a claim could be founded. The equitable rule upon which the learned Government Advocate relies, applies to imperfectly clothed transactions; transactions which in England ought to be evidenced by writing but are not evidenced by writing which in India ought to be evidenced by a registered document but are not evidenced by a registered

document, and it is well-established that, provided there have been actings and conduct of the parties unequivocally referable to engagement and productive of alteration of circumstances, loss or inconvenience, a party can found upon the equities arising from the acts done, though not upon the engagement itself. In my opinion there is no scope for the application of the equitable rule to the facts of the present case. It is not suggested by the defendants that the document, upon which the plaintiff relies, was imperfectly clothed, or that all the formalities connected with the document were not gone through. What is suggested is that the relinquishment did not become effective until there was a relinquishment in fact and to a case so put, it is clearly no answer to refer us to the doctrine of part performance.

But supposing it is possible to investigate in a case of part performance, it is relevant to enquire whether the plaintiff does found upon the equities arising from the alleged actings of the parties. The plaint expressly asks for the following declaration:—That the Court be pleased to declare that by the deed of surrender and the *ekrarnamah* dated the 18th December 1918, the plaintiff's father and the defendant second party became entitled as the next immediate reversionary heirs of the late Maharaja Sir Harballabh Narain Singh Bahadur, K. C. I. E., to all the properties left by him, and the defendant first party has no right to withhold possession of the Sonbarsa Estate from the plaintiff and the defendant second party." This does not look as if the plaintiff has based his claim, not upon the deed of surrender but upon the equities arising from the actings of the parties. A careful perusal of the plaint is sufficient to establish that the plaintiff bases his title on the deed of surrender. We are not told what the actings of the parties were which have given rise to an equity in favour of the plaintiff, and it is, in my opinion, quite impossible to investigate a case of equity on the plaint as presented by the plaintiff.

But I do not intend to rest my decision on this point on so narrow a ground as the construction of the plaint. The evidence does not, in my opinion, establish that there have been actings of the parties on which the plaintiff can base his title. The deed

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of surrender was executed on the 18th December 1918. On the 23rd December the Maharanis addressed a letter to the Collector informing him of what they had done and requesting him "to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudra Pratap Singh, if the Court of Wards do not think fit to retain management under section 13 (a) of Act IX of 1879 B. C." This is the sole 'acting' on the part of the Maharanis and it has been gravely argued that, upon this letter an equity can be founded in favour of the plaintiff. I am unable to accept this contention as well founded. It was productive of no alteration of circumstances, no loss or inconvenience, and it certainly does not disclose any act done by the grandsons known to and permitted by the Maharanis to take place on the faith of the engagement as if it were perfect. The letter was written and addressed on the 23rd December 1918, and there is no evidence of any act done subsequent to the 23rd December 1918, which might suggest the inference that the Maharanis acted on the transaction of 18th December or that they permitted their grandsons to act on the faith of the transaction of the 18th December as if it were complete in itself. The Maharanis continued to reside in Sonbarsa and to draw their maintenance allowance from the Court of Wards. The eldest Maharani died in August 1920 and, on her death, her interest in her husband's estate became vested in Maharani Nawlakhbati. The suit was instituted on the 17th January 1921, and the Court of Wards retired from the management of the estate on the 27th April 1922. On the retirement of the Court of Wards Maharani Nawlakhbati became entitled to speak on her own behalf, and she promptly repudiated the transaction of the 18th December. In my opinion, the evidence does not support the contention that there were actings of the parties on which the plaintiff could rely in support of his title. It was then argued that the only way in which the Maharanis could have abandoned the property was by requesting the Court of Wards to make over the properties to their grandsons, and that this they did by their letter of the 23rd December. But

the question, in my opinion, is not whether the Maharanis made an attempt to relinquish their estate, but whether there was relinquishment in fact. Upon the withdrawal of the Court of Wards from the management of the estate, it was open to Maharani Nawlakhbati to affirm the transaction of the 18th December. She expressly declined to affirm it, and I do not see on what ground the plaintiff should be allowed to maintain ejectment against her, since she was not at any time bound to relinquish her estate in favour of her grandsons and since she has resiled from the engagement before completing the transaction.

It was then contended on behalf of defendant No. 2 that, assuming that the deed of surrender carried the estate from the Maharanis to him and to his brother on the death of his brother, the interest of his brother came to him by survivorship, and the plaintiff as the son of his brother has no title to maintain the suit. The argument is founded on the decision of the Judicial Committee in *Venkayamma Garu v. Venkataramanayamma Bahadur Garu* (6) in which it was established that, upon the death of a daughter, her sons succeeded to the property of their maternal grandfather as his heirs, and that they took the property jointly with rights of survivorship. The Madras High Court had come to the conclusion that the doctrine of survivorship was limited to unobstructed succession and to the succession to the joint property of re-united co-parceners. This was undoubtedly the view of so eminent a Hindu lawyer as Sir Gurudas Banerji, and was accepted as settled law both in the Calcutta High Court and Madras High Court. It was contended before the Judicial Committee by Mr. Mayne that there was a number of cases in the books in which property inherited as obstructed inheritance was regarded as joint with right of survivorship. Mr. Mayne referred to the case of sons succeeding to the self-acquired property of their fathers to the case of widows succeeding to the property of their husband, and to the case of daughters succeeding to the property of their fathers. The Judicial Committee (6) 25 M. 678; 4 Bom. L. R. 657; 7 C. W. N. 112 M. L. J. 299; 29 I. A. 156; 8 Sar. P. C. J. 286 (P. C.).

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thought that "where sons succeed, the inheritance as to them is unobstructed" but it accepted the cases of widows and daughters as conclusively establishing that the doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of re-united co-parceners. It was urged before us by Mr. Naresh Chandra Sinha, that according to the Mitakshara, upon the death of a widow or a daughter, her co-widow or the surviving daughter succeeds to the property, not indeed, by survivorship, but as the nearest heir of the last male holder of the property; but it seems to me that we are not at liberty to entertain the argument, for to do that would be to throw doubt upon the correctness of the decision of the Judicial Committee. On the decision of the Judicial Committee it must follow that Barra Lal, at his death, did not leave any interest in the estate which was capable of being inherited by the plaintiff.

But the actual decision of the Judicial Committee, by no means decides the question which has been raised in this appeal. The critical question is, is the right of survivorship referred to by the Judicial Committee the right of survivorship as understood by the Mitakshara Law, according to which the right will not prevail in favour of the survivor as against the male issue of the deceased. The passage in the judgment of the Judicial Committee, as to the interpretation of which the Madras High Court and the Allahabad High Court have differed from each other, runs as follows:—"What then was the character of the property which they, that is to say, the daughter's sons, took?" In the grandfather's hand it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance." And then follows a passage which, in my opinion, is the key to the understanding of the decisions. That passage is as follows:—"Niladri and Appa Rao were members of a united family."

Now it must be conceded that if the term 'ancestral property' was used by the Judicial Committee in the sense in which that term is understood in the Mitakshara, it will be impossible to admit the validity of the argument advanced on behalf of defend-

ant No. 2 that his right to take by survivorship will prevail as against the plaintiff. "Ancestral property" in its technical sense means "property which descends upon one person in such a manner that his issue acquire certain rights in it as against him." Mr. Lachmi Kant Jha on behalf of defendant No. 2 maintains that there is an exception to the general rule when we are dealing with daughter's sons and their issue. Daughter's sons, we are told, occupy a special position in the family of their maternal grandfathers; but their sons are not members of the family of the maternal grandfather of their fathers, and they cannot be regarded as having an interest by birth in the property of the maternal grandfather of their fathers, since they do not offer any funeral cakes to their father's maternal grandfather. The argument is an attractive one, but it has two serious defects; first, whatever the position of the daughter's sons may have been before the appointment of a daughter to raise up issue for her father became obsolete, under the present law he is a member of his own father's family and cannot be regarded as a member of his maternal grandfather's family; and, secondly, the fact that a person does not offer funeral cakes to the owner of the property does not decide the question which is in debate before us. It is quite true that it is only the persons who offer the funeral cake to the owner of the property that are regarded as having an interest in the property by birth. But it is well-established that as each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. In my opinion, if the estate were ancestral estate in the hands of Barra Lal and Chotey Lal their descendants to the third generation below them would take an interest in that estate by birth, and the plaintiff, as the son of Barra Lal, would be entitled to maintain partition against Chotey Lal.

But a more serious question remains, namely, whether the property could be regarded as ancestral property in the hands of Barra Lal and Chotey Lal. Mr. Mayne answers the question in the negative. "Hence, all property," says Mr. Mayne, "which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral."

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property, and is at once held by himself in co-parcenary with his own issue. But where he has inherited from a collateral relation, as, for instance, from a brother, nephew, cousin or uncle, it is not ancestral property; consequently, his own descendants are not co-parceners in it with him.... On the same principle property which a man inherits from a female, or through a female as, for instance, a daughter's son... would not be ancestral property." (Mayne, 8th Edition, section 275, page 350). In the case of *Utar Singh v. Thakar Singh* (7) the Judicial Committee came to the same conclusion. In the course of its judgment, it said as follows:—"Unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu Law." The question is one of difficulty; and I have great hesitation in holding that the Judicial Committee in the Madras case used the expression "ancestral property" in the technical sense in which that term is used in the Mitkshara.

How, then, should the question be answered? In my opinion, the solution lies in the sentence which follows the statement that in the hands of the grandsons, it was ancestral property. The Judicial Committee pointedly referred to the fact that Niladri and Appa Rao were members of a united family, and then cited the following passage from *Katama Natchiar v. Rajah of Shiwagunga* (8):—"According to the principles of Hindu law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession." Now admittedly Niladri and Appa Rao did not have a common interest and a common possession in the property of their maternal grandfather during his lifetime. But they were undoubtedly

(7) 6 Ind. Cas. 721; 35 C. 1039; 10 Bom. L. R. 790; 1 S. P. W. R. 1908; 35 I. A. 206; 8 C. L. J. 359; 12 C. W. N. 1049; 18 M. L. J. 379; 4 M. L. T. 207; 4 P. R. 1910 (P. C.).

(8) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J. 52; 2 Sar. P. C. J. 251 19 B. R. 843 (P. C.).

edly members of a united family, and there was co-parcenaryship between them and, I would add, their issue, *qua* the property which was admittedly their ancestral property. In my opinion, the Judicial Committee acted upon the view that the property inherited by Niladri and Appa Rao formed an accretion to their family property, for on no other hypothesis is it possible to explain that decision consistently with the admitted principles of the Mitkshara. This is the view which the learned author of Mayne's Hindu Law has taken: "It will be observed," says the learned author, (8th Edition, section 563 A, 792) "that in this case the property descended to a single daughter, who was the mother of both the sons, and that these sons were members of an undivided family who took the whole property at the same time by the same title. *Prima facie* there was no reason why they should hold it in any manner different from that of their other family property, to which it would naturally form an accretion." If this view be right, as I think it is, their sons would have an interest equal to their fathers in the property treated as having accreted to the property in which they had an interest by birth. In the case before us, Barra Lal and Chotey Lal were members of a united family, and it is not suggested that there was, at any time separation between them. In my opinion, the question must be answered in favour of the plaintiff and against defendant No. 2.

The only other question which I have to consider is the question of fact raised by Maharani Nawlakhbati, namely, whether the deed of surrender executed by her is operative and enforceable against her. The case of the Maharani on this point is stated in paragraph 6 (a) of her written statement which is as follows:— "That the defendant No. 2 of whom the Maharanis were very fond, was ordered by the Government to leave the district owing to his suspected complicity in the murder of the late Maharaja Bahadur. The plaintiff's father represented to the Maharanis that it was necessary to have a deed executed by them, so that the Government might be induced to allow the defendant No. 2 to return to Bhagalpur District and that the Maharanis

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on that misrepresentation without any proper and independent advice, signed the alleged deed of surrender without properly understanding its effect. This defendant submits that in the circumstances the deed is legally invalid and inoperative." Now, one thing is clear on the evidence, and that is that the Maharanis made repeated attempts to have the order of externment against defendant No. 2 re-called. On the 5th May 1907, the Maharanis presented a petition to the Collector of Bhagalpur in which they asked for permission to be allowed to surrender their estate in favour of Chotey Lal. With reference to this petition, the learned Subordinate Judge says that this was an attempt "to prove the innocence" of Chotey Lal. "In the peculiar circumstances in which he was then placed," says the learned Subordinate Judge, "his mother and brother could not withhold their consent to the said application if it could remove the strong suspicion of murder from him. A perusal of this application would show that its main object was to save Chotey Lal. The surrender matter played an insignificant part in it. It was rather thrown out as a bait." Between 1907 and 1916, the Maharanis made various attempts in the same direction. Exhibit T is a letter from the Collector, dated the 14th March 1908, to the Maharanis, in which, replying to the letter of the Maharanis dated the 11th March 1908, he states that the Commissioner and he were of opinion that it was "not advisable to re-call Chotey Lal Sahib at present." Exhibit K, is an order dated the 24th December 1912 passed by the Collector on the petition of the Maharanis praying that their younger grandson may be allowed to visit Sonbarsa. The order runs as follows:—"I have fully considered the question and regret I am unable to recommend that the younger grandson of the late Maharaja Bahadur of Sonbarsa should be again allowed the privilege of coming to this District and to Sonbarsa." In 1913, the Maharanis presented a memorial to the Local Government, and Exhibit K is the reply of the Government to the memorial which runs as follows:—"With reference to their memorial dated nil, the undersigned is directed to convey to the Maharani Saheba of Sonbarsa, the

regret of the Lieutenant-Governor in Council that he is unable to alter the existing orders under which Lal Rudra Pratap Singh is forbidden to come back to Sonbarsa." In their letter of the 4th March 1918, Exhibit 5, the Maharanis, in forwarding the deed of surrender which they proposed to execute in favour of their grandsons to the Collector, entered into an elaborate defence of Chotey Lal and expressly asked that the Government may withdraw the order prohibiting the return of Chotey Lal to the District. And the evidence of Rai Bahadur Surja Prosad shows that, on the eve of the execution of the deed of surrender, the elder Maharani consulted him as to "what was the best way of getting the younger grandson to Bhagalpur".

Now, it is impossible to read the evidence of Maharani Nawlakhbati, without being impressed by the passion with which she exclaims again and again, "I have not given the property to anybody. It has been done by *dhokha dhokhi*, (that is, by practising deception) about the coming of Chotey Lal." Her evidence is, that it was represented to her that if she executed the document, the order of externment against Chotey Lal would be re-called, and he would be able to return to Bhagalpur. She says that the document was not read and explained to her, and that she would never have signed it, had she known that she was divesting herself of her proprietary interest in the property for ever. In my opinion, the story told by her is inherently probable, having regard to the antecedent history showing what strenuous efforts were made by the Maharanis to have the order of externment against Chotey Lal re-called.

Before examining the evidence on the point, it will be useful to remember the rules which have from time to time been laid down in order to enable the Courts to determine whether deeds taken from *pardah-nashin* ladies are enforceable against them. The jurisdiction of the Courts of law to afford protection to *pardah-nashin* ladies rests on a presumption of the imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant of contract from a *pardah-nashin* lady to show that the deed was explained to her and understood

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by her. Starting from the elementary principle that every person taking a document from a *pardah-nashin* lady is bound to show affirmatively that the document was her document, that is to say, that she understood the nature of the transaction and the effect of it, the Courts of Law have laid down certain rules for assisting them to determine the point, but it is necessary to remember that the rules so laid down are rules of prudence rather than rules of law, and that their application will depend on the particular facts of each case. As the Judicial Committee once pointed out, there is a grave risk of failure of justice if these rules are moulded into inelastic formulas or crystallized into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

Now, I do not propose to discuss all the cases bearing on the point. It will be sufficient to refer to the decision of Mr. Justice Mookerjee in *Nibaran Chandra Mookerjee v. Nirupama Debi* (9), where that learned and distinguished Judge summed up the whole position in these words:—"It is well settled," said the learned Judge, "that the Court, when called upon to deal with a deed executed by a *pardah-nashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter.... On examination, these decisions will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and in-

(9) 69 Ind. Cas. 476; 34 C. L. J. 563; 26 C. W. N. 517.

fluence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically... The essence of the matter was tersely put by Lord Buckmaster in *Sunitabala Debi v. Dhara Sundari Debi Chowdhurani* (10), when he stated that the circumstances under which a *pardah-nashin* woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation.... It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, and to have possessed a capacity to judge for herself." I respectfully adopt the view which was expressed by Mr. Justice Mookerjee in the case just cited.

Now, it is relevant to enquire whether the case before us belongs to the first class mentioned above, where the person who seeks to hold the lady to the terms of her deed stands towards her in a relation of personal confidence. The learned Government Advocate strenuously contends that since the Maharanis were under the Court of Wards, Barra Lal did not stand towards her in a relation of personal confidence. Now, one of the most impressive facts in the present case is that, though the Maharanis were wards of the Court, they made no attempt to seek the advice of the Court of Wards in the matter of the execution of the deed of surrender. They kept the Collector informed of what they were doing in the matter; but it is one thing to keep the Court of Wards informed of what they were doing; it is another thing to seek its advice in the matter. The Court of Wards, though the statutory guardian of the Maharanis, was completely ignored; and the evidence of Mr. Nilmoney

(10) 53 Ind. Cas. 131; 47 C. 175; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 821; 22 Bom. L. R. 1; 24 C. W. N. 2971; 11 L. W. 227; 46 I. A. 272; 2 U. P. L. R. (P. C.) 2 (P. C.).

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Deo, who was the manager of the Sonbarsa Estate under the Court of Wards, from 1914 to 1920, shows that, so far as he was concerned, the Maharanis were altogether "reticent" on the question of the deed of surrender. It is idle, therefore, to say that, as the Court of Wards was the guardian of the Maharanis, Barra Lal could not have stood towards them in a relation of personal confidence. In the case of *Mariam Bibee v. Muhammad Ibrahim* (11) the document was taken by a brother from a sister who was living with her husband. The case was decided on the footing that there was a relation of personal confidence between them. In the case of *Niharan Chandra Mookerjee v. Nirupama Debi* (9) the document was taken from the lady by her husband's step-brother. The case was again decided on the footing that there was a relation of personal confidence between them. Mr. Justice Mookerji pointed out in the latter case, that, according to the normal structure of a joint Hindu family, the lady would look upon her husband's step-brother as her natural protector in whom she might repose confidence properly to safeguard her rights. The facts of the present case are strongly in favour of the view that Barra Lal would be looked upon as the natural protector of the Maharanis, who, it must be remembered, were old and had no one else to advise them. Barra Lal was their daughter's son, and was brought up in their house. There was no one nearer to them in relationship than Barra Lal and it is Barra Lal to whom they would naturally turn for advice and guidance.

It is necessary, at this stage, to take note of an argument which was pressed before us with some passion by the learned Government Advocate. It was argued that Barra Lal could have had nothing to do with the deed of surrender, since he did not come to Sonbarsa till December 1918, and the draft was prepared in March 1918. It is necessary to point out that Barra Lal's home was in Burawara in Rajputana, and that he ordinarily resided in Burawara, though he frequently came to Sonbarsa. The deed of surrender was drafted sometime in March 1918, and the evidence is con-

clusive on the point that Barra Lal did not come to Sonbarsa till December 1918. But the evidence also shows that one Anirudh Prosad Singh took a prominent part in the transaction and that he was the agent of Barra Lal. Manbharan Ram Misra, the agent of the plaintiff, swears that he saw Anirudh in the house in Bhagalpur where the Maharanis were staying at the time when the draft was being prepared. In his examination-in-chief, he said that this was in December 1918; but, obviously, he made a mistake and he corrected himself in cross-examination. But he is quite clear that the Maharanis were accompanied by Anirudh when they came to Bhagalpur in connection with the preparation of the draft deed, and that he took part in the preparation of the draft, though he cannot say whether he took a prominent part. In regard to the execution of the document there is no doubt that to him was assigned the most important part, because it was he who is alleged to have read and explained the document to the Maharanis. The evidence, read as a whole, shows that, during the critical period between March to December 1918, Anirudh was throughout in the company of the Maharanis and was taking the most important part in connection with the transaction which began in March 1918 and ended in December 1918.

Now, Anirudh was undoubtedly a relation of the elder Maharani, having married a daughter of her brother. But, according to Probhu Charan Ambastha, a witness examined on behalf of the plaintiff, Anirudh was the agent of Barra Lal. Now, Probhu Charan undoubtedly knew Anirudh; the learned Subordinate Judge says that he was a friend of Anirudh and that he went to Bindwara to attest the deed of surrender at the request of Anirudh. Whether the learned Subordinate Judge intended to throw discredit on the evidence of Probhu Charan, it is difficult to say. He says that his sympathy was on the side of the Maharani and that the truth had to be wrung out from him. But it is unnecessary to pursue the subject because the learned Government Advocate before us claimed him as a witness of truth. It is obvious that, if his testimony is to be discarded, the plaintiff will be in great difficulty in establishing that the document

(11) 48 Ind. Cas. 561; 28 C. L. J. 306.

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was read and explained to the ladies. According to Probhu Charan, Anirudh was the agent of Barra Lal.

On a careful consideration of all the evidence; I have come to the conclusion that Barra Lal stood towards the Maharanis in a relation of personal confidence.

That being so, it was, in my opinion, absolutely necessary that the Maharanis should have received independent and disinterested advice in the matter. The learned Subordinate Judge has come to the conclusion, first, that it was not necessary in this case, that they should have received independent advice; and, secondly, that there are circumstances in the case which suggest the inference that they did receive independent legal advice in the matter. I will first consider whether the possession of independent legal advice was essentially necessary to validate the deed. The learned Subordinate Judge bases his conclusion on his view that there is an inherent right in a Hindu widow to surrender her estate to the next reversioners and that "such act is regarded as pious and meritorious on their part for which independent or disinterested legal advice is not necessary." It is impossible, in my opinion, to maintain the proposition. There is an old case in the books, the case of *Delrus Banoo Begum v. Nowab Syud Asgur Ali Khan* (12), which is still treated as a leading case in our Courts. That was a case in which a Muhammadan widow executed a *tawleut-namah* with a view to perpetuate certain ceremonies in commemoration of her mother's death. Now, it cannot for a moment be disputed that there is "an inherent right" in a Muhammadan widow to dedicate her properties to religious trust, and that such dedication "is regarded as pious and meritorious" on the part of Muhammadan widows. She, however, denied on oath an effectual knowledge of the document, and the Calcutta High Court came to the conclusion that it was not operative against her on the ground (amongst others) that "she had no professional assistance at the time." The decision of the Calcutta High Court was affirmed by the Judicial Committee

(12) 23 W. R. 453; 15 B. L. R. 167.

[*Ashgar Ali v. Delroos Banoo Begum* (13).] It is unnecessary to pursue the subject, for there is no authority in support of the proposition for which the learned Subordinate Judge has made himself responsible.

The conclusion of the learned Subordinate Judge is also based upon his finding that the Maharanis had "intellectual attainment" and "business capacity" sufficient to bring the case within the decision of Lord Shaw in *Kali Bakhsh Singh v. Ram Gopal Singh* (14). That was a case in which a Hindu lady made a gift of about one-half of her estate to the son of her paramour. The Judicial Committee found, first, that the lady had been in the habit for a considerable period of years, of managing her affairs, of entering up her accounts, and of attending to business; secondly, that she had much strength of will, and, thirdly, that she was a capable woman, fully alive to the direction of her own interests, and well aware of what she was doing. Upon these facts, their Lordships had to consider whether the fact that the lady did not obtain independent outside advice invalidated the deed. In dealing with this point, Lord Shaw said as follows:—"The possession of independent advice or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free-will carried out, the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution, if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."

Now, in my opinion, there is no resemblance whatever between this case and the

(13) 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 794 (P. C.).

(14) 21 Ind. Cas. 985; 19 C. L. J. 172; 18 C. W. N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147; 36 A. 81; 41 I. A. 23 (F. C.).

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case of Kali Bakhsh. The learned Subordinate Judge says that the Maharanis knew how to read and write, that "they kept a staff of their own consisting of clerks *mohurris*, *karpardaz*, etc.;" that "they used to interview high officials with whom they had informal discussion regarding the surrender," and that "they used to talk to Nakulswar, the *sarishtadar* of the office of the manager of Sonbarsa under the Court of Wards," and he concludes that, "all these facts unmistakeably establish the intellectual attainments of the two Maharanis and their business habits and capacity to judge for themselves."

In order to demonstrate how utterly impossible it is to accept the conclusion of the learned Subordinate Judge, it will be necessary to examine the evidence. We have not been referred to any evidence establishing that the Maharanis could read and write, and my own investigation, which has, I hope, been very thorough, has not yielded any result. They could certainly sign their names in Hindi, but there are many persons who can sign their names, but who cannot read and write. The Maharani was cross-examined at great length on two different occasions, and it was not suggested to her that she was literate, in any sense of the term. Let it, however, be assumed that they could read and write; the assumption will not carry us very far, unless we are able to make the further assumption that their training and habit of mind fitted them to defend any attack that might be made on their property. Of that there is no evidence whatever, and it is quite impossible to make the assumption on the materials that are before us. Then, it is suggested that they kept a staff of their own consisting of clerks, *muharris*, *karpardaz*, etc., at the palace. With every desire to understand the decision of the learned Subordinate Judge, I have not been able to appreciate how the issue is solved by a reference to the fact that the Maharanis maintained a large household, unless indeed the evidence establishes (which it does not) that they supervised and directed the work of the clerks, *muharris* and *karpardazes*, and that they managed their own affairs and did not leave them to the clerks, *mohurris* and *karpardazes*. There is not the slightest

evidence to suggest that they managed their own affairs; that they checked their accounts and that they attended to business. It is then asserted that they used to interview high officials "with whom they had informal discussion regarding the surrender." There is not the slightest evidence that Maharani Nawlakhbati ever interviewed any high official, although there is evidence that the elder Maharani did interview the Collector from time to time. Mr. B. C. Sen, who was the Collector of Bhagalpur in 1918, makes it perfectly clear that all the conversation that he had was with the elder Maharani and that the Chota Maharani never spoke to him on any occasion. Mr. Nil Money De, who was the Manager of the Court of Wards in 1918, says that Chota Maharani never spoke to him about any matter in connection with the administration or management of the estate. The evidence of Maharani Nawlakhbati shows that she left everything to Barra Maharani who was the *malik* while she was alive. It will be useful to cite a few passages from her evidence to show how utterly helpless she was, and to what extent she had to depend on others. The passages are as follows:—

Q. Was there any *kharchabahi* in which daily income and expenditure were entered belonging to the *deohri* of the two Maharanis?

A. The elder Maharani used to know all about it.

Q. Do you mean to say that you do not know if such *bahi* was kept?

A. As she was the *malik*—there could not be two *maliks*. I do not know. We were both *maliks*, but now I am the *malik*.

Q. The elder Maharani used to consult you or not in whatever she did.

A. No.

Q. Whatever work in connection with the affairs of the two Ranis used to be done, they were done by you both after consulting each other?

A. Yes.

Q. The elder Maharani never did anything which was against your wishes?

A. No.

Q. And you also never did anything what was against the wishes of the elder Maharani.

A. No.

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This seems to be a convenient place to take note of an argument which was advanced by the learned Government Advocate. His argument is, that the evidence conclusively shows that the elder Maharani, at any rate, was a capable woman, well able to take care of herself. I think the evidence shows that she used to interview Government officials; but I am unable to agree that we are in any way concerned in this litigation with the question whether the deed of surrender could have been enforced against the elder Maharani, if Maharani Nawlakhbati had predeceased her. Let it be assumed that the elder Maharani knew what she was about and that she executed the deed of surrender with full knowledge as to its effect. But a relinquishment by her would have the effect of vesting her interest in Maharani Nawlakhbati, and would not offer any solution of the problem which we are investigating. This is not denied by the learned Government Advocate but he maintains that there is an admission by Maharani Nawlakhbati, that the elder Maharani always consulted her and that she never did anything against the wishes of the Chota Maharani. In my opinion, no such conclusion follows from her evidence. The question was a perfectly general one, and she answered it in a general way; but in order to see whether there is any admission of the kind claimed by the learned Government Advocate, we have to examine the whole of her evidence; and there is little doubt, when we examine the whole of her evidence, that there is no admission of the kind claimed by the learned Government Advocate. In my opinion, there is no evidence that Maharani Nawlakhbati had any interview with any high official or that she had informal discussions "regarding the surrender" with any of them. Lastly, it is asserted that she used to talk to Nakuleswar who was the *sarishadar* of the office. It is difficult to understand what conclusion can be reached on a consideration so irrelevant as the one to which the learned Subordinate Judge refers. The single line upon which the learned Subordinate Judge has built his argument is as follows:—"The Maharanis used to talk to me through *pardah*." I quite agree that if his evidence could be read as establishing that the Maharanis directed the affairs

of the estate, and that they expressed their views to him regarding the management of the estate and that they insisted on their views being given effect to, and otherwise took an intelligent interest in the management of the estate, something might be said in favour of the view of the learned Subordinate Judge. But the evidence does not establish that which might form the basis of the judgment of the learned Subordinate Judge, and, for my part, I intend to disregard the evidence of Nakuleswar altogether on this point.

While the consideration to which the learned Subordinate Judge refers should not have weighed with him, there are circumstances which, in my opinion, establish that this was a case in which the possession of independent advice was absolutely necessary. The transaction was between grandmothers and grandsons by which the grandmothers were parting with their proprietary interest in the estate in consideration of a payment to them of Rs. 2,000 per month. The transaction was, on the face of it, an attractive one, for, though the income of the estate was nearly three lakhs a year, they were actually receiving from the Court of Wards Rs. 1,250 per month. They were, however, entitled to know what their position would be if the Court of Wards retired from the management of the estate, and whether there was any likelihood of the Court of Wards retiring from the management of the estate in the near future. Had it been suggested to them that they should take independent and disinterested advice in the matter and had they sought that advice, they would have discovered that most of the debts had been paid off, and that the retirement of the Court of Wards could not be long delayed. I attach great importance to the fact that, though the Court of Wards was the statutory guardian of the Maharanis, no attempt was made to take the advice of the Court of Wards. On an anxious consideration of all the evidence in the case, I have come to the conclusion that, in order that the plaintiff may be able to enforce the deed of surrender against the Maharani, it is necessary for him to establish that she had independent and disinterested advice in the matter.

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I will now deal with the question whether they did have any independent advice in the matter. It is conceded that there is no direct evidence on the point; but the learned Government Advocate contends—and that is the argument of the learned Subordinate Judge—that the circumstantial evidence is sufficient to establish that the Maharanis were in possession of independent advice. It is contended that the Maharanis knew perfectly well the meaning of the term 'surrender', for they expressed a wish to surrender their estate, first in 1907 and then in 1916. The argument, in my opinion, begs the whole question which is in debate before us, for, before any assumption can be made, it must be established that the Maharani understood what she was about, first in 1907, and secondly in 1916. I will first consider the proposed transaction of 1907. The evidence on this question consists of a petition of the Maharani to the Collector of Bhagalpur dated the 15th May 1907, and an endorsement of Mr. Lyall, the Collector, on that petition, dated the 25th May. It will be remembered that, at this date, Chotey Lal had already been exonerated from the District, and the learned Subordinate Judge has destroyed his own argument by expression of the view that the main object of the petition was to save Chotey Lal, and that the proposal to surrender "was thrown out as a bait." The petition of the Maharanis alleged that they were informed that after the gunshot which brought about the death of the late Maharaja, he with his own hand signified his desire on a piece of paper that after his death the Chotey Lal should succeed to his estate. It went on to say that, assuming that the Maharaja had died intestate, they were with the consent of their daughter and the eldest grandson willing to surrender their estate in favour of Chotey Lal. The endorsement of Mr. Lyall is as follows:—"I pointed out to them the grave objections that exist in so important a matter of any precipitate or imperfectly considered action. They agreed accordingly to postpone the execution of the deed of relinquishment for some months, possibly till *dasahara*." It is argued upon the endorsement of Mr. Lyall that the Maharanis must have known what relinquishment meant in Hindu law and that

there is no scope for the argument that Maharani Nawlakhbati in entering into the transaction of the 18th December 1918 did not know the meaning of the word 'surrender'. It is, in my opinion, wholly unnecessary to consider whether the Maharani did or did not know the meaning of the term surrender. The question, in my view, is did the Maharani enter into the transaction of the 18th December 1918 with the full knowledge that she was divesting herself of all proprietary interest in the estate to which she had succeeded as a Hindu widow. This question is not solved by a reference to what the Maharanis intended to do in 1907. It may well be that the Maharanis were told that if they executed a document of this nature the Government would be compelled to withdraw the order of exonerment as against Chotey Lal. We have no direct evidence on the point and Mr. Lyall has not been examined in the case. It is quite impossible to say upon the petition of the Maharanis dated the 15th May 1907 and upon the endorsement of Mr. Lyall dated the 25th May 1907 that the Maharanis intended in 1907 to divest themselves of their proprietary interest in the estate. I regard the findings of the learned Subordinate Judge on the proposed transaction of 1907 as a finding in favour of the view that there was no intention in 1907 to relinquish the estate in favour of Chotey Lal.

I now come to the proposed transaction of 1916. On this point there is no evidence at all, either documentary or oral, but there is a reference to what the Maharanis intended to do in 1916 in Exhibit 5, the letter of the Maharanis to the Collector of Bhagalpur dated the 4th March 1918. It appears from this letter that on the 4th February 1916, the Maharanis had addressed a letter to the Collector intimating a desire on their part to relinquish their estate in favour of their eldest grandson Rao Bahadur Gobind Singh. In the letter of the 4th March 1918 they say that their attention has since been drawn to a legal difficulty in executing the proposed deed of surrender in favour of one only of their two daughter's sons. They go on to say that they have been advised that the other grandson, namely, Chotey Lal, would also be entitled to a moiety of the property although the

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deed of surrender might stand in the name of one only of their grandsons. They then say that to obviate all future difficulties and prospective litigation they have decided in consultation with both the daughter's sons to surrender their estate in favour of both of them. They annex a draft of the deed of surrender which they proposed to execute in favour of their grandsons and ask the Collector to obtain the sanction of the Court to the new deed which would be in favour of both the daughter's sons. They then enter into a long and elaborate defence of Chotey Lal and assert that the suspicion against him was wholly unfounded. They allege that some enemies of the family must have poisoned the ears of the Police and that there was no evidence to justify the Police theory that Chotey Lal had any concern, direct or indirect, in the murder of the Maharaja. They then invite the Government to accept their "earnest protestations regarding his innocence and withdraw the order prohibiting his return to the District" which as they say "has so long been an unmerited punishment both to him and ourselves." Now this letter was written on the 4th March 1918 and we are asked to hold upon this letter that the Maharanis were anxious in February 1916 to surrender their estate in favour of Barra Lal. Maharani Nawlakhbati in her evidence denies any knowledge of this letter. No doubt it bears her signature; but the letter is in English and there is no evidence whatever as to who drafted this letter and whether the letter was read and explained to Maharani Nawlakhbati. It was contended that there is an admission in the 6th paragraph of her written statement that she was desirous of relinquishing her widow's estate in favour of the elder grandson in 1916; but this written statement was filed on her behalf by the Court of Wards and the question whether she knew anything about this written statement has formed the subject-matter of much discussion before us. The learned Subordinate Judge assumed, without any evidence, that the written statement was prepared upon her instructions. There was no evidence before the learned Subordinate Judge to justify this assumption; but also there

was no evidence to contradict it. In this Court, however, the Manager of the Court of Wards has been examined on behalf of the plaintiff and he states definitely that he had no talk with Maharani Nawlakhbati on the question of the written statement to be filed on her behalf. Mr. Mohamed Abdus Salam is a Deputy Collector and he was the Manager of the Court of Wards on the 22nd May 1921 and it appears that he is still the Manager of the Sonbarsa Estate, his services having been lent by the Government to the Sonbarsa Estate. He says that he filed the written statement on behalf of the Court of Wards and that he had no talk with the Maharani about the written statement because the Estate was under the Court of Wards. He explains that it was not necessary to take any instructions and he adds that he "stated the facts in this paragraph," that is to say, the 6th paragraph, "from the Estate papers which were in the possession of the Court of Wards." It is obvious, therefore, that the assumption made by the learned Subordinate Judge is incorrect and no inference adversely to the Maharani can be drawn from the facts stated in the 6th paragraph of the written statement. In my opinion, there is no evidence whatever excepting the letter dated the 4th March 1918, to establish that Maharani Nawlakhbati intended in 1916 to divest her proprietary interest in the estate to which she had succeeded as a Hindu widow in favour of Rao Bahadur Gobind Singh. So far as the letter of the 4th March 1918 is concerned, there is no evidence whatever that she was aware of the contents of this letter or that it was read and explained to her or that it was drafted on her instructions.

It is then suggested that the transaction, which began in March 1918 and culminated in the execution of the deed of surrender on the 18th December 1918, makes it impossible for us to accept the story of Maharani Nawlakhbati. The case of the plaintiff on this point is as follows:—In March 1918 the Maharanis came to Bhagalpur for the preparation of the draft deed of relinquishment. They stayed at a house near the houses of two eminent Pleaders, Babu Chandra Sekhar Sarkar and Rai Bahadur

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Surja Prosad and that they consulted them, took their advice and got the draft prepared by them. They then forwarded the draft to the Collector on the 4th March 1918 with a covering letter in which they intimated their desire to relinquish the estate in favour of their grandsons. Having done so, they went back to Sonbarsa. They returned to Bhagalpur again in November 1918, took the advice of Rai Bahadur Surja Prosad in the matter and then went to Bindwara in the District of Monghyr, the paternal home of the elder Maharani where, on the 18th December 1918, they executed the document in the presence of many respectable persons. They returned to Bhagalpur and on the 23rd December 1918 they addressed a letter to the Collector of Bhagalpur informing him of what they had done and asking the Collector "to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudra Pratap Singh if the Court of Wards do not think fit to retain management under section 13 (a) of Act IX of 1879 (B. C.)." The case of Maharani Nawlakhbati is that she did not come to Bhagalpur in March 1918, but that she came in November 1918 and then proceeded to Bindwara to execute the document on the 18th December 1918. She admits her signature to Exhibit 5, the letter of the 4th March 1918, and to Exhibit 5A, the letter of the 23rd December 1918. Her explanation, however, is that from time to time she signed various letters and documents for the purpose of making representations to the Government to withdraw the order of expropriation against Chotey Lal. She denies that she ever consulted anybody or had any talk with anybody regarding the relinquishment of the estate in favour of her grandsons and she definitely states that she executed the document of the 18th December 1918 in the belief that it is a petition to the Court to secure the return of Chotey Lal to Bhagalpur. It will be necessary to examine the evidence very critically in order to see whether the plaintiff has established his case against Maharani Nawlakhbati, but I ought to say that her story receives strong corroboration from the antecedent history to which I have referred, and which establishes

that from time to time the Maharanis made various attempts to have the order of expropriation against Chotey Lal recalled, and that in 1907 they proposed to execute a document apparently for the purpose of relinquishing their estate in favour of Chotey Lal, but really for the purpose of securing the cancellation of the order against Chotey Lal. In regard to the incident of March 1918 the evidence of Manbharan Ram Misra and Mr. B. C. Sen, who was the Collector of Bhagalpur in 1918 and who is at present the Commissioner of the Patna Division. I will first consider the evidence of Manbharan Ram Misra. He is a Marwari shopkeeper who, for a consideration of Rs. 100 per month, is looking after the case on behalf of the plaintiff. It appears that his firm has business dealings with Maharaja Harballal Singh and he pointedly refers to the fact that the Maharaja once gave him "a photo of his with an endorsement by his own hand." His evidence in regard to what happened in March 1918 is as follows:—Phucho Babu alias Ram Chandra Singh informed him that the Maharanis had arrived in Bhagalpur. He then went to the house where the Maharanis were putting up and he saw the Maharanis who told him that they had come to Bhagalpur "as they wanted to execute document for giving their estate to their grandsons." He says that he saw the drafts being prepared and that Phucho Babu and others used to go to the house of Pleaders, Chandra Sekhar Babu and Surja Prosad Babu. It ought to be pointed out that in examination-in-chief he put this incident not in March 1918, but in December 1918. In other words, his evidence in examination-in-chief was that all this happened in December 1918. In cross-examination, however, he corrected himself and said that the draft was prepared in March 1918 and not in December 1918 that the Maharanis told him that they had come to Bhagalpur "as they wanted to execute document for giving the estate to their grandsons." Now, in my opinion it is quite impossible to accept the testimony of Manbharan Misra. It is quite true that he had business dealings with the Sonbarsa Raj family, but it is unlikely that such business deal-

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ings as he had with the Sonbarsa Raj family would give him an entry into the house and to hold conversations with the Maharanis on the most intimate subjects in which the Maharanis were or might have been interested. He is at present serving the plaintiff for a consideration. His service began in March 1919, and, in my opinion, it is unlikely that the Maharanis should have gone out of their way to make a statement to a Marwari shop-keeper as to why they had come to Bhagalpur. Manbharan admits that the admission which Maharani Nawlakhbati is alleged to have made to him in March 1918 was an important piece of evidence in favour of the plaintiff; but it is remarkable that this alleged admission was not put to Maharani Nawlakhbati when she was examined as a witness in the lower Court. I pointed this out to the learned Government Advocate and the reply of the learned Government Advocate was that as the Court of Wards had decided not to press Issue No. 3 it was considered unnecessary to cross-examine Maharani Nawlakhbati on Issue No. 3. This is the explanation of the learned Government Advocate, but this is not the explanation of Manbharan Ram Misra. In cross-examination he said as follows:—"I gave instructions to my Pleaders when defendants' witnesses were being cross-examined. Don't recollect if I informed my Pleader who went to cross-examine the Maharani to ask her about the conversation I had with her and her co-widow at Bhagalpur regarding the deed of surrender as deposed to by me in my chief nor do I recollect if I informed my Pleader about the said conversation before I came to the box. My evidence regarding the said conversation with the Maharani I considered to be very material in my case. Can't give any reason why the Maharani was not asked about the alleged interview with me and their talk regarding the surrender, in her cross-examination by my Pleader. Don't recollect if I mentioned my said conversation with the Maharani to anybody else. It is not true that my evidence regarding the alleged conversation with the Maharani is a concoction and deliberately false and that, therefore, I did not mention it to any one. There

is no reason nor I can offer my explanation of my not remembering having mentioned the conversation incident to anyone, though it is true and material for the purpose of my case." Nor is it correct to say that the Maharani was not cross-examined on Issue No. 3. The whole of her cross-examination was on Issue No. 3 and the cross-examination was a long and protracted one. But having regard to the grievance which was made by the learned Government Advocate and having regard to the view which we took that it was open to Maharani Nawlakhbati to re-open Issue No. 3 we gave him the opportunity to further cross-examine Maharani Nawlakhbati in this Court. A formal question was put to her in cross-examination in this Court as to whether she did not make an admission to Manbharan Ram Misra in March 1918, and the Maharani denied that she ever made such an admission to Manbharan. We have then to choose between the evidence of Manbharan Misra and Maharani Nawlakhbati, and for my part I have no hesitation in whatever in preferring the evidence of Maharani Nawlakhbati. There is also the evidence of Mr. B. C. Sen which, in my opinion, does not touch the question which we have to consider. Mr. B. C. Sen says that he had an interview with the Maharanis at Bhagalpur about the time he received the letter of the 4th March 1918 from them, but he explains that although he was told that both the Maharanis were there he had a talk only with the elder Maharani who spoke to him from behind the *purdah*. In cross-examination he says that he had never seen the Maharanis face to face and nobody had ever identified the Maharanis; but he adds that he has himself no doubt that he did speak to the elder Maharani on this occasion. In my opinion the evidence establishes that the elder Maharani was in Bhagalpur in March 1918 and that she did have an interview with Mr. Sen in Bhagalpur in March 1918. But the evidence does not touch Maharani Nawlakhbati because Mr. Sen is very careful to point out that his conversation was with the elder Maharani and not with the younger Maharani. I have already pointed out that there is no evidence that

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the letter of the 4th March 1918 was read and explained to Maharani Nawlakhbati or that she was aware of the contents of that letter. There is also no evidence whatever as to who drafted the deed of surrender in March 1918, and on whose instructions the deed was actually drafted. Manbharan Ram suggests that it was drafted by Babu Chandra Sekhar Sarkar and Rai Bahadur Surja Prosad. Babu Chandra Sekhar Sarkar is unfortunately dead and his evidence is not available to the Court. Rai Bahadur Surja Prosad was not examined in the Court below, but, without permission, he has been examined in this Court on behalf of the plaintiff. Now it is a remarkable fact that he was not asked by the learned Government Advocate as to whether he had anything to do with the draft of the deed of surrender. I have no doubt whatever that the learned Counsel in the exercise of a wide discretion made up his mind not to examine Rai Bahadur Surja Prosad on this point. The evidence of Manbharan accordingly must be rejected in so far as he has suggested that the Maharanis took the advice of amongst others, Rai Bahadur Surja Prosad in March 1918 and that the draft deed was prepared by or under his direction. There is, in my opinion, no evidence to connect Maharani Nawlakhbati with the transaction of March 1918.

I now come to the incident of November 1918. The case of the plaintiff is that in November 1918 the Maharanis again came to Bhagalpur and took the advice of different lawyers including Rai Bahadur Surja Prosad. Muhammad Ishaq, a clerk of Rai Bahadur Surja Prosad, was called by the plaintiff and he proved an entry in the fee book of Rai Bahadur Surja Prosad showing a receipt of Rs. 10 on the 7th November 1918 forgiving opinion to the Maharanis. Muhammad Ishaq in his evidence to the Court said that Rai Bahadur Surja Prosad went and saw the Maharanis either a few days before or a few days after the fee of Rs. 10 was paid. Upon this evidence the learned Subordinate Judge built the theory that the Maharanis had independent and disinterested legal advice. It did not strike the plaintiff to call Rai Bahadur Surja Prosad to give evidence

in the Court below; but he has been called as a witness in this Court on the invitation of the learned Government Advocate, and his evidence is clear and precise and destroys the entire case of the plaintiff on this point. He admits that he saw the Maharanis at or about the time the fee of Rs. 10 was paid to him. His evidence is as follows:—"I do not recollect all the conversations that I had, but I have some recollection of the fact that the Maharani or Maharanis wanted to know what was the best way of getting the younger grandson, that is, Chotey Lal Sahib, to Bhagalpur as there was an order of Government prohibiting him from going to Bhagalpur." The question was put to him "Is this all the talk that you had?", the answer was "yes, that is my recollection." As I have said before, the evidence of Rai Bahadur Surja Prosad destroys the theory of the learned Subordinate Judge. There is not the slightest evidence in the record that in November 1918 the Maharanis obtained any outside legal opinion on the subject.

The learned Subordinate Judge also relies upon the fact that the Maharanis took advice and opinion from the Government Advocate and the Advocate-General of Bengal and upon the fact that Anirudh Prosad, a respectable Zemindar and lawyer, accompanied the Maharanis from Bhagalpur to Bindwara. He also refers to the fact that another lawyer, Bindeshwari Prosad, was also present at the time when the document was executed. Now, there is no evidence that the Maharanis took the advice of either the Government Advocate or the Advocate-General of Bengal. The allegations in the 8th paragraph of the plaint upon which the learned Subordinate Judge relies are as follows:—"That the draft of the surrender deed was prepared and placed before the Advocate-General of Bengal and the Government Advocate of Bihar and Orissa, and it was approved by them. The approved draft was sent to the Collector of Bhagalpur with an accompanying letter, dated the 4th March, 1918 for his information but no objection was taken, and afterwards on the 18th of December 1918 the aforesaid Maharanis in order to give effect to their wishes, shared in by the Hindus, executed and registered the said deed of surrender in favour of their grandsons

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Rao Bahadur Gobind Singh, the plaintiff's father and Rai Bahadur Rudra Pratap Singh, his uncle the defendant 2nd party so that the succession of the aforesaid grandsons might be accelerated and the said Maharanis might pass the remainder of their lives in the holy city of Benares spending their latter days in the Divine Worship and meditation keeping themselves entirely aloof from the concerns of this mundane world. It will be noticed that all that the plaintiff does allege in paragraph 8 is that the draft of the surrender deed was placed before the Advocate-General of Bengal and the Government Advocate of Bihar and Orissa for their approval. Now, in my opinion, it is one thing to say that the draft was approved by lawyers and another thing to say that independent advice was received from lawyers. The learned Subordinate Judge has an idea that so long as a document is placed before lawyers and they approve of the form of it, the rule as to independent advice is satisfied. The idea is wholly erroneous. What is required is that *pardah-nashin* ladies should receive advice as to the legal effect of a particular document which they are about to execute and their position under it as compared to the position which they would occupy, if they do not execute the document. There is no suggestion whatever that this was done in the present case. All that was done was that the draft deed was placed before them and they approved of it. In other words, they gave their opinion that the document complied with the formalities of law, just as they gave their opinion that the document which they proposed to execute in 1916 did not comply with the formalities of law. In my opinion there is no evidence whatever that the Maharanis received that independent advice—as distinguished from opinion—from the Government Advocate or from the Advocate-General of Bengal which it was necessary for them to have in order that the deed might be enforced as against them. It is then suggested that Anirudh Prosad, a respectable Zemindar and Pleader, accompanied the Maharanis from Bhagalpur to Bindwara. But as I have already shown

before, Anirudh Prosad was the agent of the plaintiff's father; and there is no evidence that Anirudh Prosad was asked to give his advice to the Maharanis or that he did give it. It may be pointed out that Anirudh Prosad has not been examined in this case at all. The learned Subordinate Judge suggests that it was the duty of the defendant to have examined him. With this view I am unable to agree. The learned Government Advocate asked for permission to call Anirudh Prosad as a witness in this Court and we acceded to the application; but while the Government Advocate examined the other witnesses named in his petition, he expressly stated to us that he did not propose to call Anirudh Prosad. We are not concerned in this case with the reasons which prompted the learned Government Advocate not to call Anirudh Prosad. None has been given to us, and we are bound to assume that the evidence of Anirudh Prosad would have been against the plaintiff had the plaintiff called him as a witness in the case. As regards Bindeshwari Prosad, all that I need say is that, although an attesting witness to the deed of surrender, he was not called as a witness by the plaintiff.

It is necessary to mention certain other matters which have been referred to by the learned Subordinate Judge in this connection. The learned Subordinate Judge says that the allegations in the 8th paragraph of the plaint, to which I have already referred, are admitted in the written statement of Maharani Nawlakhbati and that it must follow from such admission that the Maharanis received independent legal advice from the Advocate-General of Bengal and the Government Advocate of Bihar. I have already, in connection with another matter, dealt with this argument. I have pointed out that there is no suggestion in the 8th paragraph of the plaint that any independent advice was received either from the Advocate-General of Bengal or from the Government Advocate of Bihar and I have also pointed out that Maharani Nawlakhbati is not responsible for the written statement, and that there is positive evidence in the record, and that from the side of the plaintiff, that the written statement was

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not drafted upon her instructions. The learned Subordinate Judge then refers to the fact that the defence which is taken in paragraph 6 (a) of the written statement was not taken in the Land Registration proceedings. It will be remembered that after the execution of the deed of surrender Barra Lal applied in the Land Registration Department to have his name recorded in respect of 8-annas share in the Sonbarsa Raj and that application was resisted by the Court of Wards on behalf of Maharani Nawlakhbati. The view of the learned Subordinate Judge is that, though the Court of Wards contested the application of Barra Lal on the ground that the deed of surrender was not a *bona fide* document, the Court of Wards should have gone further and alleged that in regard to the deed of surrender the Maharani did not have any independent advice and that, not having contested the application on that ground, it is not open to the Maharani now to put forward the defence that she did not have any independent or disinterested advice in the matter. In my opinion the argument is wholly without foundation. The Maharani was not in any way concerned with the defence which was taken on her behalf in the Land Registration proceedings. The matter rested with the Court of Wards and it is the Court of Wards that defended those proceedings on behalf of Maharani Nawlakhbati. Nor am I impressed by the argument that the point as to independent legal advice not having been taken in those proceedings it is not open to the Maharani to take the point now. The Court of Wards alleged in clear terms that the deed of surrender was not a *bona fide* document. In order to prove that it was a *bona fide* document, it was necessary for the applicant to establish that the document was read and explained to the Maharani and that she understood the legal effect of that document. The learned Subordinate Judge then refers to the fact that the Officiating Government Pleader expressly stated that he would not press Issue No. 13. In my opinion Maharani Nawlakhbati ought not to be prejudiced by the action taken on her behalf by the Court of Wards. Her disability has come to an end and she is entitled to press that issue.

There is one other point to which the learned Subordinate Judge refers. He says that Nakuleswar Prosad who was called as a witness on behalf of Maharani Nawlakhbati admits in his evidence that the Maharanis were anxious to surrender their estate in favour of the next reversioners. Nakuleswar Prosad was a *sartstadar* in the Sonbarsa Court of Wards office. He was called by the plaintiff to prove a mortgage executed by the Collector and the Maharanis in favour of Rai Bahadur Dalip Narain Singh. In cross-examination he stated that the Maharanis wanted to surrender their rights to their grandsons by executing the document, and he proceeded to say that with that object they consulted the Collector to whom letters were written and that the opinion of the Advocate-General and the Government Advocate was taken and that the expenses incurred by the Maharanis for such advice and opinion were entered in the books. His evidence is obviously based upon the documents which were in the record of the Court of Wards. There is no suggestion that he has any independent knowledge of the matter. He refers to the letters which were from time to time written to the Collector and to the opinion which was taken from the Advocate-General and the Government Advocate. I am unable to read the evidence of Nakuleswar Prosad as establishing that Maharani Nawlakhbati had independent advice in the matter or that she understood the effects of the document which was executed by her on the 18th December 1918. On an anxious consideration of the evidence in the case, I have come to the conclusion that the circumstances do not establish that Maharani Nawlakhbati obtained any independent legal advice in the matter or that she understood that by executing the deed of surrender, she had effectively divested herself of all proprietary interest in the estate of her deceased husband. It remains for me to consider whether the deed of surrender was read and explained to the ladies. There are eight attesting witnesses to the deed, namely:—

1. Bindeswari Prosad Singh, Vakil, High Court.

2. Ajodhya Prosad Chowdhury, Municipal Commissioner, Monghyr.

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3. Prabhu Charan Ambasta.
4. Bindeswari Prosad Singh, Vakil, Mouglhyr.
5. Anirudh Prosad Singh, Pleader and Zerrindar.
6. Ramchandra Singh of Mohanpur.
7. Ram Chandra Singh of Mauza Chakla Hanuman Nagar.
8. Nirbhay Narain Singh of Bindwara.

The plaintiff has called Ajodhya Prosad Singh and Prabhu Charan Ambasta. The defendant has called Nirbhay Narain Singh and Ramchandra Singh of Mauza Chakla Hanuman Nagar. I may at once say that I have not been impressed by the evidence of the witnesses called on behalf of the defendants. The learned Subordinate Judge has rejected their testimony and I see no reason to take a different view.

But the onus is on the plaintiffs and it is for the plaintiff to prove that the document was the document of the Maharanis and that they executed the document after understanding the nature of the document and the effect thereof. Prabhu Charan's evidence is that the document was read out to the Maharanis who were sitting behind the *pardah*. It will be noticed that he does not say that the document was explained to the Maharanis. It has been argued before us that reading a document, which was in English, carried with it the implication that it was explained to the Maharanis. Mr. Dutt's argument, on the other hand, is that on the evidence of Prabhu Charan we ought to hold that all that was done was that the document as it stood was read out to the ladies. I am unable to agree with either contention. Reading out a document means reading it out in a language understood by the persons to whom the document was being read out; but it is another thing to say that it was explained to the ladies. The document is by no means a simple one. It is expressed in the language of the Full Bench of the Calcutta High Court in the case of *Debi Prosad Chowdhri v. Golap Bhagat* (3). That the document needed careful explanation, I have no doubt whatever; and I am unable to hold on the evidence of Prabhu Charan that the document was in fact explained to the Maharani. The evidence of Ajodhya Prosad is that Anirudh Babu read and explained the document to the Maharanis in *Hindi*, and that he had

no difficulty in understanding the nature of the document. The question, however, is not whether he understood the nature of the document but whether the Maharanis understood it. There is a conflict between the evidence of the two attesting witnesses called on behalf of the plaintiff, and, in my opinion, it is difficult to hold on this evidence that the document was explained to the ladies. We have not the evidence of Anirudh Prosad who is alleged to have taken the most prominent part in connection with the events of the 18th December 1918 and I am unable to hold that the document was in fact explained to the ladies. Since the evidence of Prabhu Charan was unsatisfactory from the point of view of the plaintiff, it was open to him to call other witnesses. There is no explanation whatever why he has not called the four remaining witnesses who signed the document as attesting witnesses. Mr. Justice Woodroffe once said that the reading of documents to illustrate *pardah-nashin* ladies is sometimes a meaningless formality, [See *Mariam Bibee v. Muhammad Ibrahim* (11)]; and I am unable to hold on the uncorroborated testimony of Ajodhya Prosad that the document was explained to the ladies, especially Maharem Nawlakhbati denies on oath that it was so explained.

To sum up: I have been impressed by the fact that Maharani Nawlakhbati has denied on oath an effectual knowledge of the deed of surrender. The act imputed to her is an act of effacement, an act by which she is said to have operated her death. In the witness-box, she denies that she is dead and she explains the circumstances under which she came to execute the deed of surrender. It was determined in the case of *Delus Banoo Begum v. Nowab Syua Asghar Ali Khan* (12) affirmed by the Judicial Committee in *Asghar Ali v. Dilroos Banoo Begum* (13) that *pardah-nashin* ladies have a claim to special consideration where they deny on oath an effectual knowledge of documents which they are said to have made. It may, of course, be that her explanation is untrue, and that she is really dead; but where the question is whether a *pardah nashin* lady has operated her own death which she was not bound to do, the Courts will, I apprehend, act with great caution, and will not deprive her of her property

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unless compelled to do so. Most of the cases that come before the Courts are cases which arise after the death of the *pardah-nashin* ladies; but the question here is raised in the lifetime of Maharani Nawlakhbati and the claim of the plaintiff is disputed by Maharani Nawlakhbati. In the next place, it seems to me that the explanation given by the Maharani has received considerable support from the admitted history of the transactions from 1907 to 1918. Again and again attempts were made by the Maharani to have the order of externment against Chotey Lal recalled; and we know that in 1907 they proposed to surrender the estate to Chotey Lal, not with a view to carry the estate from them to Chotey Lal, but with the object of forcing the Government to recall the order of externment against Chotey Lal. And the advice which they sought from Rai Bahadur Surja Prosad on the eve of the transaction in suit is not without significance, and suggests that, in the minds of the Maharanis there was some connection between the execution of the document and the cancellation of the order of externment against Chotey Lal. In the third place, I consider that Barra Lal stood towards the Maharanis in some relation of personal confidence, and should have dealt with them at arm's length. This he did not do and, what is more, he completely ignored the Court of Wards which was the statutory guardian of the Maharanis. The Court will, in such a case, presume confidence put and influence exerted, and I am not satisfied on the evidence that confidence was not put and that influence was not exerted. But, apart from the question of presumption and, assuming that Barra Lal did not stand towards the Maharanis in some relation of personal confidence I am quite clear that the possession of independent and disinterested advice was essential to give validity to the deed of surrender. There is no evidence that the Maharanis had an intellectual attainment or business capacity sufficient to fit them to be on guard against any attack that might be made on their property, and I am unable to say that the possession of independent advice would have made no difference in the case. The terms of the deed were, on the face of it, attractive so far as the Maharanis were concerned, for the immediate effect of the

deed would be to give them Rs. 2,000 per month, whereas they were getting much less from the Court of Wards. But the debts of the estate had practically been liquidated and the retirement of the Court of Wards could not long be delayed. Then again it is established beyond doubt and controversy that the motive which impelled the Maharanis to enter into the transaction of the 18th December 1918, was to secure the withdrawal of the order of the externment against Chotey Lal; and I think that this was a matter in which they were entitled to have independent advice. I think that it is established that Maharani Nawlakhbati did not have any independent advice; and though I agree that the document was read to the Maharanis in the language understood by them, I am unable to hold, on the uncorroborated evidence of a single witness, since that evidence is contradicted by Maharani Nawlakhbati; that the document was explained to them. Differing from the learned Subordinate Judge, I hold that the deed of surrender is not enforceable as against Maharani Nawlakhbati.

I would dismiss this appeal with costs.
Kulwant Sahay, J.—I agree.

Z. K. & N. H.

Appeal dismissed.

SOHAN SINGH v. JAWALA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 406 OF 1922.

July 22, 1922.

Present.—Mr. Justice Campbell.

SOHAN SINGH—PLAINTIFF—APPELLANT

versus

JAWALA SINGH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Ac V of 1908), s. 11—Findings not necessary for decision of suit—Res judicata.

Findings upon matters which are not necessary for the determination of a suit do not constitute a final decision so as to be binding as *res judicata*. [p. 854, col. 2.]

Second appeal from a decree of the District Judge, Ferozepore, dated the 14th November 1921, affirming that of the Munsif, dated the 24th June 1921.

Mr. Rustumji, for the Appellant.

Lala Mehar Chand, for the Respondents.

JUDGMENT.—This second appeal is the outcome of a suit in which Sohan Singh, son of Nand Singh, claimed possession from his two brothers, Jawala Singh and Sundar Singh, of 4 *kanals* of land which he alleged himself entitled as one of the heirs of his deceased father. He was met by the pleas that his share had been separated off in his father's lifetime and that in a previous suit between the same parties he was held not to be entitled to any more land than was then in his possession.

The Courts below have concurred in finding that the question of the plaintiff's right to the 4 *kanals* in suit is *res judicata* by the previous suit. The First Court also held that, apart from this legal bar, the plaintiff had failed to prove his right to the land. The learned District Judge appears to have affirmed this decision also but not in very clear terms. His main reason for dismissing the appeal is manifestly his finding on the point of *res judicata*.

The plaintiff has preferred a second appeal and Counsel for the appellant has conceded that section 11, Civil Procedure Code, does not bar the suit. He contends, however, that the law of estoppel precludes the plaintiff's claim and also that there is a finding of fact against the plaintiff on the merits.

The previous suit was filed against the present plaintiff by the present defendants on 20th June 1919, after the death of Nand Singh and was for possession of 47 *kanals*

10 *marlas* left by Nand Singh which Sunder Singh and Jawala Singh alleged had been forcibly appropriated by Sohan Singh. The latter replied that he was only in possession of 27 or 28 *kanals* which his father had made over to him in his lifetime and that he was actually entitled to more than this, *viz.*, of one-third what his father had died possessed of.

The Munsif proceeded to frame an issue in the following terms:—

Is the defendant No. 1 (*i.e.*, Sohan Singh) entitled to an area in excess of that held in possession by him?

On this he recorded a finding that Sohan Singh in 1887-1888 was "settled apart from his father, getting possession of 27 or 28 *kanals* of land as his own share, in the way of complete partition of his interests," and that the defendant is entitled to 28 *kanals* of which he held possession at the death of Nand Singh, deceased." He dismissed the suit "inasmuch as the defendant holds possession of 28 *kanals* to which he is entitled as Nand Singh's son by virtue of the partition of 1887-8."

It is obvious that no issue was necessary as to the title of Sohan Singh to any land which was not then in his possession. The question was merely whether he was entitled to retain the land which he then held. The other question whether he was to succeed on the death of Nand Singh to a share in the land retained by the latter for himself of which possession at the time was held by the then plaintiffs whose claim he was resisting, was not one necessary to the determination of the suit, a finding on that question was not one against which he could have appealed and thus, as ruled, *inter alia*, in *Narain Das v. Faiz Shah* (1), the question was not a matter directly and substantially in issue which was heard and finally decided. *Jamaitunnissa v. Lutfunnissa* (2) is explicit to the same effect. This, as stated already, is conceded by the learned Counsel for the respondents.

I confess that I am unable to follow the same Counsel's argument about estoppel. He contends that Sohan Singh is estopped

(1) 157 P. R. 1889 (F. B.).

(2) 7 A. 606; A. W. N. (1885) 89; 4 Ind. Dec. (N. S.) 657.

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from raising now a plea that he is entitled on his father's death to obtain a further share because he deliberately raised it in the former suit and obliged the Court to put it in issue and decide it. I can find nothing in support of this proposition in Chapter VIII of the Indian Evidence Act, nor do I see that the Court was obliged by the present plaintiff or by any one else to frame an issue regarding rights in property which was not in suit. The other point whether, apart from the question of *res judicata*, the plaintiff has established his claim was dealt with by the learned District Judge as follows:—

"Neither in the present plaint nor in the previous suit is there any mention of the chief contention now put forward, namely, that after the Settlement of 1911-12 Nand Singh took back 9 *kanals* of land from each of his sons for his own maintenance, nor, though the point is covered by Issue No. 2 in the present case, is there any sufficient proof of this on the record. The *Patwari* (P. W. No. 1) does not support the allegation while P. Ws. Nos. 2 and 3 are not themselves credible witnesses."

I find that in a statement made before the framing of issues the plaintiff did say that after Settlement his father had taken back some land and I fancy that the learned Sessions Judge has overlooked this portion of the pleadings. I have also seen the deposition of the *Patwari* and I do not think that the learned Sessions Judge can have read it carefully. It appears to me that the learned Sessions Judge's finding on this second point is not a considered one based upon all the evidence on the record and that, in reality, he dismissed the appeal entirely upon the view taken by him of the applicability of section 11, Civil Procedure Code, with which I am obliged to disagree.

For these reasons I accept the appeal, set aside the order of the lower Appellate Court and remand the appeal under O. XLI, r. 23, for a fresh decision on the points arising other than those covered by Issue No. 1 framed by the Trial Court. Stamp on appeal to this Court to be refunded and costs to be costs in the cause.

W. C. A.

Appeal accepted.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 21-9 OF 1922.

April 27, 1923.

Present:—Mr. Pison, J. C.

Khan Bahadur MUHAMMAD ALI KHAN

—APPELLANT

versus

Rai Bahadur MAKHAN SINGH AND
OTHERS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 3 (2)
(3)—Urban immoveable property and village immoveable property—Town, what is—Pre-emption, origin of.

In order to determine whether property in dispute in a pre-emption suit is village or urban immoveable property, the Court has to deal not with the *mauza* or revenue area as a whole unit, but with the character of the particular land in suit. [p. 857, col. 1.]

Muhammad Din v. Shah Din, 90 P. R. 1907; 151 P. W. R. 1907, relied on.

Areas which were formerly agricultural may be absorbed in towns and losing all their former characteristics become suburbs indistinguishable in character from the town itself. [p. 857, col. 1.]

Kishan Dyal v. Ali Bahksh, 87 P. R. 1890, *Umar Bahksh v. Abdul Karim*, 70 P. R. 1898, *Abdulla v. Punnu Ram*, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906 and *Ghulam Murlaza v. Rupa Mal*, 57 P. R. 1906; 100 P. L. R. 1906; 84 P. W. R. 1906, referred to.

It is not necessary to have a gradual development in order to make an area become part of a town; an entirely new suburb may suddenly spring up by the constitution of a block of buildings. [p. 857, col. 2.]

Allah Ditta v. Muhammad Nazir, 7 Ind. Cas. 716; 84 P. R. 1910; 102 P. W. R. 1910, relied on.

The inclusion of an area within Municipal limits is a highly important factor to be taken into account in determining whether that area is within a town or within a village. [p. 858, col. 1.]

The law of pre-emption is derived from three sources, Muhammadan Law, the necessities of the existence of racial communities and public and private convenience. One of the main reasons for the acceptance of a pre-emptive right is the vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To allow landed estate to pass into the hands of strangers is not only to deprive the community of a valuable asset into which its communal right has not been entirely abandoned, but also to entail the dissolution of its internal organisation by the engrafting of strangers upon the common body. For these reasons the first right of pre-emption in the case of agricultural land or of the sites of agricultural villages accrues primarily to the relatives of the original owner and after them to other members of the proprietary body. [p. 859, cols. 1 & 2.]

On the other hand, pre-emption in towns, though the principle may have originally been evolved from Muhammadan Law, depends at the present

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time purely on the consideration of public and private decency and convenience; here it is not relationship but contiguity which is of prime importance. [p. 859, col. 2.]

In order to determine whether any specified area is to be considered as part of a town or part of a village, the test to be applied is whether such an area has retained any of its original characteristics which would be consistent with the organisation of a society to whom the principles of pre-emption among agricultural communities would apply, or whether, on the other hand, it is one to which the principles of town pre-emption are applicable. [p. 859, col. 2.]

First appeal from an order of the District Judge, Kohat, dated the 30th November 1921, whereby the suit of appellant for pre-emption of 5 kanals 3 marlas in Kohat was dismissed.

Mr. Parma Nand, R. S., for the Appellant.

Mr. Dewan Chand, R. S., for the Respondents.

JUDGMENT.—The present suit is one for pre-emption of a 3-8th share of a certain area of a land occupied by a "mandi" situated just outside the walls of Kohat City. The suit was resisted upon a number of grounds upon all of which it will not be necessary for me to adjudicate in this appeal. Pre-emption is claimed on the basis of relationship between the plaintiff and the vendors. It has been found by the Trial Court that the property in suit is urban immoveable property as defined in section 3(3) of Act II of 1905 and that, therefore, pre-emptive rights in it are governed by section 13 of the same Act and not by section 12. It is admitted that, if this finding is correct, the plaintiff cannot pre-empt, the defendant-vendee being himself a co-sharer in the property. The first point, therefore, which I am called upon to decide is whether or not the property in suit is urban immoveable property. It is contended by the plaintiff-appellant that it is not, and that it is village immoveable property within the meaning of section 3(2) of the Act. The position taken up by the respondents is that the property is urban immoveable property and that, if it is not, it is nevertheless not village immoveable property. This alternative contention of the respondents depends upon the construction to be placed upon the words "immoveable property within the limits of village sites" contained in section 3(2) of Act II of 1905

and of certain rulings which had been passed excluding buildings of various natures from the above definition. This alternative contention, of course, need not be considered if the appellant fails to upset the finding of the Trial Court to the effect that the property is urban immoveable property, as that finding necessarily implies that the present suit must fail.

The following facts may be stated with regard to the property in suit. The property in suit is comprised in an area of 5 kanals 3 marlas situated in the revenue area of Mauza Kohat. It is assessed to revenue. It is entirely occupied by a "mandi," or market, which contains a large number of shops. It is recorded in revenue papers as "ghair mumkin mandi." The revenue area of Mauza Kohat includes also Kohat City proper which is fortified and enclosed by a wall and which has been given a separate number in the Revenue Records as "qasba Kohat." The site in suit lies just opposite the Tahsil gate of the City outside the wall, but separated only from the City by a main road. It is within the limits of the Municipality and of the octroi area. The property is undoubtedly used purely for commercial purposes. An excellent map of the property is attached to the record.

The case is very parallel to that recently decided by me in the case of *Sher Ali v. Kalandar Khan* (1), Civil Revision No. 109 of 1922, where it was held that the buildings of Bhanamari, occupying a situation just outside Peshawar City very similar to that occupied by the land in suit in regard to the City of Kohat, were, for purposes of pre-emption, a sub-division of the town of Peshawar. That ruling is now in course of publication, and was not before the Trial Court when the present suit was decided. I have in it reviewed various authorities on the subject of the creation of new suburbs in the immediate vicinity of a town. There is, however, one distinction between the two cases. The ruling in the case of *Sher Ali v. Kalandar Khan* (1) was one which covered the whole of the site of Bhanamari and declared Bhanamari to be a sub-division

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of Peshawar. In the present case we are not dealing with anything except the area covered by the suit itself. In this respect the Punjab Chief Court ruling *Muhammad Din v. Shah Din* (2) is important as a precedent. It dealt with an area situated in Qila Gujar Singh near the town of Lahore, and it is an authority that the Courts have to deal not with the "*Mauza*" or revenue area as a whole unit, but with the character of the particular land in suit. I have no doubt of the correctness of the view that Courts may and should consider the position and character of any specified plot quite apart from the character of the unit in which it is included. That ruling is also parallel to the present case in that it deals with an area included in an estate which is also particularly agricultural and which has all the administrative characteristics of village estates; that is to say, it has its assessment of revenue, its Record of Rights, its ordinary village population and its village officers. The particular area, however, dealt in Qila Gujar Singh was nevertheless declared to be an area which had been absorbed in the town of Lahore. I have to see, therefore, whether the area now in suit has been similarly absorbed in the town of Kohat. It can hardly be denied and there is a consensus of authority for the proposition, that areas which were formerly agricultural can actually be absorbed in towns and, losing all their former characteristics, become suburbs indistinguishable in character, from the town itself. We have, for instance the case of Batala in the Punjab very parallel to the present case [*Kishan Dial v. Ali Bakhsh* (3)] and another case referring to the same town *Umar Bakhsh v. Abdul Karim* (4), *Abdulla v. Punnu Ram* (5) relates to the outgrowth of suburbs from Multan town and *Ghulam Murtaza v. Rupa Mal* (6) to the creation of a new quarter called "*Mohalla Giddarpur*." *Allah Ditta v. Muhammad Nazir* (7) is again authority for the view

that it is not necessary to have a gradual development in order to make an area to become a part of a town, but that an entirely new suburb may suddenly spring up by the construction of a block of buildings. The block of buildings referred to in that case was very similar in character to that with which we are concerned in the present suit. The inherent weakness in the present case of the position of the appellant in denying that the area in suit has become a portion of the town may be seen from the line of argument adopted by his learned Counsel. He would argue that a distinction must be made between the expansion of a town afterwards and the extension of an existing village towards a neighbouring town. It is almost impossible to follow this argument as having any real bearing upon the matter in hand. The question is not whether the inhabitants of the town or the inhabitants of an outside area have taken the initiative in creating a suburb, but whether such a suburb has or has not been actually created. The learned Counsel would also endeavour to distinguish the case of Multan from that of Kohat by arguing that residence in or near Multan is not exposed to the same danger as is unfortunately prevalent in a Frontier town like Kohat. He argues that the urban population of Kohat necessarily confines itself to the fortified walls of the City, and it is unlikely that it can extend the boundaries of the town beyond its own walls. This argument, again, I am unable to regard very seriously. It is perfectly possible to recognize the extension of a town like Kohat outside its fortified walls and there cannot be the least doubt that this expansion has been regularly taking place in recent years. Indeed, there are documents on the record which explain the present expansion and which are strongly in support of the view that it is an actual expansion of the town. Applications on the subject of re-claiming the land in suit were made by the plaintiff's father and another relative in the year 1893. It would seem clear from those applications that the Executive Authorities had been endeavouring to encourage the reclamation of this land, and its occupation by buildings in order to improve the sanitation of the City. There is no doubt that from 1893 onwards a gradual develop-

(2) 90 P. R. 1907; 151 P. W. R. 1907.

(3) 87 P. R. 1890.

(4) 70 P. R. 1898.

(5) 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906.

(6) 57 P. R. 1906; 100 P. L. R. 1906; 84 P. W. R. 1906.

(7) 7 Ind. Cas. 716; 84 P. R. 1910; 102 P. W. R. 1910.

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ment took place. The site was originally occupied by a few "*kachoha*" huts and shops which were gradually re-placed by masonry buildings and practically by a new Bazar or regular trading centre.

Peshawar City, it may be remarked, is similarly surrounded by a fortified wall, but has similarly extended its Bazar outside that wall and, indeed, some of the most important trading centres of Peshawar City lie actually outside the original perimeter wall. To take another test, I have already remarked that the area in suit is situated not only within the limits of Kohat Municipality, but within the limits of octroi administration. Many Municipalities, including Kohat, have not applied their octroi administration to the whole of their notified limits. The inclusion of an area within Municipal limits is a highly important factor to be taken into account in determining whether that area is within a town or within a village. In fact, both Messrs. Ellis and Shadi Lal in their Commentaries would appear to accept the proposition that, ordinarily, every place within Municipal limits is a town. I consider myself, however, that this view goes rather too far. The sounder view, no doubt, is that taken in two cases by the Judicial Commissioner of Oudh where it was held that a purely administrative act including a certain area within the limits of Municipalities could not *per se* operate to destroy the pre-existing character of that area. The correct view, in my opinion, is that which has already been expressed in the case of *Sher Ali v. Kalandar Khan* (1) relating to Bhanamari, i. e., that the inclusion of an area in Municipal limits, while not being conclusive as to its urban character, is, at the same time, a strong evidence of that character. It is at least a complete answer to the attempt to deny the urban character of that area by reference to the fact that it is included also on an estate paying revenue and having in other respects, Revenue Record of Rights and Village Officers. The appellant has referred to a ruling of the Divisional Court passed with regard to the area in the case of *Sukha Singh v. Muhammad Ismail Khan* on the 16th of January 1901. It was there held that the area in the suit was not within the town. The learned Divisional Judge remarked: "No doubt, Kohat is a town

qua its urban portion, but it is also a village as regards the lands beyond the town which are assessed to land revenue and form a '*Mauza*.' The land in suit lies beyond and outside of the town and clearly for a portion the revenue unit forming a village called Kohat." The effect of that ruling, however, upon the present case is, in my opinion, nil. In the first place, the learned Divisional Judge was dealing with an entirely different Pre-emption Act from what which is now in force. The pre-emptive right then depended upon sections 11 and 12 of the Punjab Laws Act. Further, the ruling was passed some two years before the Settlement of the Kohat District which took place in 1903. In 1901 no such area as "*kasba* Kohat" or "Kohat town" was recorded in revenue papers at all. In the Settlement of 1893 Kohat town was recognised as a separate portion of "*Mauza*" Kohat, again and this is the most important point of all, we are not now dealing with the character of the land in 1901 but with its character in 1922. To draw an inference from that ruling would be to lose sight of the principle that an area may develop into a portion of the town by change, expansion and development. Again, a comparatively recent ruling of a Divisional Court in this Province which relates to Garhi Mawaz Khan which is one of the villages surrounding Kohat, does not appear to me to have any bearing on the present case. We are not considering whether Garhi Mawaz Khan, as a whole, or even whether Mauza Kohat as a whole is urban immoveable property, but whether the area now in suit is urban immoveable property. All the considerations mentioned above raise to my mind the strongest presumption that the area in suit has lost every character connected with the organisation of an agricultural village and has taken upon itself the entire characteristics of a town suburb.

It is noticeable that no definition of the word "town" is given in the Acts of 1905 or 1913. Mr. Ellis in his Commentary has attempted a definition. He says, "the safest definition appears to be an area inhabited by the residents not bound by any interest in agriculture that is a place which depends mainly on trade." This definition had been quoted and accepted by the

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Lahore High Court in Letters Patent Appeal No. 27 of 1919 [*Shankar Das v. Mathra Das* (8)]. Now, with all due respect to the learned Commentator and the learned Judges of the Lahore High Court, I cannot personally agree that this definition furnishes the true test. It seems to me perfectly possible to conceive a genuine and true town which does not owe its origin or existence in any way to trade. There are, undoubtedly, in Europe and possibly also in India towns which owe their entire development and existence to educational, artistic, religious, political or even military considerations. One may take, as an instance of town created purely for political purposes, the construction and development of new Delhi, or more properly Raisina. It would probably not be denied that Raisina, when completed, will have the character of the town, but at the same time it would be difficult to suppose that it is a place which depends mainly upon trade. It appears to me that we must go somewhat deeper in estimating the *ratio decidendi* between a town and an agricultural village. The Law of Pre-emption may be said to be derived from three sources, Muhammadan Law, the necessities of the existence of the racial communities, and public and private convenience. There is also no doubt that the framers of the Acts of 1905 and 1913 were not guided purely by the principles of pre-emption to be discovered from Muhammadan Law, or from archaic custom, but also by consideration of public policy and convenience as they existed at the time when those Acts were passed. Now, it is very easy to realise that one of the main reasons for the acceptance of a pre-emptive right is the vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To allow landed estate to pass into the hands of strangers is not only to deprive the community of the valuable asset in which its communal right has not been entirely abandoned, but also to entail the dissolution of its internal organisation by the engrafting of strangers upon the common body. Such a necessity is predominant in the case of trans-frontier Pathans outside the strict limits of British India, who are still governed

purely by Tribal Law and who are in a continual state of warfare with their neighbours which makes the preservations of their essentially homogeneous character a matter of life and death. But the same considerations even now prevail, though to a limited extent, among tribes actually domiciled within British territory and no longer subject to Tribal Law. The necessity is still felt among them for the rigid exclusion of strangers from among the proprietary and governing body of the tribe. The same consideration may be said to exist, though in a still more limited degree, among nearly all agricultural communities in the North of India. It is also easy to realise how important was the recognition of this principle among the communities for whom the Law of Islam was originally framed in view of their social, religious and military organization. For all these reasons the first right of pre-emption in the case of agricultural land or of the sites of agricultural villages accrues primarily to the relatives of the original owner and after them to other members of the proprietary body. On the other hand, pre-emption in towns, though the principles may have originally been evolved from Muhammadan Law, depends at the present time purely on the consideration of public and private decency and convenience. Here it is not relationship but contiguity which is of prime importance. Apart from the origin of the custom, it is tolerably clear that the framers of the modern Pre-emption Acts were primarily guided by considerations of the kind which I have just enumerated. If the above view of the Law of Pre-emption is kept in mind, I think we can arrive at a truer test for determining whether any specified area is to be considered as part of town or part of a village. The test to be applied is, whether such an area has retained any of its original characteristics which would be consistent with the organisation of a society to whom the principles of pre-emption in agricultural communities would apply, or whether, on the other hand, it is one to which the principles of town pre-emption are clearly applicable. There cannot, in my opinion, be any doubt in the present case. I have already shown that the area in suit has all the characteristics of the town property. It is used purely for the purposes

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of trade, it is subject to Municipal taxation and it enjoys all the conveniences, privileges and disabilities, which attach to town property. Its system of lighting, sanitation and restrictions upon new buildings is that which obtains in the town of Kohat. By no stretch of imagination can it be said to have retained any of those characteristics which attached to land owned by any agricultural body, and over the rights of which an agricultural community is interested in its capacity of a homogeneous community. I have no hesitation, therefore, in agreeing with the view taken by the Trial Court that the land in suit is essentially urban immoveable property within the meaning of section 3 (3) of the Pre-emption Act.

On the above finding the question as to whether, if the area in suit is not within the limits of a town, it would nevertheless be property excluded from the definition of village immoveable property and would, therefore, not be subject to pre-emption, in any case, does not arise. I may remark, however, on this subject that there has been a certain conflict of view as to the meaning of the limits of "village sites" in the Punjab. The view, however, would appear to have been ultimately accepted that buildings which are not included in the original village site as demarcated by what is known as the "*lallukhr*" in Revenue Records are not immoveable property within the limits of village sites. This view was taken by my predecessor in this Court in the case *Mia Pir Muhammad v. Abdul Ghani*, Civil Revision No. 72 of 1915, which related to certain water-mills. The same view had been taken in Civil Revision No. 48 of 1914. I may remark, however, that it would be extremely difficult to apply the principles there adopted to all villages in the North-Western Frontier Province. It has been pointed out, for instance, that in the Hazara District the residential houses of a village community are often scattered about over a number of hills, and that it would be quite impossible to define any particular area as the village site. I need not, however, enlarge further upon this question, as it is one, in the present case, of purely academic importance.

I do not consider it necessary now to adjudicate upon any other question which

arises in the present suit. It has been admitted that if the property in suit is urban immoveable property, and the suit for pre-emption cannot succeed, I, therefore, uphold the dismissal of the suit by the Trial Court and dismiss this appeal with costs.

Z. K. & N. H.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 28
OF 1923.

February 10, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice.

In re, PANDIT ROOP CHAND AND
ANOTHER—DEFENDANTS—PETITIONERS

versus

GOKAL CHAND AND OTHERS—PLAINTIFFS
AND ANOTHER—DEFENDANT—

RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 22,
23—Transfer of case—Jurisdiction of Court—
Convenience of parties.*

In sections 22 and 23 of the Civil Procedure Code, the Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it, and has wisely refrained from attempting to crystallise this discretion into a definite formula. [p. 861, col. 1.]

The jurisdiction conferred upon the Court by these sections is, however, of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. [p. 861, col. 2.]

The cardinal principle to be observed in such cases is, that the plaintiff, as the *arbiter litis*, has a right to choose his *forum* and that a Court should be exceedingly reluctant to interfere with this right. [p. 861, col. 2.]

The mere circumstance that the defendant's convenience would be promoted by the transfer cannot be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law; but if the defendant establishes a manifest preponderance of convenience in his favour, the Court would be justified in granting his prayer. [p. 861, col. 2.]

Application under sections 22 and 23, Civil Procedure Code, for transfer of the case from the Court of the Senior Sub-Judge, Ambala, to some Court in the District of Saharanpur.

Pandit Sheo Narain, R. B., for the Petitioners.

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Lala Manohar Lal, for Respondents Nos. 1 and 2.

Lala Jagan Nath, for Respondent No. 3.

ORDER.—On the 26th June 1913, the parties entered into a contract at Jagadhari, in the Ambala District, for the purpose of carrying on timber business in partnership. It is common ground that the plaintiffs, who reside at Jagadhari, were to finance the business, and that it was to be managed by the defendants, who belong to Kankhal in the Saharanpur District. The defendants also undertook to keep the accounts of the partnership and to submit a weekly statement thereof to the plaintiffs at Jagadhari.

It appears that for nearly nine years the parties worked together amicably, but they have now fallen out. The plaintiffs have consequently brought an action in the Court of the Subordinate Judge at Ambala for the dissolution of the partnership and the rendition of accounts; but the defendants, while admitting the jurisdiction of the Ambala Court to try the action, contend that the balance of convenience is in favour of the venue being changed to Saharanpur. They have accordingly made the present application under section 22, read with section 23(3), of the Civil Procedure Code, asking this Court to determine that the suit shall proceed, not in the Ambala Court, but in a Court of competent jurisdiction at Saharanpur.

Now, a comparison of section 22 of the present Civil Procedure Code with section 20 of the Code of 1882 makes it clear that, while the latter required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court before it interfered with the right of the plaintiff to choose his *forum*, no such provision is to be found in the present Code. The Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it, and it has wisely refrained from attempting to crystallise this discretion into a definite formula. Though there is no statutory provision governing the jurisdiction of the Court in a matter of this kind, there are certain principles which are recognized by the English Courts as well as the Indian Courts. Now, the

cardinal principle, the soundness of which is beyond dispute, is that the plaintiff as the *arbiter liti* has a right to choose his *forum*, and that the Court is exceedingly reluctant to interfere with this right. The jurisdiction conferred upon the Court is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. I am not prepared to accede to the proposition that the mere circumstance that the defendant's convenience would be promoted by the transfer should be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law; but I recognize that, if the defendant establishes a manifest preponderance of convenience in his favour, the Court would be justified in granting his prayer.

Coming now to the substance of this case, I find that there is no question here of the plaintiffs abusing the process of the Court or harassing the defendants. The application rests, as stated above, solely upon the ground of convenience, and I do not think that the applicants have succeeded in making out a clear case of preponderance of convenience such as would justify an exercise of my discretionary jurisdiction. It would, no doubt, be more convenient for the defendants to have the action tried at Saharanpur. They reside in that district and probably a large number of their witnesses belong to various places in that district and in the neighbouring districts where the major portion of the business was transacted. The plaintiffs, on the other hand, reside in the Ambala District and a large portion, if not the whole, of their evidence is only obtainable there. But the determining factor, in my opinion, is that the contract of partnership was admittedly entered into at the plaintiffs' place of residence, and it was there that the defendants were required to submit an account of the business carried on by them. It is to be observed that the action brought by the plaintiffs requires the defendants merely to discharge, in the presence of the Court, the duty which they had undertaken to perform outside the Court.

The nature of the action, moreover, shows that the determination of the issues arising between the parties will depend

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mainly upon documentary evidence, and that oral evidence will play only a subsidiary part. The defendants will probably be required to produce the books of the partnership, but it would not add materially to their inconvenience if they take them to Ambala instead of Saharanpur.

I have bestowed my careful consideration upon the case, but I am not prepared to hold that the defendants have shown any sufficient cause for depriving the plaintiffs of the right which the law undoubtedly confers upon them. I must, therefore, dismiss the application with costs.

Z. K.

*Application dismissed.***BOMBAY HIGH COURT.**

SECOND CIVIL, APPEAL No. 673 OF 1921.

August 25, 1922.

Present:—Sir Mallubhai Shah, Kt.,
Acting Chief Justice, and Mr. Justice
Crump.

BHAU DAJI KHADE—PLAINTIFF
—APPELLANT

*versus***PATLU MALU SABLE AND OTHERS—****DEFENDANTS—RESPONDENTS.**

*Civil Procedure Code (Act V of 1908), O. II,
r. 2—Mortgage of three plots of land—Suit to redeem
two plots—Consent decree—Subsequent suit to
redeem third plot, whether maintainable.*

P. mortgaged three plots of land to D. He brought a suit to redeem two of the plots only and this resulted in a consent decree giving him possession on payment of a certain sum. He then brought a suit to recover possession of the third plot.

Held, that under O. II, r. 2, of the Code of Civil Procedure, the suit was not maintainable as by omitting to sue in respect of the third plot in the first suit the plaintiff must be deemed to have relinquished his claim to it. [p. 863, col. 1.]

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 184 of 1920, confirming a decree passed by the Second Class Subordinate Judge at Dahiwadi, in Civil Suit No. 146 of 1919.

Mr. P. B. Shingne, for the Appellant.

Mr. T. N. Walavalkar, for the Respondents.

JUDGMENT.—In this case the plaintiff sues to recover possession of one Survey Number which, along with two other Survey

Numbers, was mortgaged in 1869 to the defendants' ancestor. In 1911 the present plaintiff, as purchaser of the equity of redemption, sued to redeem the mortgage of 1869. He mentioned only two Survey Numbers in that suit omitting the Survey Number now in suit. In that suit a compromise decree was passed as a result of which, on payment of a sum of Rs. 75, he was to recover possession of the two Survey Numbers mentioned in that suit. He recovered possession of these two lands after paying the amount.

He has now filed the present suit on July 10, 1919, to recover possession of the remaining land alleging that the defendants were in wrongful possession of that Survey Number. Several issues were raised in the Trial Court, but on the facts as stated above the Trial Court dismissed the suit holding that the land in suit had not been redeemed, and that the defendant's possession, therefore, was not wrongful.

The learned Assistant Judge in appeal confirmed the decree of the Trial Court on the ground that the land now in suit not having been included in the previous suit the plaintiff's claim could not be allowed.

In the appeal before us, it is urged by Mr. Shingne that after the mortgage-amount fixed under the consent decree was paid by his client, the possession of this property by the defendants became wrongful, as the mortgage was satisfied. He is, therefore, entitled, he contends, to recover possession of the property. It seems to us that the contention is unsound. In the first place, it is difficult to say that when the sum fixed under the decree was paid, the whole mortgage was satisfied. It is quite possible that the parties might have fixed the amount at a lower figure in view of the fact that the plaintiff had omitted to sue in respect of the land now in suit. It is difficult to hold that the possession of this Survey which was rightful under the mortgage became wrongful when the decretal amount was paid.

Apart from that, however, it seems to us that it was incumbent upon the plaintiff to sue in respect of all the lands comprised in the mortgage, if he wanted to recover possession of all the lands. His omission to include the land in suit in the redemption suit seems to be fatal to his present claim

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for the possession of that land. In view of the provisions of O. II, r. 2, he cannot be allowed to sue to recover possession of the land, in respect of which he must be deemed to have relinquished his claim by omitting to sue in respect of it. It is not suggested before us that the plaintiff was not aware of this land forming part of the mortgaged lands, nor is it suggested that the omission was due to any inadvertence or mistake on his part. He may have a remedy by applying to the Court which passed that decree to include that Survey Number in the decree. Whether that remedy is open to him, under the circumstances of this case or not, is a matter upon which we express no opinion. It is clear that his present claim for possession cannot be allowed according to law. We, therefore, dismiss the appeal with cost.

W. C. A.

*Appeal dismissed.***MADRAS HIGH COURT.**

CIVIL APPEALS NOS. 314 OF 1918 AND 60 OF 1919.

August 15, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

IN APPEAL NO. 314 OF 1918.

S. PARAMASIVAM PILLAI—

DEFENDANT NO. 1—APPELLANT

*versus*MINAKSHISUNDARAM PILLAI DEAD
AND OTHERS—PLAINTIFF AND REMAINING
DEFENDANTS—RESPONDENTS.*Minor, transaction with—Fairness of transaction—Partition—Adult co-owner, position of—Partial partition.*

It is the duty of an adult person dealing with a minor through his guardian to show that the transaction is a fair one and the minor is not prejudiced in any way by any act or omission on his part. [p. 868, col. 2.]

Yeechurt Ramamurthy v. Yeechurt Ramamma, 33 Ind. Cas. 961; 30 M. L. J. 308; 3 L. W. 322, *Nallappa Reddi v. Balammal*, 2 M. H. C. R. 182, relied on and followed.

A Hindu co-parcener seeking to set aside a partition effected during his minority must allege and prove that the partition is unfair or prejudicial to his interests. An alienee from the guardian of a minor has to prove necessity or benefit to sustain the alienation. But the case of a co-owner who wishes to sustain a partition between himself and a minor occupies a position midway between the above two cases. [p. 868, cols. 1 & 2.]

Where in a partition between one co-owner and another minor co-owner represented by his mother, it appeared that the land allotted to the adult was twenty times the size of that allotted to the minor and was situated in a locality of growing commercial importance and the mother had not independent advice and important facts were suppressed from her knowledge:

Held, that the onus of proving that the transaction was fair or beneficial to the minor was on the co-owner and the transaction on the above facts was an unconscionable one and must be set aside. [p. 870, col. 2.]

In a partition between co-owners it is proper that each co-sharer should ordinarily be given his share in every item of property belonging to the co-owners unless the items cannot be divided either conveniently or without prejudice or without affecting their utility or commercial value. [p. 869, col. 1.]

Mahomed Ibrahim v. Haji Mahomed Ibrahim, 7 Bom. L. R. 482 at p. 485; 13 C. L. J. 322; 15 C. W. N. 552, *Ashanullah v. Kall Kinkur Kur*, 10 C. 675; 5 Ind. Dec. (N. S.) 453, relied on.

Appeals against the decrees of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Original Suit No. 82 of 1916 (Original Suit No. 2 of 1915 on the file of the Court of the Subordinate Judge, Ramnad.)

Mr. T. R. Ramachandra Iyar (with him Messrs. K. Bhashyam Iyengar, and K. S. Ramashandra Iyar), for the Appellant.—This is a suit by the plaintiff to set aside a partition entered into with the defendant co-owner by plaintiff's mother as guardian during his minority. The Sub-Judge has given plaintiff a decree.

The onus is on plaintiff to show fraud or undue influence or that the partition was grossly unfair or prejudicial to his interests. Parties were only co-sharers and not members of a joint family. Mere inequality is not enough to vitiate the partition. Gross inequality and clear pre-judice must be shown

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by plaintiff [*Nallappa Reddi v. Balammal* (1) and *Yeechuri Ramamurthy v. Yeechuri Ramamma* (2).]

Further, inequality notwithstanding, if the guardian acted fairly *bona fide* and honestly with a due consideration of the minor's interests, the transaction must be upheld. *Balkishen Das v. Ram Narain Sahu* (3); *Mayne's Hindu Law*, page 662.

Here though the extent of land allotted to defendant was 11,000 *kulis* as against 512 to plaintiff, the value of each share is stated to be Rs. 500. The recital has not been proved to be false.

Partition is not an alienation and principles as to burden of proof applicable to cases of alienation do not apply. Again, there is no fiduciary relationship between co-owner and the minor son of a deceased co-owner. [*Siddick Hajee Sumar Sait v. Mahomed Hussain Sait* (4)] (analogous case of partners). There is no duty cast on the defendant to look to plaintiff's interests provided there is no over-reaching, concealment or fraud. Every co-owner is entitled to demand partition and is not bound to wait till the majority of another. Right to partition is an ordinary incident of co-ownership.

Mr. T. Rangachariar (with him Messrs. N. Srinivasa Charya and V. N. Venkatavardachari), for the Respondents—Unlike in Hindu Law, every co-owner is entitled to his definite specific share in every item of joint property.

It is impossible to predicate in a Mitakshara joint Hindu family what share each member has; but in a Dayabhaga family or amongst co-heirs, every co-owner is entitled to his share in every item.

It is on this principle that it has been held that whereas an alienee from a Mitakshara co-parcener of an undivided share has only an inchoate right to work out his equity in a partition suit, an alienee from a co-heir of an undivided share is entitled to his share in the property claimed.

See section 44, Transfer of Property Act; *Ashanullah v. Kali Kinkur Kur* (5), *Mahomed Ibrahim v. Haji Mahomed Ibrahim* (6), *Debendra Nath Bhattacharjee v. Hari Das Bhattacharjee* (7).

Thus, it is also a partial partition by a co-owner is not bad. *Moideensa Rowthen v. Mahammad Kasim Rowthen* (8).

This being the right of a co-owner, a partition amongst co-owners is really the alienation or transfer by one co-owner to the other of his interest in one item in lieu to the other co-owner surrendering his right in some other property.

A partition between one co-owner and another is thus in effect an alienation. Here, we have an alienation by a guardian in favour of the defendant and the principles as to alienation apply to the present case.

Further, I come within the exception recognised in *Yeechuri Ramamurthy v. Yeechuri Ramamma* (2). That case is a joint Hindu family case and the actual decision can thus have no bearing on the point here. But every person who deals with a guardian has to prove fairness of the transaction before it can be sustained against a minor. See also *Keramutulla Miah v. Keramutulla Meah* (9).

Assuming the onus is on plaintiff, it has been shifted to the defendant when it is apparent, on the face of the transaction, that 11,000 *kulis* were allotted to defendant and only 512 to plaintiff. The inequality in extent and presumably of value is so gross and patent that the defendant is bound to explain and cannot rely merely on some onus of proof. *Yeechuri Ramamurthy v. Yeechuri Ramamma* (2) and *Balkishen Das v. Ram Narain Sahu* (3).

The evidence in the case also shows that the lands allotted to defendant were in a commercial locality of growing importance and rising value. The defendant suppressed real facts from guardian who relied on him and had no independent advice. The defendant's conduct has been fraudulent and the minor

(1) 2 M. H. C. R. 182.

(2) 33 Ind. Cas. 961; 30 M. L. J. 368; 3 L. W. 322.

(3) 30 C. 738 at p. 752; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489; 30 I. A. 139 (P. C.).

(4) 37 Ind. Cas. 728; 4 L. W. 521; (1916) 2 M. W. N. 341.

(5) 10 C. 675; 5 Ind. Dec. (N. S.) 453.

(6) 7 Bom. L. R. 482 at p. 485.

(7) 7 Ind. Cas. 844; 13 C. L. J. 322; 15 C. W. N. 552.

(8) 28 Ind. Cas. 895.

(9) 49 Ind. Cas. 886; 23 C. W. N. 118 at p. 123.

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is not bound by an obviously unjust and pre-judicial transaction.

JUDGMENT.

Devadoss, J.—The first defendant is the appellant in Appeal No. 314 of 1918. The suit is by one Meenakshi Sundaram Pillai for a division of the plaint property which belonged to him and to the first defendant or for the value of his share, should the Court consider that it was inequitable that he should get possession of a moiety of the plaint land. The main allegations in the plaint are, that plaintiff's father Chellaperumal Pillai was a First Grade Pleader at Sattur; that he purchased the plaint land in 1900 along with the first defendant under Exhibit D; that his father died in 1902; that in 1904 when the plaintiff was a minor, the 1st defendant entered into an arrangement with his mother as evidenced by Exhibit A, whereby the plaint plot was allotted to the first defendant and another plot which belonged in common to his father and the first defendant was allotted to him for his share; that he attained majority on 3rd January 1914 and that the plaint plot was worth much more than Rs. 500 the value given in Exhibit A; that he was entitled to be given a moiety of the plaint site as there was no necessity for the execution of Exhibit A by his guardian, and that it was not binding on him. The first defendant pleaded among other things that the arrangement evidenced by Exhibit A was a *bona fide* arrangement, that the plaint plot was not worth more than five hundred rupees in 1904; that the plot allotted to the plaintiff was the more valuable of the two as it was situated opposite to the District Munsif's Court-house and other public buildings; that he did not act in any way unfairly to the plaintiff, and that the plaintiff's guardian had "the very competent, independent and absolutely disinterested advice of the plaintiff's father's best and trusted friend;" that the arrangement was beneficial to the plaintiff and that he was not entitled to claim a moiety of the plaint land, and that the suit was barred by limitation. The other defendants are aliens from the first defendant who have built houses on the plaint land. They adopted the defence of the first defendant and added that in any event the plaintiff

was not entitled to possession of the plaint land; that they had invested large sums of money in erecting houses, and that the plaintiff was not entitled to ask that they should be pulled down and removed.

The Temporary Subordinate Judge, Ramnad, held that the plaintiff's suit was not barred by limitation; that the arrangement evidenced by Exhibit A was without any necessity; that the first defendant did not act *bona fide* and that the other defendants were not *bona fide* purchasers for value, and gave a decree to the plaintiff for a sum of Rs. 16,500 being the value of a half share of the plaint property. Against this decree the first defendant has preferred Appeal No. 314 of 1918. The other defendants have preferred Appeal No. 60 of 1919.

It is unnecessary to consider Appeal No. 60 of 1919 as the appellants did not bring the legal representatives of the first respondent on record within the time allowed by law. The plaintiff who was first respondent died in April 1921 and the application of the Vakīl at the time of the hearing of the appeal to be allowed to bring on record the legal representatives of the plaintiff-respondent cannot be entertained after the lapse of one year and three months. The decree of the Subordinate Judge will stand so far as the appellants in Appeal No. 60 of 1919 are concerned. Appeal No. 60 is dismissed.

Appeal No. 314 of 1918 was argued at great length and the main contention for the appellant was that Exhibit A, being an ordinary partition arrangement unless the plaintiff could show that it was brought about by fraud, or any improper act on the part of the first defendant, it could not be set aside, and that the Subordinate Judge had wrongly thrown the onus of proving the necessity for the transaction on the first defendant and that the finding of the Subordinate Judge was vitiated by his wrong view of the law as regards the onus of proof. It is necessary to see what the facts are before applying the law to the facts of the case. The admitted facts are that the plaintiff's father Chellaperumal Pillai was a well-known First Grade Pleader in Sattur and acquired considerable property. He purchased the plaint property in 1900 under Exhibit D for Rs. 500 in his name as well as in that of

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the first defendant. He died in 1902 leaving the plaintiff and another son aged about 3 and his wife aged about 23 or 24 years. His wife was his own sister's daughter and after his death his affairs were managed by his widow and sister. In his Will he appointed four persons to assist the widow in the management of his estate one of whom is defendants' witness No. 1. Another piece of land consisting of 4 plots situated opposite to the present District Munsif's Court-house was purchased for Rs. 500 in the joint names of first defendant and Chellaperumal Pillai. Though the document evidencing the purchase of the latter four plots has not been exhibited, yet it can be fairly held to have been proved that it was purchased in 1897 for Rs. 500. It is also well-known that Sattur is a place of commercial importance. There are several Cotton Mills and a number of Factories. The plaint site is near the road leading to the Railway Station, one of the principal thoroughfares of the town. The extent of the plaint land is 11,000 *kulis*. The extent of the other plot opposite to the District Munsif's Court-house is 512 *kulis*. The plaintiff was a minor of about seven years of age and his mother a young Hindu widow at the time of Exhibit A. There is no evidence that there was any need for partition in 1904. The plaintiff's father had acquired before 1900 two plots of land called Marakadai or Timber depot land adjoining the road to the Railway Station which could connect the plaint land with the road. There was no access from the plaint land to any of the public roads in 1904 and, subsequent to the date of Exhibit A, the first defendant bought the plots to the south and north of the plaint land in order to get access to the road on either sides by Exhibits III and H. There is also evidence to show that from 1897 people began to build near and about the plaint land. There is no evidence, that the plaintiff's mother consulted any independent person with regard to the division of the plaint land excepting defendants' witness No. 1 about whose evidence I shall have to say something later on.

On these facts the question is, whether the onus which was primarily on the plaintiff to show, that the transaction was not

one for his benefit has really shifted to the first defendant. The plaintiff has, no doubt, to make out a case before he could ask for a decree in his favour. When it is admitted that the plaintiff was a minor and that his mother was a young widow and there were no near male relations, who could give independent advice to her; when it is remembered that the first defendant knew all about this property from the very beginning, and when it is also remembered that defendants' witness No. 1 who was supposed to give disinterested advice acted, to say the least, most carelessly, for he says in his evidence, "I did not look into the extent as to how many *kulis* it was. I did not then question any of them for what sum the land opposite to the Court-house has been bought and how much had been spent on it," and when we find a great disparity in extent between the extent of the plaint land, and that of the land opposite to the Court-house and when there is no ostensible reason for the division except the wish of the first defendant, the onus shifts and it is for the defendant to make out that the transaction was a fair one and not an unconscionable one. The plaintiff's father had acquired, as I said above; the timber depot land adjoining the road, and that would have given access to the plaint land from the road. When he acquired such a large plot as the plaint one measuring over two acres and when it is proved that houses were beginning to spring up from 1897 in or about the locality, one cannot but come to the conclusion that the plaintiff's father knew that the land would become valuable as a house-site in the course of a few years, that it would appreciate very much in value and that considerable profit would accrue by parcelling it out and selling the parcels to different people. That such an idea was also in the mind of the first defendant could be inferred from the fact that, soon after the purchase under Exhibit D, he began to purchase land adjoining the plaint land, *vide* Exhibits I and II. When the circumstances were such that the first defendant must have known that in the course of a few years the land would become very valuable as house-sites, it was most unfair on his part to take the whole of the plaint land for his

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share and give the plaintiff a small plot which, according to him, was worth Rs. 500.

Mr. T. R. Ramachandra Iyer very strenuously contended, that all we have to look to, is the value of the two plots on the date of Exhibit A in order to decide whether the transaction was a fair one or an unfair one. If the two plots were in the same locality and the environments were the same, his argument might be considered tenable. But when it is shown that one plot was more than 20 times the size of the other, and when it is remembered, that in a growing town of commercial importance open land inside the town may sooner or later become valuable as house-sites, it is impossible to resist the conclusion that the first defendant induced the plaintiff's mother and her advisers to take the small plot near the public buildings and got for himself a large plot likely to rise in value in a short time. In this connection, we have to see whether the plaintiff's mother had not only really disinterested, but sound advice. The defendants' 1st witness Mr. Viswasa Nadar is a respectable Second Grade Pleader, who is also the Government Pleader of Sattur. But a reading of his evidence shows that either he was careless of the interests of his friend's son or paid no attention to the contents of the document to which he put his signature as attesting witness. He does not seem to have made any enquiry as regards the extent of the plaintiff land or its value on the date of Exhibit A. He made no enquiries as to the value of the plot opposite the Court-house or the superstructure thereon, and his statement that some *pariahs* offered Rs. 3 to 5 per *kuli* for a portion of the plot for a pathway without taking the trouble to find out how much he could realise by such sale is not of much value. As a Pleader he ought to have known that a minor's property could not be parted with unless some advantage was likely to accrue to him by such transaction; and his utter indifference as to what really happened to the minor's property shows that, however honest his intention might have been, his conduct was wholly against the interests of the minor. He, as a Vakil, ought to have advised the mother not to part with an extensive property

which was likely to become valuable. He, as a local resident, must have known the state of things not far from his own house. That houses were beginning to spring up from 1897 about the plaintiff land, he must have been aware of, as it is near the road going to the Railway Station. That the plaintiff site was attracting the attention of would-be buyers must have been known to him, and his not advising the plaintiff's mother not to part with the whole of the plaintiff site, I can only attribute it to sheer indifference and carelessness. He could very well have advised the mother to take a half share of the plaintiff property as well as a half share of the property opposite to the Court-house. Defendants' 2nd witness is an old retired First Grade Pleader of Sattur. His evidence that Chellaperumal Pillai was anxious to build an office or bungalow opposite to the District Munsif's Court-house cannot have any influence in deciding whether the transaction evidenced by Exhibit A was beneficial to the minor or not, because that wish had ceased with his death and no body in his senses could have imagined that the plaintiff, a young boy of seven years of age, was going to become a Vakil and was going to build an office opposite the Court-house. There is some inconsistency in the evidence of defendants' witness No. 1 when he says that the District Judge of Tinnevely, Mr. Phillips, inspected the site for a Court-house in 1897. It is well-known that Mr. Phillips, now Phillips J., was District Judge of Tinnevely from 1903 to 1906 and from the records called for from the office, it is found that the Government placed funds at the disposal of the D. P. W. for building a Court-house only in 1902. So it cannot be said to have been satisfactorily made out that Chellaperumal Pillai expected in 1900 that a Court-house was going to be built about 1905-1906 and he had an intention of building an office in front of the Court-house which did not exist before 1905. It may be that Chellaperumal Pillai had an idea of building an office on that road. But that is no ground for depriving the plaintiff of a very valuable house-site of considerable extent.

Mr. Ramachandra Iyer's main conten-

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tion is that Exhibit A was a partition arrangement and that a partition arrangement, unless it was brought about by fraud, or undue influence, ought to be upheld and he relies on *Balkishen Das v. Ram Narain Sahu* (3). No doubt, in a joint Hindu family partition at some time or other is likely to take place and the mere existence of minors cannot prevent a partition taking place. But it is always open to a minor member to show that the partition was not fair. Lord Davey delivering the judgment of their Lordships of the Privy Council observes at page 752: "There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself." This is the principle which governs partitions in Hindu joint families—it is open to a minor member to show that a partition was unfair or prejudicial to the minor's interests. The case of a co-owner claiming a division with a minor stands on a slightly different footing. In a joint Hindu family there may be a number of members and it may not be in the interests of the family to keep them joint. But in the case of a co-owner who is only interested along with a minor in one or more items of property, when division is effected, such division must be a fair one and not prejudicial to the interests of the minor. The case of an alienation by a minor's guardian stands on a different footing. In order to justify the alienation of a minor's property the tests laid down in *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (10) should be satisfied—the actual pressure on the estate, the danger to be averted or the benefit to be conferred. But the case of a co-owner asking for a division of property

belonging to himself and a minor occupies a position midway between that of partition in a joint family and that of alienation by the guardian of a minor. Whenever an adult person deals with a minor through the minor's guardian, it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by any act or omission on his part. Reliance was also placed by the appellant on *Yeechuri Ramamurthy v. Yeechuri Ramamma* (2), as supporting the contention of the appellant. Srinivasa Ayyangar, J., in delivering the judgment of the Court observed at page 311* "Partition amongst the members of the family is a family arrangement and is generally resorted to in order to keep peace in the family or preserve the family properties; and the principles applicable to family settlements are applicable to partitions among the members of a family. There must, of course, be equal knowledge on the part of the members and there must not be any overreaching or fraud. . . . In some cases the very nature of the transaction or the method of division may show that it was unfair or prejudicial to the interests of the minor, and in such cases the burden which was on the plaintiff in the first instance may be shifted at once. The burden may also be shifted in cases where the facts are specially in the knowledge of a particular party (See section 106 of the Evidence Act)." This case instead of supporting the appellant's contention is against it. The ruling in *Nallappa Reddi v. Balammal* (1) was strongly pressed upon our attention by the appellant; there a minor on attaining majority sought to set aside a partition in which he was represented by his mother as guardian. The learned Judges say: "In this case the plaintiff and his brothers appear to have been represented in good faith by their mother and natural guardian, and there is nothing to indicate fraud, or that any undue advantage was taken of the plaintiff's minority, or of the sex of their mother." It appears that the plaintiff's branch in that case obtained only one *muttah* as its share while four *muttahs* were allotted to the other branch, and it was contended that the division

(1.) 6 M. L. A. 393; 18 W. R. 81n.; Seevastre 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 B. R. 1471

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was unequal on the face of it. Dealing with this contention the learned Judges observe, "there is no evidence of the relative value of these five *muttaks*" and in the concluding portion of the judgment says that "no such gross inequality has been shown, as would justify us in setting aside the division of 1837 on this ground."

It was urged by Mr. T. Rangachariar for the first respondent's legal representative that a tenant-in-common or a co-owner was entitled to be given his share in every item of the property belonging to himself and other co-owners and he relied upon *Debendra Nath Bhattacharjee v. Hari Das Bhattacharjee* (7); *Ashaniullah v. Kali Kinkur Kur* (5); *Mahomed Ibrahim v. Haji Mahomed Ibrahim* (6) and *Moideensa Rowthen v. Mhammad Kasim Rowthen* (8). It is no doubt proper that, wherever practicable, co-owners should be given a share in each item of property but this doctrine should not be too strictly applied by Courts. Where property cannot be divided conveniently or where division into small portions would affect the value of the property prejudicially it is inequitable that Courts should grant to the various members, property which according to his estimate would be equal in value, but where property could be divided without in any way affecting its utility or its commercial value into a number of plots, it is proper that each co-sharer should have a slice of it according to his share. In India the feeling against parting with immoveable property is strong and Courts should give due regard to it in effecting division of family or ancestral property. The principles governing cases of a partition in joint Hindu families cannot apply to cases of co-owners as is seen from *Moideensa Rowthen v. Mahammad Kasim Rowthen* (8), where Ayling and Tyabjee, JJ., observed at page 896: "It is, therefore, futile to describe a suit in which one heir claims to receive his share of the property of the deceased from another heir as a suit for partial partition and to say that, therefore, the suit is not maintainable. Both the terminology and the principles of the Hindu Law are in such a case inapplicable. This point must be kept distinct from the questions that

may arise when an heir claims his share of the property of the deceased, and when he in reality ought to institute a suit for administration he asks for what is styled 'partial partition.' In such a case it would be a question for the Court whether in order to avoid multiplicity of suits the plea of any defendants ought not to be given effect to in order that the whole estate of the deceased should be administered and in due administration should be partitioned for once. But the question cannot permit of a hard and fast rule to govern all circumstances."

It is clear, therefore, that a co-owner can bring a suit for division of a particular item of property and any subsequent suit for division of other items would not ordinarily be barred. It is unnecessary to consider the contention of the respondent that a person effecting a division of property with a minor is an alienee of the property and, therefore, the necessity for it and the advantage to be gained by it should in all cases be proved by the party dealing with the minor. Each case must depend upon its circumstances. The learned Subordinate Judge, no doubt, considered that it was the duty of the first defendant to prove the necessity for the division in 1904 and the advantage to be gained by the plaintiff thereby. That is not a correct view of the law. All that he had to show was that it was a fair transaction and the guardian acting on behalf of the plaintiff had all the information which he himself could have had if he had taken the trouble to get it.

The decision reported in *Keramutulla Miah v. Keramutulla Meah* (9) may seem to support the respondent's contention but a careful reading of it would show that it cannot support such a wide proposition.

Justice Newbould in delivering the judgment of the Court observed at page 123*: "There is nothing in the doctrine of family arrangements opposed to the general principle, that, when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground

* Page 23 C. W. N.—[Ed.].

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much as there is no allegation that this settlement was not come to after careful scrutiny of the accounts, there is no reason to doubt that this sum did not represent the actual amount due to the minor on the date of the settlement."

The next contention urged by Mr. Ramachandra Ayyar was that no preliminary decree was passed. This can be no objection to the decree as it stands, as it gives the plaintiff only the value of his share. There is no direction to divide the plaint property by metes and bounds. The plaintiff very rightly gave up his claim to a moiety of the plaint property and was content to receive its market-value, inasmuch as a number of people, about 80, had built houses on the plaint land. Mr. Ramchandra Aiyar further contended that the plot opposite the District Munsif's Court-house was not brought into the hotchpot. The learned Subordinate Judge directed that the plaint should be amended by including it. Evidently, owing to some oversight, it was not included. The plaintiff's legal representative does not object to the first defendant getting his share of it. In respect of that there will be a preliminary decree for division by metes and bounds.

Mr. Ramachandra Aiyar further objected to his client being made responsible for the whole of the decree amount as he had realised by sale of the plaint property a much smaller amount. I think there is some force in this contention. The plaintiff could have insisted upon his getting possession of the plaint property and could also have insisted upon defendants other than the first defendant removing their superstructures because the transaction under Exhibit A was wholly void so far as he was concerned. But the plaintiff was well advised in not asking that the land should be vacated by the defendants and it is in the interests of the defendants that a money-decree was passed in favour of the plaintiff. The land has considerably risen in value since the purchase by the various defendants on account of their having built houses on the plots purchased by them. The Subordinate Judge has found that the alienees from 1st defendant were not *bona fide* purchasers for value. I think the Court could very well exercise its discretion in the cir-

cumstances by directing the defendants other than the 1st defendant to bear a proportionate share of the value of the property after deducting the actual amount paid by them. In other words, the 1st defendant is liable as between himself and the other defendants only to the extent of the amounts received by him as the price of plots sold to them. The plaintiff could execute his decree against the 1st defendant and other defendants for the whole amount. But the other defendants could claim as contribution from the first defendant amounts not exceeding the amounts actually paid by them for buying the property. A note should be made in the decree to this effect. The question of limitation was not pressed by Mr. Ramachandra Aiyar. He did not challenge the finding of the lower Court on the point.

Subject to the modification as regards the other plot, the appeal is dismissed with costs of the first respondent's legal representative.

Mr. Rangachari pressed his Memorandum of Objections and claimed a higher amount than that allowed by the Subordinate Judge. There is no clear evidence that the value of the plaint land was anything more than that estimated by the Subordinate Judge. The evidence of defendants' witness No. 4 is not at all satisfactory; and the few documents, such as Exhibits XIV (a) and XXIX, do not throw any light on the actual value of the plaint land on the date of the plaint. I see no reason to disturb the finding of the learned Subordinate Judge as regards valuation. In the result, the Memorandum of Objections is dismissed with costs.

Spencer, J.—I agree.

V. N. V.

N. H.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1665 OF 1919.
July 21, 1922.

Present.—Mr. Justice Broadway and
Mr. Justice Brasher.

MOHAMMAD USMAN KHAN—

DEFENDANT—APPELLANT

versus

ATA MOHY-UD-DIN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Necessity—Money borrowed

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for trade—Antecedent debt—Mortgage, prior.

Money borrowed for the purposes of trade is not taken for necessity. An alienation, therefore, by an agriculturist of ancestral land for such purposes would not be justified.

Where two mortgages, executed within a few days of each other in favour of the same mortgagee, form practically one transaction, the mortgage prior in date cannot be considered as an antecedent debt.

Second appeal from a decree of the District Judge, Jullundur, dated the 21st July 1919, reversing that of the Sub-Judge, Jullundur, dated the 10th June 1915.

Mr. *Hargopal*, for the Appellant.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—The plaintiffs sue to recover possession of certain land which had been mortgaged by their deceased father, on the ground that the mortgages were without consideration and necessity. The defendants pleaded, *inter alia*, that the plaintiffs, who are *Maliks* of Jullundur, were governed by Muhammadan Law and not by the ordinary agricultural custom. The first Court held that the plaintiffs were governed by custom, and upheld the mortgage in part. Both parties appealed, and the District Judge, while agreeing with the first Court that the plaintiffs were governed by custom, held that they were debarred from suing by reason of the delay in filing the suit. The plaintiffs then appealed to this Court with the result that the order of the District Judge was set aside, and the case was remanded under O. XLI, r. 23, Civil Procedure Code, for a fresh decision. The District Judge who then heard the appeal, considered that the only point which remained for decision was to which extent consideration and necessity for the mortgages had been proved. He modified the original decree so as to render the plaintiffs liable for the payment of Rs. 1,154 instead of Rs. 1,046-8-0. The defendant has again appealed to this Court, and his Counsel urges that after the order of remand was passed, the whole case had to be decided again by the lower Appellate Court, and that the District Judge was in error in not giving any decision as to whether the plaintiffs were governed by custom or Muhammadan Law. This contention appears to us to be correct but,

at the same time, the admission contained in the grounds of appeal render a remand unnecessary. The second and third grounds clearly mean that though *Maliks* are in general governed by the ordinary agricultural custom, they as dwellers in towns have a right to alienate ancestral property for purposes which would not constitute legal necessity in the case of an ordinary agriculturist living in a village. The appeal really relates to an item of Rs. 265 out of the consideration for the first mortgage, and the whole of the consideration (Rs. 1,300) for the third mortgage, which the District Judge has held not to be binding on the plaintiffs because the money was taken for the purpose of trade.

Having regard to the grounds of appeal, it is clear that the appellant cannot now maintain that the plaintiffs are governed by Muhammadan Law, and that the only ground on which he can be heard is whether the items referred to above were taken for necessity.

The consideration (Rs. 1,300) for the third mortgage was taken by the mortgagor for trading purposes, and it has been held in *Santa Singh v. Waryam Singh* (1) that this would not justify an alienation of an ancestral land by an agriculturist.

Out of the money which formed the consideration for the first mortgage, Rs. 265 were taken to pay off a previous mortgage, the money due on which had also been borrowed for the purpose of trade. The previous mortgage cannot be considered as an antecedent debt because it was in favour of the same mortgagee and was effected only a few days before the mortgage in dispute. The two mortgages formed practically one transaction and we do not consider that the learned District Judge has erred in placing this item of Rs. 265 on the same footing as the money taken for the later mortgage.

The contention of the appellant is that while, in accordance with *Santa Singh v. Waryam Singh* (1), an alienation of ancestral land by an ordinary agriculturist for the purpose of trade is not justified, such an alienation might be sanctioned by custom when made by a resident of a town whose

(1) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

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principal occupation is business. This contention may be perfectly correct, but we feel that we are precluded from making any investigation into the matter. What the appellant wishes to show is that a special custom at variance with the ordinary agricultural custom is followed by the community to which the plaintiffs belong. No such contention was raised in the Courts below and in the absence of a certificate a second appeal on this ground cannot be entertained.

We accordingly dismiss the appeal with costs. The cross-objections filed by the respondents have not been pressed and they are also dismissed.

W. C. A. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 213 OF 1922.

April 27, 1923.

Present :—Mr. Pison, J. C.

RAM DAS—PLAINTIFF—PETITIONER

versus

RAM LAL AND OTHERS—DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interference, when justified.

A petitioner who invokes the revisional power of a High Court must come into Court with clean hands and must show that he has been unjustly treated. [p. 874, col. 1.]

A High Court will not exercise its revisional jurisdiction when the finding of the Court below has resulted in substantial justice, even where that finding has proceeded upon a wrong determination of a question of law. [p. 873, col. 2; p. 874, col. 1.]

Ghasita v. Sultan, 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 228 P. L. R. 1911, relied on.

The Judicial Commissioner will not in the exercise of his revisional jurisdiction interfere with even a wrong decision come to by an Appellate Court so long as the latter had jurisdiction to determine the question and actually did determine it, except where the wrong decision is of a vitally important description and where it cannot possibly, in the interests of justice, be allowed to stand. [p. 873, col. 2.]

Petition for revision of an order of the Divisional Judge, Derajat, dated

the 11th of June 1922, reversing an order of the Munsif, First Class, Dera Ismail Khan, dated the 15th March 1922.

Mr. *Jai Deva*, for the Petitioner.

Lala Mathra Das, for the Respondents.

JUDGMENT.—There is only one point upon which the revision could be possibly entertained by this Court, and that is upon the finding of the Divisional Judge that the agreement of August 1917 (the recorded date was the 10th of *Bhadon* 1974) was, though unregistered, admissible in evidence. Now, even assuming that I disagreed with the finding of the learned Divisional Judge on this point that fact could not constitute a valid ground for revision. I should follow the ruling of this Court published as Judicial Record No. 15, which is to the effect that the Judicial Commissioner will not interfere with even a wrong decision come to by an Appellate Court so long as the latter had jurisdiction to determine the question actually did determine it. It may be admitted that certain cases in which a wrong decision of law was involved, might be taken up on the revisional side when the wrong decision in question was of a vitally important description and where it could not possibly, in the interests of justice, be allowed to stand. The present case presents no feature of this nature. It may be admitted that the liability of the document in question to registration is, to a certain extent, a contentious one and that there are arguments of some force for considering it so liable. On the other hand, the document itself created no lease, the position of lessor and lessee being already established by a previous instrument, and there is a great deal to be said for the view adopted by the learned Divisional Judge. I can see, therefore, not the slightest reason why I should take up this question at all upon the revisional side. There is a further reason in the present case which should make me slow to interfere on revision. *Ghasita v. Sultan* (1) is a good authority for the proposition that a High Court will not exercise its revisional jurisdiction when

(1) 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 228 P. L. R. 1911.

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the finding of the Court below has resulted in substantial justice, even where that finding has proceeded upon a wrong determination of a question of law. In the case referred to the learned Judges of the Punjab Chief Court went so far as to admit that the finding of the Court below that the suit was within time was wrong and that it should have been held time-barred. They, nevertheless, following the above principle, declined to interfere. It is indeed a cardinal principle that a petitioner who invokes the revisional power of a High Court, must come into Court with clean hands and must show that he has been unjustly treated. These conditions appear to me singularly absent in the present case. It is perfectly obvious, as realized by the Divisional Judge, that the sole reason which induced the plaintiff to repudiate his own agreement was that the value of the *serai* had become abnormally enhanced and that he would, therefore, lose money over the transaction. He nevertheless allowed Pokhar Das to pay on his behalf the decretal amount which formed the basis of that agreement. He comes into Court to repudiate his own agreement upon the purely technical point of registration. He cannot, therefore, be regarded in any way as a person entitled to invoke revisional and purely discretionary powers in his interest. There are no other grounds in the present case on which I could even consider the question of interference, although certain grounds connected with the question of interest have been argued before me.

For the above reasons, I must decline to interfere and I dismiss this application with costs.

Z. K.

Application dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1456 OF 1919.

June 14, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

MAYA DAS AND OTHERS—

DEFENDANTS—APPELLANTS

versus

JINDA RAM—PLAINTIFF

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Jurisdiction, absence of, in previous case.

Where a Court has no jurisdiction in law to try a case, its decision therein does not operate as a bar to a consideration in a subsequent suit, of the questions involved in the suit. [p. 875, col. 2.]

The fact that at the time of the decision of the former suit, the case-law was in favour of the Court having jurisdiction, does not make any difference.

Llabati Misra v. Bishun Chobey, 6 C. L. J. 621, followed.

Panchu Mandal v. Chandra Kanta Saha, 12 Ind. Cas. 9; 14 C. L. J. 220, *Langat Singh v. Radha Kishen*, 7 Ind. Cas. 781 and *Dyal Singh v. Ram Rakha*, 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912, distinguished.

Appeal from a decree of the District Judge, Jhang at Sargodha, dated the 10th May 1919.

Lala Ram Chand Manchanda, for the Appellants.

Lala Mehr Chand Mahajan, for the Respondents.

JUDGMENT.—On the 12th November 1919, one Jinda Ram instituted a suit claiming to redeem a house, which was held in mortgage by Maya Das-Gulab Singh on payment of Rs. 275. The plaintiff alleged that he had purchased the said house subject to that mortgage from the original mortgagors. The defendants pleaded, *inter alia*, that the house could not be redeemed except on payment of a total of Rs. 1,381.

The original mortgagors had sued the original mortgagees for redemption in 1896. That case had been tried by a Munsif Second Class, who, holding that the interest was a charge on the property, decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the Trial Court's decree was restored by the Chief Court in its order dated 18th January 1900. This decree was, however, never executed and in the present case, the defendants urged that the decision in

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the former case acted as *res judicata* and that, therefore, redemption could only take place on payment of the amount then arrived at, i. e., Rs. 873, subsequent interest and further costs of repairs or a total of Rs. 1,381. The Trial Court held that as the final decision in the former suit was that of the Chief Court, the parties were bound by it and decreed the plaintiff's suit for redemption on payment of Rs. 1,381 and subsequent interest at the rate entered in the mortgage-deed. The plaintiff appealed to the learned District Judge against this decision, contending that the decision of the former suit could not act as *res judicata* or estop him from urging that, according to the terms of the mortgage-deed itself, the interest was not a charge on the property. The learned District Judge agreed with this contention and held that the former suit did not prevent the plaintiff from raising this question again and further, that having regard to the phraseology of the mortgage-deed, interest was not a charge on the property. He, therefore, modified the decree of the Trial Court and granted the plaintiff a decree for redemption on payment of Rs. 358. Against this decision Maya Das and others, defendants, have come up to this Court in second appeal through Mr. Ram Chand Manchanda.

Mr. Ram Chand Manchanda stated that he did not urge that the doctrine of *res judicata* applied but that the parties were estopped by the judgment of the Chief Court in the former case. The present suit was tried and triable by a Subordinate Judge. The former suit was tried by a Munsif of the Second Class with powers upto Rs. 500. That Munsif, therefore, had no jurisdiction to pass the decree he did. The learned Vakil for the appellant cited *Lilabati Misra v. Bishun Chobey* (1), *Panchu Mandal v. Chandra Kanta Saha* (2) and *Langat Singh v. Radha Kishen* (3) and contended that both the parties were estopped from agitating any point which had been decided in the former suit. While we have no quarrel with the authorities cited we are

unable to see that they have any bearing on the point before us. It is perfectly clear that the Munsif Second Class who tried the former suit had no jurisdiction and his findings, therefore, cannot be regarded as binding on the parties. Mr. Ram Chand contended that the authorities at the time when the former suit was decided were in favour of the Munsif having had jurisdiction. That may be so, but as laid down in *Dyal Singh v. Ram Rakha* (4) and other authorities, the Munsif, Second Class, had no jurisdiction in law to try the case. We, therefore, hold that the former suit does not operate as a bar to the consideration of the question relating to interest.

Again, after reading carefully the mortgage-deed itself we are unable to see that it has been in any way misinterpreted or misconstrued by the learned District Judge. We, therefore, dismiss this appeal with costs.

W. C. A. & N. H. *Appeal dismissed.*

(4) 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 147-26 OF 1921.

May 4, 1923.

Present.—Mr. PIPON, J. C.

Musammat MUKANDI BAI—DEFENDANT
—APPELLANT

versus

Musammat JAMNI BAI—PLAINTIFF—
RESPONDENT.

Hindu Law—Succession—Widow, disqualification of—Unchastity—Hostility.

Under the Hindu Law unchastity disqualifies a widow from succeeding to her husband's estate but it must be physical unchastity which occurred during the lifetime of the husband. [p. 878, col. 2.]

In the absence of unchastity, a widow will be excluded from succeeding to her husband only on proof of malignant or unjustified hostility towards her husband for which she is alone, or at least partly, responsible. [p. 879, cols. 1 & 2.]

Khettermont Dassi v. Kadambini Dassi, 17 Ind. Cas. 83; 16 C. W. N. 964, relied on.

Kery Kohitany v. Moneram Kohla, 13 B. L. R. 1 (F. B.); 19 W. R. 367, referred to.

(1) 6 C. L. J. 621.

(2) 12 Ind. Cas. 9; 14 C. L. J. 220.

(3) 7 Ind. Cas. 781.

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First appeal from an order of the District Judge, Bannu, dated the 9th November 1921.

Mr. Saaduddin Khan, K.S., for the Appellant.

Mr. Chiman Lal, R.S., for the Respondent.

JUDGMENT.—The parties to this case are the two co-widows of Harbhajrai, deceased. The defendant, *Musammat* Mukandi Bai, has taken entire possession of the property left by the deceased, and the plaintiff, *Musammat* Jamni Bai, sues for possession by partition of a half share in the whole estate to which she claims to succeed as a co-widow. The date of the marriage of *Musammat* Jamni Bai, the plaintiff, to Harbhajrai cannot be exactly ascertained but it was certainly prior to 1901. The date of Harbhajrai's second marriage to *Musammat* Mukandi Bai must apparently be placed about 1900. It has been shown that the plaintiff bore one daughter and two sons to the deceased. Both her sons, however, died. Her surviving child, the daughter *Musammat* Bharawan Bai is now about 20 years old. *Musammat* Mukandi Bai, the defendant, bore three daughters to Harbhajrai, two of whom survive. Harbhajrai died in April 1920. It is common ground that since at least the year 1907 there had been an estrangement between the deceased and the plaintiff. The suit is resisted on the ground that the plaintiff is disqualified from succeeding to her husband's estate by reason of (1) her unchastity, and (2) her open hostility to her husband. The plaintiff has obtained a decree in the Trial Court for possession of half the immoveable property left by the deceased. The suit also included a claim to certain alleged cash property, but this claim has been disallowed and no appeal has been lodged against that portion of the suit which has been rejected. The decree of the Trial Court omits to state that the decree for possession is one by partition, but this appears to be purely a clerical error which can be corrected, if necessary, on the present appeal. The appeal is a first appeal and is lodged by the defendant *Musammat* Mukandi Bai against the decree granted to the plaintiff.

Before dealing with the points for determination on this appeal, it will be as

well to state clearly all the facts which have been ascertained regarding the relations between the plaintiff and her husband. The first document on the record is a post-card dated the 1st December 1901 written by Harbhajrai to the plaintiff's father Rup Chand. It is a curiously worded document which shows that at the time the plaintiff had already left her husband and returned to her parents. In this post-card Harbhajrai remarks that he has heard that Rup Chand intends to send back *Musammat* Jamni Bai to him, and threatens that if he does so, Harbhajrai will set his dogs upon her. This gives some indication of the terms on which husband and wife were living in 1901. It is, however, tolerably clear that at a later date the plaintiff returned to her husband and that they lived together, at any rate for some period, as husband and wife. In fact, in an application made by Harbhajrai on a guardianship proceeding on the 16th of May 1917 he refers to this post-card and says that *Musammat* Jamni Bai has since been living with him, that she has since borne him three children, and that the post-card was written under provocation given by his father-in-law, Rup Chand, and that it is not worthy of serious consideration by a Court. It may be assumed, therefore, that for some period after 1901 the plaintiff and Harbhajrai lived together on fairly good terms and that the bore him three children the parentage of which he has never denied. However this may be, in 1907 the parties were again estranged. The plaintiff put in an application under section 488, Criminal Procedure Code, against her husband claiming maintenance on the ground that he had turned her out of his house. The parties, however, arrived at an agreement on the 21st of July 1907 which is recorded on the file of that case. Under this agreement Harbhajrai undertook to keep his wife and, in order to avoid quarrels with his mother, that they should reside in separate houses. He promised to give her jewelry and to treat her in an honourable manner, and bound himself, in the event of his acting contrary to the agreement, to pay her Rs. 15 per mensem as maintenance from the date of his breach of the agreement. The estrangement, however, evidently continued. On the

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10th of January 1908 - Harbhajrai lodged a suit for restitution of conjugal rights, which was decided by the District Judge on the 4th of February 1908. *Musammāt* Jamni Bai pleaded that she had all along been perfectly willing to reside with the plaintiff. Harbhajrai obtained his decree, but it was found by the District Judge that *Musammāt* Jamni Bai had always been ready to live with him and in consequence he allowed the husband no costs in the suit. Harbhajrai applied for execution and the parties left the Court together. In 1909 the plaintiff sued for three months' arrears of maintenance at Rs. 15 per mensem and Harbhajrai endeavoured in his pleas to repudiate the agreement of the 21st of July 1907 by alleging that it was extracted from him by fraud and undue influence, and that it contained penal clauses. In the Appellate Court (on the 22nd of March 1910) the plaintiff obtained a decree in full for the amount claimed and it was held that Harbhajrai had broken his agreement, had turned the plaintiff out, had re-married and had refused to take her to his home. Another suit was lodged by the plaintiff for Rs. 165 arrears of maintenance, and this was finally decided by the Divisional Judge's appellate order of the 18th of November 1910. It was held in that suit that no question of *Musammāt* Jamni Bai's misconduct had ever been raised and that her claim to maintenance could not be validly resisted. From that time up to 1917 no litigation appears to have taken place between the parties. On the 2nd of May 1917 Harbhajrai lodged an application for the guardianship of *Musammāt* Bharawan Bai, the daughter of himself and *Musammāt* Jamni Bai. He alleged that the girl was now old enough to be betrothed and that he was entitled to her custody. The application was rejected on the ground that the girl was quite old enough to know her own mind. It was clear that the dispute between the parties was one regarding the betrothal of *Musammāt* Bharawan Bai. On the 22nd of May 1917 Harbhajrai lodged a civil suit against *Musammāt* Jamni Bai, *Musammāt* Bharawan Bai, Rūp Chand and the man to whom *Musammāt* Bharawan Bai had been betrothed praying for a declaration that he alone was authorized to effect the girl's betrothal. His

suit was dismissed on the 2nd of July 1917, it being held that the fault lay with Harbhajrai himself, that he had consented to the betrothal but had later repudiated it because he demanded that the maintenance which he paid to the mother should be reduced to Rs. 10 in view of the fact that *Musammāt* Bharawan Bai was about to marry a rich man. There was no further litigation up to the death of Harbhajrai in 1920. The above practically exhausts all the documentary evidence which we have upon the record as to the relations between the plaintiff and her husband.

In the Trial Court the suit was resisted, *inter alia*, on the ground that the respective daughters of the plaintiff and the defendant were necessary parties to the suit and should be impleaded. This ground has been dropped by the learned Counsel for the appellant who admits that in the presence of widows daughters have no right to the estate.

Another ground argued on this appeal is that the Trial Court had improperly disallowed the production of certain witnesses, who had been summoned by the appellant. Counsel points out that, after a large number of adjournments, the 14th of October 1921 was fixed for the hearing of evidence and that on the 6th of the same month the defendant had applied to summon six witnesses for that date. The record shows that on the 14th of October only two witnesses were heard on each side and a date was then given for the hearing of arguments. Now, I cannot accept the appellant's contention that the procedure of the Trial Court in this respect was, in any way, defective, because the record shows conclusively to my mind that the defendant entirely acquiesced in those proceedings. She was at the time represented by able Counsel and the order of the Court dated the 14th of October 1921 shows that her Counsel never raised any sort of objection on the score that he had other evidence to produce, but that it was at the request of Counsel on both sides that an adjournment was granted purely for the production of arguments. It is perfectly obvious that the other witnesses had been abandoned by the defendant's Counsel and, as a matter of fact, it is difficult to see in any case how the

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witnesses could have been material even if he had not abandoned them. They were apparently summoned solely upon the question of the plaintiff's chastity. Now, the allegation of the plaintiff's unchastity, although it is one of the grounds upon which the present appeal is based, was one which was never made in the pleadings. There is not the slightest indication on the record that such an allegation was ever put before the Trial Court prior to that date, or argued before it. Further, the proceedings which I have detailed above, show one outstanding fact, and that is that, throughout the whole of the very acrimonious litigation between Harbhajrai and the plaintiff he never on any occasion alleged that the plaintiff had been unchaste. This is particularly remarkable in view of the fact that he seems to have taken every possible ground, tenable and untenable, for defeating his wife's claim to maintenance. The plea of unchastity was one which must inevitably have been raised by him if there had been the slightest justification for it. Not only this, but we have a judicial pronouncement by the Divisional Court in the order of the 18th of November 1910 to the effect that no question of misconduct had ever been raised against *Musammal Jamni Bai*. The inherent weakness of the plea now put forward is illustrated by the only evidence which I am shown by the learned Counsel for the appellant. He refers me to the fact that Harbhajrai in his application for guardianship of *Musammal Bharawan Bai* stated that "it was *na mauzun*" that she should remain with her mother. He wishes me to infer that this is an insinuation against the unchastity of the girl's mother. I am unable, however, to concede this, as it is perfectly clear that no such allegation was ever made. The second piece of evidence to which he refers me is the record of a murder case which took place after the death of Harbhajrai in which it was alleged that one of the motives for the murder had been a liaison between the murdered man and the girl *Musammal Bharawan Bai*. I fail to see, however, that this is in any way relevant to the present case. In the first place, neither *Musammal Bharawan Bai* or her mother were parties to that case, or were ever examined as witnesses, or ever had the least opportunity of rebutting the

insinuation made. In the next place, it is not the moral conduct of *Musammal Bharawan Bai* which we are considering, but that of her mother, the present plaintiff. I cannot seriously listen to the argument that we are entitled to draw the inference either that *Musammal Bharawan Bai* was herself a bad character, or that, even if she were, her mother's misconduct is thereby proved, or even to be presumed. On the contrary, I have shown above that there is what amounts to overwhelming evidence to show that throughout the whole course of her long estrangement from her husband the plaintiff remained perfectly chaste.

The trend of judicial authority is to the effect that under Hindu Law unchastity disqualifies a Hindu wife from succeeding to her husband's estate, but that it must be physical unchastity which occurred during the lifetime of the husband. For this proposition a Calcutta ruling, *Khettermoni Dassi v. Kadambini Dassi* (1), is authority. I need not discuss this question, further, as I hold it fully proved that during the lifetime of her husband *Musammal Jamni Bai* remained perfectly chaste and, indeed, there is not the slightest ground for holding that she has been unchaste since his death.

The only remaining ground on which she can be disqualified from inheritance is that she has been openly hostile to her husband. The learned Counsel for the appellant relies upon the general principles and growth of Hindu Law in support of his contention. He would argue that Hindu Law, at the outset, did not recognize the claim of a widow to succeed at all, and that her right of inheritance depended upon the introduction of a legal fiction under which she was regarded as a single person corporate with her husband. Under this legal fiction it was recognized that on the death of her husband the widow as a portion of his person, remained and therefore, could not be ousted from his estate. He has referred me to the very lengthy judgment of a Full Bench of the Calcutta High Court published as *Kery Kolitany v. Moneeram Kolita* (2). That judgment alludes to the principle of Hindu Law that

(1) 17 Ind. Cas. 83; 16 C. W. N. 964.

(2) 13 B. L. R. 1 (F. B.) 19 W. R. 367.

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absolute and unqualified obedience is exacted from a wife. The result of the ruling was to find that, in spite of the original principles of Hindu Law, a widow could not be deprived of her inheritance by reason of unchastity which took place after the death of her husband. It recognized the adaptation of the principles of strict Hindu Law to modern ideas of equity and modern social organization. The ruling which I have quoted above, *Khettermoni Dassi v. Kadambini Dassi* (1), shows, again, that, in the absence of unchastity, there must be not only hostility on the part of a wife but what is described as "malignant hostility" if she is to be excluded. Now it is not difficult to apply these principles to the present case. I cannot agree with the contention that mere hostility between the parties in itself will disqualify a widow. It is abundantly clear that there must be something more than hostility on the part of the husband resulting in estrangement, and there must be malignant or unjustified hostility on the part of the wife. Certainly unilateral hostility on the part of the husband will not be sufficient. It is undeniable in the present case that the parties became estranged, and it may even be possible that Harbhajrai himself was not, in the first instance, responsible for this unfortunate state of affairs. In fact the agreement of the 21st of July 1907 gives a very clear indication of how the trouble originally arose. It would seem from that agreement that the disturbing element was Harbhajrai's mother. It is not, however, necessary to speculate upon the original causes of the estrangement. It is sufficient to say that throughout the whole of the long litigation Harbhajrai consistently put himself in the wrong. He invariably failed to establish his allegations, or to escape from his responsibility for maintaining his wife. Indeed, he even found it worth while seriously to impugn his wife's personal character. As against this, the learned Counsel for the appellant would take his stand upon that absolute dependence of wife upon husband which was one of the first principles of Hindu Law. The argument would seem to imply that the question as to whether the husband or the wife were responsible for the estrangement is immaterial. This view would seem to depend upon that somewhat difficult meta-

physical conception of the wife as part of the corporate person of her husband. Now, it is impossible to hold that Courts will recognize this theory, when pushed to the extreme limit of implying that the woman can have no personal right in the matter at all and that she is, in other words, at the mercy of her husband in this respect. It is clear from the use of the word "malignant" in the ruling to which I have referred above, that the open hostility which disqualifies a wife must be one for which she is alone, or at least partly, responsible. In the present case the facts are overwhelmingly clear. We have judicial pronouncements to the effect that the husband alone was responsible for the litigation which took place between the parties. The agreement for the payment of maintenance was one which was to take effect only if Harbhajrai committed a breach of his undertaking to treat his wife honourably and to permit her to live with him. The fact that maintenance was decreed against him and that he has been obliged to continue the payment of the allowance in itself proved that he himself broke the terms of the agreement. Even his suit for restitution of conjugal rights clearly showed that *Musammal Jamni Bai* was at that time, as before, ready to live with him, and the result of the suit showed, that, in spite of the conduct of Harbhajrai and the litigation, she at once accompanied him to his home at the conclusion of the suit. I have already mentioned that the original causes of the estrangement must be a matter of speculation only, and there is reason to think that the mothers of the respective parties were at least partly responsible for it. No doubt, the estrangement arose not only from this cause, but from a certain mutual incompatibility of temperament between the parties. But it is impossible to twist this or any proved fact which has come to light into an attitude of malignant hostility on the part of *Musammal Jamni Bai*. I must, therefore, hold that no such hostility has been proved on her part which would disqualify her under Hindu Law, from succeeding to her husband's estate. It is not denied that if neither unchastity or hostility is proved, the two co-widows must succeed equally. I, therefore, agree throughout with the conclusion arrived at by the Trial Court,

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I have already mentioned that there appears to be a purely clerical omission in the decree in that it omits to state that the decree for possession is one for possession by partition. I herewith amend this clerical error and insert the words "by partition." The appeal is dismissed with costs.
Z. K. & N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 745 OF 1921.

August 30, 1922.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

VASU KRISHNA YEKAVDA—

DEFENDANT—APPELLANT

versus

MADHAVRAO MORESHWAR BHADANEKAR—PLAINTIFF—

RESPONDENT.

Khoti Settlement Act (I of 1880), s. 10—Mortgage of Khoti land, effect of—Khot, right of, to claim land.

A simple mortgage of Khoti land by the occupant thereof, amounts to a transfer of his interest in the land, within the meaning of section 10 of the Khoti Settlement Act, and entitles the Khot to claim the land, even though the mortgage was paid off before the Khot advanced his claim.

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 215 of 1920, confirming a decree passed by the Second Class Subordinate Judge at Devgad, in Civil Suit No. 161 of 1918.

Mr. A. G. Desai, for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.—The point arising in this appeal is very simple. The facts are that the defendant effected a simple mortgage of his one-third share in the *Khata*. The mortgage is said to have been paid off on November 5, 1917, and the Khot filed the present suit in 1918, to claim the right which accrued to him under section 10 of the Khoti Settlement Act, as amended by the Acts of 1912 and 1913. In virtue of the provisions of section 9, as amended, the interest of the occupancy tenant is heritable but not transferable without the consent of the Khot. The exception laid down in

that section does not apply to the facts of the present case, and under section 10 "if the occupant does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot, his land shall be at the disposal of the Khot as Khoti land free of all incumbrances, other than the liens or charges created or existing in favour of Government." That is the provision which the plaintiff seeks to enforce in his favour, and both the lower Courts have awarded his claim.

In the present appeal before us by the occupant, the original defendant No. 2, it has been urged that that simple mortgage is not a transfer of the interest of the occupant in the land within the meaning of section 10. But it is difficult to hold that a simple mortgage is not a transfer of the interest of the mortgagor within the meaning of that section. There is no decision on the point, and on the plain meaning of the word 'transfer' it is difficult to exclude such a transfer as we have in the present case from the scope of that section.

It is also urged that as the defendant No. 2 paid off the mortgage before the suit was filed, it must be treated as not having been made at all and that at the date of the suit there was no cause of action. The words of the section are clear that, if the occupant does any act purporting to transfer any portion or any interest in the land without the consent of the Khot, his land shall be at the disposal of the Khot. It is the defendant's act by way of effecting a simple mortgage that gives the Khot a right which he claims to enforce in the present suit, and the satisfaction of the mortgage before suit cannot afford any answer to the claim made by the plaintiff. It is apparently a hard case; but we have to give effect to the provisions of the section as enacted by the Legislature, and defendant No. 2 has not been able to show that the present transfer is outside the scope of the section. We, therefore, dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

MARYAM BIBI v. GHULAM MAHOMED.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 762 OF 1919.

January 31, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Fforde.Musammāt MARYAM BIBI—DEFEND-
ANT—APPELLANT
versusGHULAM MAHOMED AND OTHERS—
PLAINTIFFS—RESPONDENTS.*Custom—Succession—Ancestral property—Equal holdings—Common ancestor expressly mentioned in pedigree table—Presumption.*

Where in a suit relating to succession under the Customary Law of the Punjab it was found that the holdings of the plaintiffs, collaterals of the deceased, were almost equal in area to those of the deceased, some of the *khata*s being still joint, and that the common ancestor of the parties was expressly mentioned in the pedigree tables prepared at the different Settlements:

Held, that, in the absence of any indication that the property was self-acquired, the presumption was that it was ancestral.

The express mention of a common ancestor in a pedigree table furnishes a presumptive proof that the land originally belonged to him.

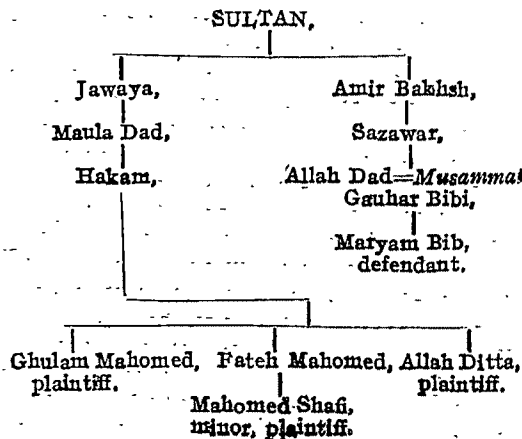
Jiwan Singh v. Har Kaur, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914, followed.

First appeal from a decree of the Senior Subordinate Judge, Sialkot, dated the 31st March 1919.

Messrs. Aziz Ahmad and Abdul Rashid, for the Appellant.

Messrs. Zafar Ullah Khan and Din Dayal, for the Respondents.

JUDGMENT.—The dispute in this case relates to the estate of one Allah Dad, a Chinna Jat, of the Daska Tahsil, in the Sialkot District, whose relationship with the contesting parties is shown in the following pedigree table:—



The plaintiffs, who are the collaterals of the deceased in the fourth degree, allege that the property is ancestral, and that they are entitled to inherit the estate in preference to the deceased's daughter, Maryam Bibi. The Trial Court has found in favour of the plaintiffs and decreed their claim.

The defendant has preferred an appeal to this Court, and the sole question argued before us is, that the plaintiffs have failed to establish that the land has descended from the common ancestor. The estate of the deceased consists of four plots of land, two situate in the village Manpur, and the remaining two in a neighbouring village called Kothi Channu. Now, the Manpur estate comprises two parcels,—

(1) Two *kanals* 3 *marlas* out of a small joint holding, which mainly consists of two disused wells, of which Allah Dad and the plaintiffs were joint owners.

(2) A holding of 262 *kanals* which corresponds to a holding of 259 *kanals* owned by the plaintiffs in this village.

Coming now to the property in Kothi Channu, we find that Allah Dad and the plaintiffs were joint owners in a *khata* of 659 *kanals* 10 *marlas* to the extent of $\frac{1}{4}$ th share each, and that each branch of the family has also a separate holding of nearly 85 *kanals*.

The learned Subordinate Judge has, in view of the fact that the holdings of the parties are almost equal in each of the two villages, and that two of the *khata*s are even now jointly owned, reached the conclusion that the whole of the property descended from a common ancestor. This conclusion receives support from the fact that the common ancestor, Sultan, is expressly mentioned in the pedigree table, and it has been held by a Division Bench in *Jiwan Singh v. Har Kaur* (1), that the express mention of the common ancestor in the genealogical tree furnished a presumptive proof that the land originally belonged to him.

The facts mentioned above do not entirely negative the theory that the two branches of the family jointly acquired all the plots otherwise than by succession from a common ancestor, but there is not a scintilla of

(1) 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914.

SARJU PRASAD MISSIR v. MAKSUDHAN CHADHURY.

evidence on the record in support of such acquisition. At any rate, the Trial Judge has drawn from these facts the inference that the property in dispute is ancestral and we are not prepared to hold that his conclusion is erroneous. We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

April 27, 1922.

Present:—Viscount Cave, Lord Shaw and Sir John Edge.

SARJU PRASAD MISSIR AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MAKSUDHAN CHADHURY AND OTHERS
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr 58, 63—Property sold in execution of money-decree—Attachment under mortgage-decree—Objection by prior purchaser allowed—Sale under mortgage-decree, effect of—Order on objection, whether final. Certain property belonging to S was mortgaged to L. K. sued S to recover a certain sum of money and obtained an order for attachment before judgment of the property. The suit was subsequently decreed. L then obtained a decree on his mortgage and attached the mortgage property. K brought the property to sale under his money-decree and purchased it himself. He then filed an objection against the attachment and sale of the property in execution of L's mortgage-decree. This objection was allowed and the property was exempted from sale under L's decree. K then obtained possession of the property. Several years later, L's representatives brought the property to sale under L's mortgage-decree and purchased it themselves. Thereupon they brought a suit for possession and mesne profits against K.

Held, that the order on K's objection having become final and binding on L and his representatives, the sale of the property under L's mortgage-decree was ineffective as against K and he could not, therefore, be evicted from the property. [p. 885, col. 2.]

Privy Council Appeal from the judgment and decree of the Patna High Court, dated 30th July 1917, reversing the judgment and decree of the District Judge, Darbhanga, dated the 21st May 1914.

Messrs. DeGruyther, K. C. and Dube, for the Appellants.

Mr. J. M. Parikh, for the Respondents.

JUDGMENT.—These are two consolidated appeals by the plaintiffs from two decrees, dated the 30th July 1917, of the High Court at Patna, which reversed a decree, dated the 21st May 1914, of the District Judge of Darbhanga and dismissed the suit of the plaintiffs.

The suit was brought by the plaintiffs, the appellants here, on the 10th of January 1912 in the Court of the Subordinate Judge of Darbhanga for certain declarations as to title and for a decree for possession of certain immoveable property and for mesne profits. That immoveable property will in this judgment for the sake of brevity be referred to as the property in dispute. The property in dispute was originally the property of one Sadik Ali Khan; the plaintiffs claim title through one Lalji Lal; the defendants claim title through one Kamal Narain Choudhury. The facts will later be briefly stated, but their Lordships may here say that in their opinion the fate of these consolidated appeals depends upon the effect of an order of the 14th September 1886 of the Subordinate Judge of Tirhoot, which was made in certain execution proceedings to which Kamal Narain Choudhury as an objector to an application for the attachment of the property in dispute, and Lalji Lal, as applicant for the attachment, were with Sadak Ali Khan parties.

Sadik Ali Khan on the 13th January 1882 by deed mortgaged the property in dispute and much other immoveable property, with which this suit is not concerned, to Lalji Lal for Rs. 40,000 and interest which might become due thereon. On the 27th September 1883 Kamal Narain Choudhury brought in the Court of the Subordinate Judge of Muzaffarpur a suit for money due to him against Sadik Ali Khan. On the same day the suit was transferred to the Court of the District Judge of Darbhanga. On the 24th November 1883 Kamal Narain Choudhury obtained from the District Judge an order for the attachment before judgment of the property in dispute, and that property was attached. On the 2nd April 1884 Kamal Narain Choudhury obtained from the District Judge a decree against Sadik Ali Khan for the money owing to him. On the 27th June 1884 Kamal Narain Choudhury

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obtained from the District Judge attachment of the property in dispute. On the 21st March 1885 Sadik Ali Khan by deed further mortgaged to Lalji Lal for Rs. 90,000 the property in dispute, and much other property with which this suit is not concerned.

The Rs. 90,000 included the debt due under the mortgage of the 10th January 1882, and it was expressly agreed by the mortgage of the 21st March 1885 that Lalji Lal's security under the mortgage of the 10th January 1882 should continue. On the 11th December 1885 Lalji Lal brought, under section 88 of the Transfer of Property Act, 1882, against Sadik Ali Khan a suit in the Court of the Subordinate Judge of Muzaffarpur to recover the money due to him under the mortgages of the 10th January 1882 and the 21st March 1885, amounting together to Rs. 98,519-13-6 and further interest. On the 12th February 1886 Lalji Lal obtained in that suit a decree under section 88 of the Transfer of Property Act, 1882, for sale of the properties mortgaged if the decretal money should not be paid to him by Sadik Ali Khan within 4 months from the date of the decree.

The property in dispute being under attachment in execution of Kamal Narain Choudhuri's decree of the 2nd April 1884, Lalji Lal, on the 20th February 1886, presented to the Court of the District Judge of Darbhanga a petition for the execution of his decree of the 12th February 1886, in which he stated the nature of the assistance from the Court for which he asked, thus:—

"That in the above-mentioned case, though postponement for four months has been granted to the judgment-debtor to pay the entire decretal amount, but there is very little chance of the judgment-debtor paying the entire decretal money within the time allowed. The judgment-debtor owes a considerable amount, and besides this his properties have been advertised for sale in satisfaction of several decrees. If proceedings for execution of this decree would be taken by your petitioner after expiry of four months' time allowed by the Court, then the decretal money due to him cannot be realised in any way; for this reason it is very necessary to take out the execution

proceedings. Therefore, it is prayed that the case may be registered, that proceedings for attachment of the properties of the judgment-debtor may be taken; that sale proclamation may be issued and date for sale of the properties may be fixed by the Court after the time allowed, and that the decretal money due to your petitioner may be realised. Inventory of the properties is given below."

On the 20th May 1886 Lalji Lal obtained in the Court of the Subordinate Judge of Muzaffarpur an order of attachment under his decree of the 12th February 1886 of the property in dispute, and the property in dispute was accordingly attached.

On the 16th August 1886 the right and interest of Sadik Ali Khan in the property in dispute were put up for sale at public auction in execution of Kamal Narain Choudhuri's money-decree against him of the 2nd April 1884, and Kamal Narain, who had previously obtained permission to bid at the sale, purchased the right and interest of Sadik Ali Khan in the property in dispute. On the 8th September 1886 Kamal Narain Choudhuri presented to the Court of the Subordinate Judge of Tirhoot a petition of objection to the attachment of the property in dispute, which Lalji Lal had obtained. To that proceeding by petition of objection Lalji Lal and Sadik Ali Khan were made parties. That petition, so far as it is material, was as follows:—

"That objection on behalf of the objector in the execution case of Lalji Lal Sahu; decree-holder, against Sadik Ali Khan, judgment-debtor, is as follows:—

"1. That a Title Suit No. 18 of 1883 was filed by the objector on the 9th *Kartik*, 1291, corresponding to the 25th October 1883, in the Court of the District Judge, and the properties of Babu Sadik Ali Khan, the defendant-judgment-debtor, situated in *Mauza Bhandarson asli*, with *dakhli*, together with the *tolas*, *Pargana Loam*, were attached, and on the 2nd April 1884 a decree was passed in favour of the objector; in the execution of decree on the 24th *Asarh* 1291 *F. S.* corresponding to the 2nd July 1884 the said property was attached, and on the 16th August 1886, after having been sold by the District Judge, was purchased by the objector.

"2. That the judgment-debtor, after

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the attachment mentioned above, mortgaged the said property under a bond, dated the 12th (21st) March 1885, to Lalji Sahu. Hence the said mortgage under the provisions of section 276 of the Civil Procedure Code is null and void.

"3. That subsequent to attachment by this objector Babu Lalji Lal Sahu attached the said property on the 7th Jeth 1293 alleging a lien under a decree obtained on confession of judgment, and the date for the sale of the said property is fixed for the 15th September 1886.

"4. That when the said property had been sold they cannot now be sold under the provisions of section 285.

"5. That the said property having been sold, is purchased by this objector, the Court has no jurisdiction to sell the property again, and the said property under section 278 is fit to be exempted; and it is prayed that by allowing this objection *Mauza* Bhandarson, *asli*, together with *dakhli* and the *tolas* in *Pargannah* Loam, be exempted from sale.

"I, Kamal Narain Choudhury, objector, do declare that the contents of this petition of objection are true to my knowledge.

"(Signed) Kamal Narain Choudhuri, objector, "By my own pen."

There appears to be some confusion in paragraph 1 of the petition of objection as to facts and dates. The decree of the 2nd April 1884 was made by the District Judge in the suit which was brought on the 27th September 1883, and the order for the issue of the writ of attachment was made on the 27th June 1884. It is to be observed that there is nothing in that petition of objection which would suggest to the Subordinate Judge that Lalji Lal had held any mortgage of the property in dispute except the mortgage of the 21st March 1886, or would draw the attention of the Subordinate Judge to the fact that by the mortgage of the 21st March 1886, the security which Lalji Lal had obtained by the mortgage of the 10th January 1882, was maintained, or to the fact that the mortgage of the 10th January 1882, was made before Kamal Narain Choudhury had obtained his attachment of the property in dispute.

Those facts do not appear to have been brought to the attention of the Subordinate Judge by or on behalf of Lalji Lal or by any

one. On the 14th September 1886 the Subordinate Judge on that petition made the following order: "It is ordered that the objection of the objector be so far allowed that *Mauza* Bhandarson *asli* bearing No. 22 (the property in dispute) in the inventory of the decree-holder (Lalji Lal) be exempted from the sale." As their Lordships construe that order, it was an order that the property claimed should not be sold under the decree which Lalji Lal had obtained on the 12th February 1886. Lalji Lal did not appeal against that order of the 14th September 1886 of the Subordinate Judge, and it became final. On the 19th November 1886 Kamal Narain Choudhury obtained his sale certificate in respect of his purchase at the auction-sale on the 16th August 1886 of the right and interest of Sadik Ali Khan in the property in dispute, and obtained possession as the purchaser.

On the 21st February 1895 the plaintiffs in this suit, who are the appellants here, in a suit to which the respondents here, who are the representatives of Kamal Narain Choudhury, were not parties, obtained a money decree against Lalji Lal. In execution of that money-decree the plaintiffs, appellants here, purchased the mortgage-decree which Lalji Lal had obtained on the 12th February 1886, and eventually, in execution of the mortgage-decree of the 12th February 1886, applied for the sale of the property in dispute, which was sold and was purchased by them on the 16th February 1907, and a certificate of sale was granted to them on the 29th May 1908. The defendants, respondents here, were not parties to those proceedings. This suit was brought by the plaintiffs (appellants) on the 10th January 1912 to obtain declarations of title to and possession of the property in dispute, and mesne profits. The suit was tried by the District Judge of Darbhanga and went on appeal to the High Court at Patna. There are concurrent findings of these Courts which determine a question which arose as to the identity of the property in dispute.

The District Judge being of opinion that the order of the Subordinate Judge of Tirhoot of the 14th September 1886 was made without jurisdiction, as Lalji Lal's decree was a decree for sale under the Transfer of Property Act, 1882, and that Lalji

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Lal's decree of the 12th February 1886, was binding on the property in dispute, gave the plaintiffs, appellants here, a decree for possession, subject to a right of the defendants, respondents here, to redeem and decreed that plaintiffs were entitled to mesne profits. From that decree the plaintiffs and the defendants appealed to the High Court at Patna.

The learned Judges of the High Court before whom those appeals came were of opinion that Lalji Lal had not obtained under section 89 of the Transfer of Property Act, 1882, an order absolute for sale, had, in ignorance of his rights, elected to surrender his rights under his mortgage of the 10th January 1882, and had proceeded to execute his decree of the 12th February 1886, as a money-decree; had attached the property in dispute under section 274 of the Code of Civil Procedure, 1882; had gone to trial on the objection of Kamal Narain Choudhury under section 278 of that Code, and had acquiesced for 20 years in the decision of the 14th September 1886, against him under section 278 and they allowed the defendants' appeal and dismissed the plaintiffs' appeal and their suit. From those decrees these consolidated appeals have been brought.

At the hearing of these consolidated appeals Counsel were unable to show that any order absolute for sale under section 89 of the Transfer of Property Act, 1882, was made, but their Lordships are aware that even in 1886 the necessity for an order absolute under that section was sometimes overlooked in suits for sale, and sales proceeded in suits for sale under an ordinary order for execution such as would be made for the execution of a money-decree. Their Lordships do not draw the same conclusion as the High Court that Lalji Lal, elected to surrender his rights under the mortgage of the 10th January 1882. Lalji Lal had got the property in dispute attached in order to bring it to sale, and on the petition of Kamal Narain Choudhury the Subordinate Judge made his order of the 14th September 1886, which, as their Lordships construe it, was an order that the property in dispute should not be sold in the suit of Lalji Lal. It appears to their Lordships to be unnecessary to consider whether that order should or should not have been made. The petition

of objection was a petition which the Subordinate Judge had to consider and dispose of, and any party to that proceeding who was dissatisfied with the order which the Subordinate Judge might make could have appealed from it. Lalji Lal was a party to that proceeding and he did not appeal, and the order became final and binding upon Lalji Lal and upon those who claim title under him. From 1886 Kamal Narain Choudhury or the defendants who represent him have been lawfully in possession of the property in dispute under the certificate of sale of the 19th November 1886, and the plaintiffs did not bring this suit disputing that title until the 10th January 1912. Their Lordships are of opinion that the decrees of the High Court were right.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. The appellants must pay the costs of these consolidated appeals.
Z. K. *Appeals dismissed.*

Solicitors for the Appellant.—Messrs. *Watkins and Hunter.*

Solicitors for the Respondents.—Messrs. *Truefitt and Francis.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 2270 OF 1918.

January 23, 1923.

Present.—Mr. Justice Broadway and Mr. Justice Zafar Ali.

THE FIRM DEOKI NANDAN AND SONS
—PLAINTIFFS—APPELLANTS—

versus

RAM LAL AULAK AND MESSRS.
LOCKWOOD BROTHERS—DEFEND-
ANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 230—Principal and agent—Contract with foreign merchant—Personal liability of agent—Presumption.

Under section 230 of the Contract Act an agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist when the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad. But this presumption is not applicable where the contract is entered into directly with the foreign merchant; the agent acting merely as a sort of post office and undertaking no sort of responsibility. [p. 887, col. 1; p. 888, col. 1.]

Tulika Basavaraju v. Parry & Co., 27 M. 315
Arumachalam Chettiar v. Kasi Nenenda Pillai

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24 Ind. Cas. 1007, *Puran Chand v. Tara Singh*, 131 L. R. 1905, *Bharagava & Co. v. B. Kolkayashi*, 65 Ind. Cas. 468; 2 L. L. J. 374; 18 P. W. R. 1922, relied on.

Fasal Ilaht v. Imperial Chemical Co., Delhi, 67 Ind. Cas. 157, distinguished.

First appeal from a decree of the District Judge, Delhi, dated the 20th April 1914.

Lala *Sardha Ram*, for the Appellants.
Lala *Durga Das*, for the Respondents.

JUDGMENT.—The firm of Messrs. Deoki Nandan and Sons of Delhi on the 20th of February 1912 instituted a suit against Ram Lal Aulak of Lahore for the recovery of Rs. 2,100. In the plaint it was alleged that a contract had been entered into between the plaintiffs and the defendant on the 4th of February 1908 for the purchase by the former from the latter of Fawn Rugging at rate of Re. 1 per yard net at Karachi according to a particular sample sent to the defendant along with the order; that the goods supplied were not in accordance with the sample, they being different in quality and weight; that at the instance of both parties a survey was held at Karachi by two European Surveyors who furnished their report, dated the 16th of July 1908, holding that the plaintiffs were entitled to an allowance of Rs. 5 per cent. on the invoice value of the goods; that the defendant failed to pay the amount allowed and on the 24th of February 1909 definitely agreed to pay the sum of Rs. 1,550 in full settlement of the plaintiffs' claim in this connection; that the defendant gave a letter to the plaintiffs addressed to the National Bank of India directing the said Bank to allow the plaintiffs the sum of Rs. 1,500 in connection with another draft and at the same time undertook to remit the remaining sum of Rs. 50 from Lahore; that the National Bank of India failed to make the allowance and the defendant failed to remit the sum of Rs. 50, and that on the 13th of January 1910 the defendant wrote to the plaintiffs asking for further time, but not having been paid any part of the sum agreed upon the plaintiffs claimed a decree for Rs. 1,550 *plus* interest at the rate of 12 per cent. per annum, or a total of Rs. 2,100.

Ram Lal Aulak traversed the averments in the plaint pleading that he had not

entered into any contract with the plaintiffs but had merely acted as a "post office" between the plaintiffs and the firm of Messrs. Lockwood Brothers, Limited, Sheffield. He further denied that he had been any party to the survey proceedings referred to, and alleged that he had been merely acting as the agent of Messrs. Lockwood Brothers, Limited, and had in no way rendered himself personally liable. The non-payment of Rs. 1,500 was admitted, but it was attributed to the plaintiffs' own neglect. It was also pleaded that the suit was time-barred and that the Court at Delhi had no jurisdiction. As a result of these pleadings Messrs. Lockwood Brothers, Limited, were added as defendants in the suit by order of the Court; but that firm did not enter any appearance throughout the proceedings. The plaintiffs traversed Ram Lal's pleas and the following issues were settled:—

(1) Is this case within the jurisdiction of this Court?

(2) Is it within time?

(3) Did the defendant Ram Lal act only as agent of Lockwood Brothers?

(4) If so, is not he liable personally for the due of the plaintiff?

(5) Was the matter in dispute referred to the arbitration of surveyors? If so, how much was allowed to the plaintiff on account of deficiency in weight and quality?

(6) Is the decision of surveyors binding on defendant No. 1?

(7) Is the plaintiff guilty of any laches disentitling him from claiming amount awarded to him by surveyors?

(8) In case issue No. (6) goes in favour of defendant No. 1 and issues Nos. 3 and 4 against him, was there any deficiency in weight or quality of the goods supplied, and, if so, is the plaintiff entitled to any damages on account of that from the defendant?

(9) Has the plaintiff any cause of action?

(10) Is the survey report admissible in evidence?

The District Judge held that the plaintiffs were fully aware of the fact that Ram Lal Aulak was acting as the agent of Messrs. Lockwood Brothers, Limited, in connection with this contract and that Messrs. Lockwood Brothers were the real principals. A decree was, however, granted against both the defendants, Ram Lal Aulak being held

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liable by virtue of section 230 (1), the presumption therein being held not to have been rebutted. It was held that the suit was within time and within the jurisdiction of the Delhi Court (Issues Nos. 2 and 1) and that Ram Lal Aulak was aware of the survey proceedings and had agreed to them on behalf of his principals (Issues Nos. 4, 5 and 6). The remaining issues were also decided in favour of the plaintiffs.

Against this decree two separate appeals have been filed; one by the plaintiffs who complained against the disallowance of interest and an item of Rs. 55 in connection with the survey report, and the other by Ram Lal Aulak in which he challenged the correctness of the decision in its entirety, more particularly as to his own personal liability. On behalf of the plaintiffs in both cases we have heard Mr. Sardha Ram, while Mr. Durga Das has addressed us on behalf of Ram Lal Aulak.

Mr. Durga Das confined his arguments to the question of Ram Lal Aulak's personal liability and contended that on the findings arrived at by the learned District Judge the suit as against his client should have been dismissed. After a careful consideration of the evidence on the record and the arguments of the learned Vakils, we are of opinion that Mr. Durga Das contention is correct. Under section 230 of the Contract Act an agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad. It was contended by Mr. Durga Das that in the present case the contract was actually entered into between the plaintiffs and Messrs. Lockwood Brothers, Limited, Ram Lal Aulak acting purely as a sort of post office, and, therefore, it was contended that Ram Lal entered into no contract at all either for himself or for a merchant resident abroad. In *Tutika Basavaraju v. Parry & Co.* (1) a contract had been entered into by Messrs. Parry and Company acting as agents of the East India Distilleries and Sugar Factories, Limited. Messrs. Parry and

Company, had actually signed the contract but had described themselves as doing so on behalf of their principals and it was held that Messrs. Parry and Company were not personally liable under the contract. Similarly, in *Arunachalam Chettiar v. Kasi Nevenda Pillai* (2), it was held that an agent by entering into a contract in his principal's name holds out that he is merely an agent and it is the principal and not the agent who is liable on such a contract. A similar view was expressed in *Puran Chand v. Tara Singh* (3) by Johnstone, J., and *Bhargava & Company v. B. Kobayashi* (4) is another decision to the same effect. *Fazal Ilahi v. Imperial Chemical Company, Delhi* (5) relied on by Mr. Sardha Ram is clearly distinguishable. There it was definitely held that the defendant had entered into a contract with the plaintiffs on his own behalf. In the present case it appears from the correspondence on the record between Ram Lal Aulak and the plaintiffs that on the 3rd of February 1908 Ram Lal Aulak wrote to the plaintiffs saying that if they favoured him with an order by return of mail he would guarantee the delivery in May, but *subject to the approval of his home friends by wire*. To this is the plaintiffs' reply Exhibit P-1 dated the 4th of February 1908. They enclosed "sample" of the goods they wanted, referred to the price and then proceeded as follows:—"We will pay you the money on getting the things cleared. They may draw upon us through any Bank, say National Bank, and it will pay customs duty and other charges itself. *It is better for you to send the sample and write to them all particulars about this, if they accept let them wire*, if not, then we will arrange in other way."

From the above it appears to be perfectly clear that the plaintiffs understood that the acceptance of their offer was in the hands, not of Ram Lal, but of his "Home friends" Messrs. Lockwood Brothers, Limited, and it was that firm that had to accept by wire. Ram Lal has sworn that he sent an indent form duly signed by Messrs. Deoki Nandan and Sons to Messrs. Lock-

(2) 24 Ind. Cas. 1007.

(3) 138 P. L. R. 1905.

(4) 65 Ind. Cas. 468; 2 L. L. J. 374; 18 P. W. R. 1922.

(5) 67 Ind. Cas. 157.

(1) 27 M. 315.

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wood Brothers, Limited, in England. A copy of this indent is to be found at pages 12 to 14 of the printed book, Exhibit P. W. No. 6. It was produced by the plaintiffs and, although they denied having signed the original, we have no hesitation in accepting Ram Lal Aulak's assertion that the original was signed by the plaintiffs. On the 4th of March 1908 Ram Lal wrote (Exhibit P. W. No. 7) to the plaintiffs in which he informed them that Messrs. Lockwood Brothers, Limited, had cabled their acceptance of the offer and the original telegram was forwarded. In another letter dated the 8th April 1908 (Exhibit P. W. No. 8) reference was made to the indent. A copy of it being sent to the plaintiffs it being asserted that the indent (in original) had been accepted as *per* telegram already forwarded.

The above correspondence satisfies us that the plaintiffs understood that Ram Lal was not in any way rendering himself personally liable under the contract. Both the plaintiffs and he clearly understood that it was for Messrs. Lockwood Brothers, Limited, to accept the offer made by the plaintiffs or not, such acceptance being by wire. In these circumstances, it appears to us that the presumption referred to in section 230 of the Contract Act does not here arise, inasmuch as Ram Lal Aulak entered into no contract for Messrs. Lockwood Brothers, Limited, the contract in question having been entered into directly between the plaintiffs in India and Messrs. Lockwood Brothers, Limited, in England. This being the case, Ram Lal Aulak was not personally liable under the contract.

It was contended, however, that Ram Lal Aulak had subsequently accepted personal liability, inasmuch as he had agreed to the survey and, on the 24th of February 1909, had settled the dispute for the sum of Rs. 1,550. His personal liability was further alleged on the strength of a letter Exhibit P. 4 written by him on the 13th of October 1910. While we agree with the Court below in holding that Ram Lal Aulak was aware of the survey proceedings, we consider that his action in connection therewith was merely as an agent and that he did not render himself personally liable under the contract. Again, on the 24th of February

1909 in arriving at the settlement he distinctly states that he did so "under directions" of Messrs. Lockwood Brothers, Limited. His personal liability cannot be inferred under that letter. In the letter dated the 13th October 1910 there is nothing which indicates that he undertook any personal liability to pay the amount agreed upon by way of settlement. It is true that he asked for a period of seven weeks delay in the said letter, but it is clear that he did not render himself personally liable, for he distinctly states that he had written a very strong letter to Messrs. Lockwood Brothers, Limited, thus making it evident that it was they and they alone who were to pay.

Mr. Sardha Ram then contended that the phraseology of Exhibit P. W. No. 6, the indent, showed that it could not have been addressed to Messrs. Lockwood Brothers, Limited. Here, again, we are unable to agree. The form is one evidently used by Messrs. Lockwood Brothers, Limited, and there is nothing in its terms which indicates that any person other than Messrs. Lockwood Brothers, Limited, was to deal with the offer therein contained. That the original indent was sent for acceptance to Messrs. Lockwood Brothers, Limited, is further supported by a letter (Exhibit D-F) dated the 5th February 1909 from Messrs. Lockwood Brothers, Limited, to Ram Lal Aulak in which they complain of Ram Lal's action in connection with the survey proceedings, saying that it was most unsatisfactory that he should have allowed an arbitration to proceed *on a sample other than the original sent to them by him to work to*. It will be borne in mind that in Exhibit P-1 dated the 4th of February 1908 the sample with which the plaintiffs wished the suppliers to be supplied was forwarded to Ram Lal who very evidently forwarded the same to Messrs. Lockwood Brothers. In this view of the case, it is not necessary to go further into the arguments of the learned Vakils.

In our opinion Ram Lal Aulak was not personally liable under the contract and we accordingly accept this appeal (Civil Appeal No. 2867 of 1918) and dismiss the plaintiffs' suit with costs throughout. Messrs. Lockwood Brothers, Limited, were made defendants by order

QADAR BAKHSH V. MANGHA MAL.

of the Court, but the plaintiffs have never amended their plaint at any time, nor have they sought any relief against them. The suit as instituted is, therefore, dismissed. It follows that the plaintiffs' appeal (Civil Appeal No. 2270 of 1918) is also dismissed.

Z. K.

*Appeal dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 521 OF 1920.

February 16, 1923.

Preseat:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

QADAR BAKHSH AND OTHERS—**PLAINTIFFS—APPELLANTS***versus***MANGHA MAL AND OTHERS—****DEFENDANTS—RESPONDENTS.**

Adverse possession—Mortgagor and mortgagee—Registration Act (XVI of 1908), s. 49—Unregistered document—Admission for collateral purpose.

It is going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property. [p. 890, col. 1.]

A mortgagee can set up adverse possession if his possession at its inception was that of a trespasser. [p. 890, col. 2.]

Jiwa Khan v. Lakhmi Chand, 11 Ind. Cas. 429; 232 P. L. R. 1911; 146 P. W. R. 1911, followed.

It is to be decided on the facts of each case whether or not the circumstances establish an adverse title in a mortgagee. [p. 890, col. 1.]

A document although inadmissible for want of registration to prove title, can be referred to in order to ascertain the nature of the possession of the holder of the property. [p. 890, col. 2.]

Varada Pillai v. Jeevarathnammal, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.), *Karnam Kandasami Pillay v. Chinappa*, 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423 *Musigadu v. Maniam Gopal Reddy*, 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251, *Mahendra Bahadur Singh v. Chandrapal Singh*, 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622, *Jhamphu v. Kulramani*, 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761 and *Ram Singh v. Basi*, 48 Ind. Cas. 447; 89 P. W. R. 1918, relied on.

Defendant was in possession as mortgagee of certain property belonging to the plaintiffs. In 1884 a portion of the property was redeemed and a fresh mortgage was created of the remainder, but without possession. On that date the mortgagors obtained possession of the whole

of the property. In 1888 the portion under mortgage was sold to the defendant by an unregistered sale-deed and the latter obtained possession of the property sold and continued in possession for over twelve years. In a suit for redemption of the property:

Held (1) that although the unregistered sale-deed was inadmissible in evidence to prove the defendant's title, it could be referred to in order to ascertain the nature of his possession after 1888; [p. 890, col. 2.]

(2) that the defendant having obtained possession of the property in 1888 without title, that is, as a trespasser, his possession was adverse to the plaintiffs from its inception and having continued for over twelve years had ripened into ownership.

Second appeal from a decree of the District Judge, Multan, dated the 1st December 1919, modifying as to costs only that of the Munsif, First Class, Multan, dated the 15th February 1919.

Sheikh Niaz Muhammad, for the Appellants.

Lala Har Gopal, for the Respondents.

JUDGMENT.—The suit giving rise to this appeal was filed by Qadar Bakhsh and three others and was for possession of certain land by redemption. It was alleged that the plaintiffs' father and uncle had mortgaged the land in suit on the 18th of August 1880 for Rs. 200 in favour of Kanhya Lal, father of the defendants; that half of the land mortgaged had been redeemed, and that the remaining half was redeemable on payment of Rs. 100. The defence set up was that the mortgage of 1880 had come to an end in 1884 when the father of the plaintiffs alone mortgaged his share by a mortgage-deed, dated the 7th of March 1884, this subsequent mortgage being without possession and containing no clause under which the mortgagees could obtain possession. Further, it was pleaded that in 1888 Allah Ditta, father of the plaintiffs, had sold the land in suit to one of the defendants for Rs. 600, and that possession had been obtained under that sale and given effect to in the mutation proceedings in 1890. The Trial Court dismissed the plaintiffs' suit holding that the defendants had been in adverse possession for a period of over twelve years, and that the plaintiffs had failed to show that the land they sought to redeem was the identical land which had been mortgaged by Allah Ditta. It was held that the deed of sale propounded by the defendants was inadmissible in evidence for any purpose whatsoever owing to

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its not having been registered.

The plaintiffs appealed, but the learned District Judge maintained the decree of the Trial Court, although on different grounds. He held that the plaintiffs had proved that the land in suit was identical with the land mortgaged to Kanhaya Lal under the mortgage dated the 7th of March 1884. He further held that the deed of sale of 1888 was admissible in evidence as it did not require to be registered under section 17 of the Registration Act. Finally, he held that the mortgage of 1880 had come to an end and had been superseded by the mortgage of 1884; that under this mortgage of 1884 the mortgagor continued in possession up to 1888 when the defendants obtained possession not as mortgagees but as vendees, thus holding adversely to the original owner, this adverse title being rendered unassailable by the efflux of time.

The plaintiffs have now come up to this Court in second appeal through Mr. Niaz Muhammad and we have heard Mr. Har Gopal on behalf of the respondents. For the appellants it has been urged that, inasmuch as the respondents were mortgagees, their possession must be regarded as that of mortgagees and, therefore, no adverse title could be, or had been proved. In support of this attention was drawn to *Jiwa Khan v. Lakhmi Chand* (1), *Indar v. Asa Singh* (2), *Amir v. Nadir Ali* (3), *Lehna Singh v. Santa Singh* (4), *Khtarajmal v. Dalm* (5).

While we are in accord with the general principles enunciated in those decisions we are unable to see that they support the whole of Mr. Niaz Muhammad's contention. In *Jiwa Khan v. Lakhmi Chand* (1) it was specifically pointed out that it would be going too far to say that in no possible case could a mortgagee set up an adverse title to the mortgaged property. We think that it is to be decided on the facts of each case whether or not

the circumstances established an adverse title. In the present case, we may say at once that, in our opinion, the deed of sale is inadmissible in evidence for want of registration, and the respondents, therefore, cannot base any title to the land under that deed.

There is, however, authority for the view that a document, although inadmissible for want of registration, to prove title, may be referred to in order to ascertain the nature of the possession sought to be disturbed, see, for instance, *Varada Pillai v. Jeevarathnammal* (6), *Karnam Kandasami Pillay v. Chinnappa* (7), *Musigadu v. Maneam Gopal Reddy* (8), *Mahendra Bahadur Singh v. Chandrapal Singh* (9), *Jhampu v. Kutramani* (10), *Ram Singh v. Basti* (11).

We think that in this case the deed of sale may be referred to for the sole purpose of determining the nature of the possession taken by the respondents in 1888. On doing so, we find that this document supports the finding arrived at by the learned District Judge to the effect that the mortgagee's possession in 1888 was not as mortgagees but under colour of a deed of sale. This deed of sale, not having been registered, created no title in favour of the respondents, thus leaving them in the position of trespassers, and as their possession has extended for over a period of twelve years, they have now become full owners of the land and their possession cannot be disturbed. It was held in *Jiwa Khan v. Lakhmi Chand* (1) that a mortgagee can set up adverse possession if his possession at its inception was that of a trespasser.

We accordingly dismiss this appeal with costs.

Z. K. & N. H.

Appeal dismissed.

(6) 53 Ind. Cas. 901; 43 M. 2441 (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

(7) 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423.

(8) 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251.

(9) 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622.

(10) 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761.

(11) 48 Ind. Cas. 447; 89 P. W. R. 1918.

(1) 11 Ind. Cas. 429; 232 P. L. R. 1911; 146 P. W. R. 1911.

(2) 65 P. R. 1908; 113 P. W. R. 1908; 90 P. L. R. 1908.

(3) 68 Ind. Cas. 7331 (1923) A. L. R. (L.) 74.

(4) 13 Ind. Cas. 8521; 9 P. W. R. 1912; 138 P. L. R. 1912.

(5) 32 C. 296; 32 I. A. 23; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 8 Sar. P. C. J. 534; 9 C. W. N. 201 (P. C.).

KHAN MUHAMMAD V. AHMAN.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 876 OF 1922.

December 1, 1922.

Present:—Mr. Justice Broadway.

KHAN MUHAMMAD—JUDGMENT—

DEBTOR—APPELLANT

versus

AHMAN AND OTHERS—PLAINTIFF—

DECREE-HOLDERS AND JALLU—VENDOR—

DEFENDANT—RESPONDENTS.

Pre-emption—Decree directing payment of certain sum and costs—Failure to pay costs, effect of—Civil Procedure Code (Act V of 1908), s. 148, applicability of, to pre-emption decrees.

It is the duty of the decree-holder in a pre-emption suit to take all precautions and make sure that the decree passed in his favour is strictly complied with.

Kanhaya Lal v. Mohammad Shafi Khan, 18 Ind. Cas. 600; 141 P. L. R. 1913 13 P. W. R. 1913, followed.

Section 148 of the Civil Procedure Code is not applicable to decrees in pre-emption suits.

Suranjan Singh v. Rambahal Lal, 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950, relied on.

A decree in a pre-emption suit directed the pre-emptor to pay into Court a certain sum of money together with the costs of the suit within a certain time. The pre-emptor paid in the amount specified in the decree but failed to pay in the costs within the time fixed.

Held (1) that the decree being perfectly clear, the pre-emptor was not entitled to any extension of time for payment of the costs;

(2) that, having failed to comply with the decree, his suit must stand dismissed.

Kanhaya Lal v. Mohammad Shafi Khan, 18 Ind. Cas. 600; 141 P. L. R. 1913; 3 P. W. R. 1913, distinguished.

Miscellaneous second appeal from an order of the Additional District Judge, Jhelum, dated the 16th February 1922, reversing that of the Senior Subordinate Judge, Gujrat, dated the 4th March 1921.

Mr. Nanak Chand, for the Appellant.

Mr. Jalaluddin for the Respondents.

JUDGMENT.—In a pre-emption decree, passed on the 31st May 1920, it was ordered that the pre-emptor should pay into Court a sum of Rs. 1,500 and costs within three months from the date of the decree. The pre-emptor had already deposited Rs. 300 in Court and within the prescribed time he paid in the balance of Rs. 1,200 but omitted to file the costs. The vendees thereupon urged that the suit should be stand dismissed. The Court of first instance gave effect to this plea and against this the pre-emptor preferred an appeal to the District Judge who found that the decree was in no way

ambiguous and clearly required the pre-emptor to deposit the costs as well as the pre-emption money within the specified period of three months. He, however, came to the conclusion that the *parcha* given to the pre-emptor was a little misleading and, acting under section 151, Civil Procedure Code, extended the time for payment of the costs. Against this order the vendee has come up to this Court in second appeal through Mr. Nanak Chand. The respondents have been represented by Mr. Jalaluddin.

Reliance is placed on *Kanhaya Lal v. Mohammad Shafi Khan* (1) as giving the Court power to extend time. That case, however, is clearly distinguishable, for there the decree, which was passed under O. XX, r. 14, Civil Procedure Code, did not include the costs as part of the money to be paid in by the date fixed. A reference to the *parcha* said to have been given to the appellant is not very clear. No *parcha* was produced in the Court of first instance and the grounds of appeal contained no reference to the existence of such a document. As pointed out by Mr. Nanak Chand, such a piece of paper is obtainable at any time without any serious difficulty. If, as a matter of fact, the appellant had been misled by any such *parcha* it is this document that would have been the basis of his claim for extension of time. As pointed out in *Kanhaya Lal v. Mohammad Shafi Khan* (1) it is the duty of the decree-holder in a pre-emption suit to take all precautions and make sure that the decree passed in his favour is strictly complied with. As pointed out by the District Judge, the decree is perfectly clear and I am unable to see that any case has been made out for the extension of the time under section 151 of the Civil Procedure Code. Section 148 does not seem to apply and, according to *Suranjan Singh v. Rambahal Lal* (2), it is not meant for pre-emption suits.

I accordingly accept this appeal and, setting aside the decree of the lower Appellate Court, restore the order of the Court of first instance with costs throughout.

Z. K.

Appeal accepted.

(1) 18 Ind. Cas. 600; 141 P. L. R. 1913; 3 P. W. R. 1913.

(2) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950.

PAIRA RAM V. KESHONATH.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 977 OF 1920.

February 1, 1923.

Present :—Mr. Justice Abdul Raouf.

PAIRA RAM—PLAINTIFF — APPELLANT
versus

KESHONATH, REPRESENTATIVE OF BUDH
RAM, DECEASED, AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, rr. 3 (1), 6—Pre-emption suit—Joinder of several causes of action against vendee—Discretion of Court.

A pre-emption suit is really directed against the vendee, the vendor not being a necessary party thereto.

Under the provisions of r. 3 (1), O. II, of the Civil Procedure Code a plaintiff in a pre-emption suit is entitled to claim to pre-empt in a single suit several sales effected by different vendors in favour of the same vendee.

Where a Trial Court does not think fit to take action under r. 6 of O. II of the Civil Procedure Code, against a joinder of several causes of action in the same suit an Appellate Court should not interfere with the exercise of its discretion.

Miscellaneous second appeal from an order of the District Judge, Lyallpur, dated the 31st March 1920, reversing that of the Munsif, First Class, Jhang, dated the 18th February 1919.

Messrs. M. Saleem and Devl Dayal, for the Appellant.

Dr. Nand Lal for the Respondents.

JUDGMENT.—This is an appeal from an order of remand in a pre-emption suit made under the following circumstances:—

The vendee purchased four plots of land from different owners at different dates and for different prices. The plaintiff pre-emptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales. An objection was raised in the Trial Court on the ground of misjoinder of causes of action and parties. It was overruled and the suit of the plaintiff was decreed in respect of all the four plots. The vendee appealed to the lower Appellate Court and again put forward the objection as to the misjoinder. The lower Appellate Court without deciding whether the suit was bad on account of misjoinder of parties or causes of action has thought it proper to act under O. II, r. 6, Civil Procedure Code and has directed the institution and trial of four separate cases regarding the sales

and has made an order of remand under O. XII, r. 23, Civil Procedure Code.

Against this order of remand the present appeal has been preferred. O. II, r. 3 (1) provides that "save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit." Rules 4 and 5 of the same Order provide that in certain cases this cannot be done. The suit for pre-emption was really against the vendee. The different vendors under the different four sale-deeds were not necessary parties. They were simply impleaded as *pro forma* defendants. The suit was, therefore, properly instituted. The Trial Court did not think fit to act under rule 6, tried the case and passed a decree. In my opinion, it was not proper for the Appellate Court to have interfered with the discretion of the Trial Court in this matter. Evidence has been taken, the suit has been tried and a decree has been passed. It is highly inconvenient, if not improper, that the entire proceedings taken in the Court below should be set aside and four separate suits should be instituted and the trial should begin over again. This will result in loss of time and money to the parties.

I accordingly accept this appeal and set aside the order of remand with costs.

Z. K. & N. H.

Appeal accepted.

LALU V. FAZAL DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2159 OF 1919
December 21, 1922.Present:—Mr. Justice Abdul Raof and
Mr. Justice Moti Sagar.

LALU AND OTHERS—DEFENDANTS

—APPELLANTS

versus

FAZAL DIN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I. of 1877), s. 42—Declaration as to right of succession—Suit, maintainability of.

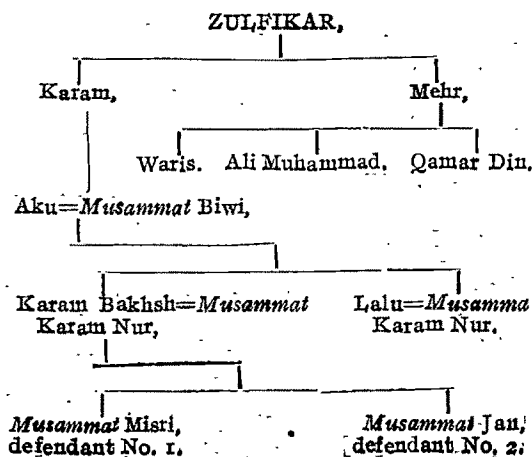
A suit does not lie for a declaration, not of an existing right but of a *spes successionis*, that is, the chance or possibility of acquiring a right in the future. The Courts will not grant a declaration that plaintiff is entitled to succeed to certain property on the happening of a certain event.

Strimathoo Moothoo Vija Ragoonadah Kollandapuree Natchiar v. Dorasinga Tevar, 2 I. A. 169; 15 B. L. R. 83; 23 W. R. 31; 3 Sar. P. C. J. 456 (P. C.), *Greeman Singh v. Wahari Lali Singh*, 8 C. 12; 9 C. L. R. 249; 6 Ind. Jur. 191; 4 Ind. Dec. (N. S.) 8 (P. C.) and *Pirithi Pal Kunwar v. Guman Kunwar*, 17 I. A. 107; 17 C. 933; 5 Sar. P. C. J. 569; *Rafique & Jackson's P. C. No. 118*; 8 Ind. Dec. (N. S.) 1167 (P. C.), relied on.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 4th July 1919, varying that of the Junior Subordinate Judge, Rawalpindi, dated the 21st October 1918.

Mr. M. S. Bhagat, for the Appellants.
Sardar Kharak Singh, for Mr. D. R. Sawhney, for the Respondents.

JUDGMENT.—The following pedigree table will explain how the parties are related to each other.



On the 20th January 1883 Karam, son of Zulfiqar, gifted the property in suit to *Musammat Biwi*, his daughter, and Karam Bakhsh, his daughter's son. Lalu, the 2nd son of *Musammat Biwi*, was evidently not born at this time. In 1884 the plaintiffs, who are the sons of Mehr, brought a suit against the donor and the donee for a declaration that the said gift was invalid and that it would not affect the reversionary rights of the plaintiffs after the death of the donor. This suit was dismissed. On *Musammat Biwi's* death the property in suit was mutated in the name of her son, Karam Bakhsh, and when he died his widow, *Musammat Karam Nur*, succeeded to the property on a life-tenure. *Musammat Karam Nur* entered into a re-marriage with Lalu, brother of her deceased husband, and then the property had to be mutated again; this time in the names of her two minor daughters, *Musammat Misri* and *Musammat Jan*. This mutation was effected in 1908 and since that date the daughters have been in uninterrupted and continuous possession of the land in question. In April 1918 the plaintiffs brought the present suit for a declaration that they were the next reversionary heirs of defendants Nos. (1) and (2), *viz.*, *Musammat Misri* and *Musammat Jan*, and that on the death or the marriage of the latter they would be entitled to succeed to the property now in their possession. The suit was resisted on the ground that the plaintiffs had no cause of action; that they had no *locus standi* to maintain the suit in the presence of Lalu, their uncle, who was a nearer heir than the plaintiffs; that the gift made by Karam in 1883 was intended for the benefit of the whole family, and that the property could not revert to the plaintiffs until the total extinction of the lineal descendants, male and female of the donees. On these pleadings Lalu was also impleaded as a defendant in the case. The Trial Court dismissed the suit on the ground that the plaintiffs were remote collaterals and had no right to sue in the presence of Lalu, a nearer reversioner than themselves. On appeal, the learned District Judge by an order, which is wholly unintelligible, modified the decree of the First Court and held that on the failure of the line of *Musammat Misri* and

BENI PARSHAD V. GUR DEVI.

Musammat Jan, Lahu would be entitled to succeed to half the property in suit. Against this judgment and decree both parties have appealed.

In our opinion the order of the learned District Judge is clearly wrong and must be set aside on the short ground that there is no cause of action for this suit. What the plaintiffs want to obtain is an affirmative declaration; that they may have the right to succeed to the property on the death or the marriage of the two defendants; in other words, they ask for a declaration "not of an existing right but of a *spes successionis*, i. e., the chance or possibility of acquiring a right in the future. It has been repeatedly held that the Courts will not grant such a declaration, *vide Strimathoo Meethoo Vijla v. Ragoonadah Kolandapuree Nat-chiar v. Dorasinga Tevar* (1), *Greeman Singh v. Wahari Lall Singh* (2) and *Pirithi Pal Kunwar v. Guman Kunwar* (3). It will be open no doubt to the plaintiffs when succession opens out to sue for possession of the property if possession is denied them.

We accept the appeal and dismiss the plaintiffs' suit, but, having regard to the fact that the plaintiffs are not to blame for this appeal and that the appeal has been necessitated on account of the wholly unintelligible order passed by the Court below, we leave the parties to bear their own costs in this Court.

Z. K. & N. H.

Appeal accepted.

(1) 2 I. A. 169; 15 B. L. R. 83; 23 W. R. 314; 3 Sar. P. C. J. 456 (P. C.).

(2) 8 C. 12; 9 C. L. R. 249; 6 Ind. Jur. 191; 4 Ind. Dec. (N. S.) 8 (P. C.).

(3) 17 I. A. 107; 17 C. 933; 5 Sar. P. C. J. 569; Rañque and Jacksons's P. C. No. 118; 8 Ind. Dec. (N. S.) 1167 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2544 OF 1919.

February 27, 1923.

Present:—Mr. Justice Le Rossignol and
Mr. Justice Martineau.

BENI PARSHAD—PLAINTIFF—
APPELLANT

versus

Musammat GUR DEVI—DEFENDANT
—RESPONDENT.

Hindu Law—Joint family—Partition; partial, effect of.

The very conception of a joint Hindu family involves joint ownership of all the family property by its members, and the moment a partition takes place between the members, even though it is a partition of only a portion of the joint property, they cease to be members of a joint Hindu family. [P. 895, col. 1.]

Gavrishankar Parabhuram v. Atmaram Rajaram, 18 B. 611; 9 Ind. Dec. (N. S.) 916, dissented from.

First appeal from a decree of the Senior Subordinate Judge, Ambala, dated the 29th August 1919.

Mr. Manohar Lal, for the Appellants.

Lala Jagan Nath, for the Respondent.

JUDGMENT.—The plaintiff is the brother, and the defendant Musammat Gur Devi, is the widow of Atma Ram, a Bania of Jagadhari, who died on the 9th June 1917, and the suit is for a declaration that the defendant is not the heir of Atma Ram and is not entitled to the Succession Certificate which she has obtained, the plaintiff's contention being that he and Atma Ram formed a joint Hindu family and that the defendant is also not entitled to succeed by reason of her unchastity during her husband's lifetime. The lower Court has dismissed the suit, finding that the plaintiff and Atma Ram were divided in status by a partition which took place between them, that the evidence as to the defendant's unchastity is unreliable, and that if there was any unchastity it was condoned by her husband. The plaintiff appeals.

It is not disputed that the plaintiff and Atma Ram executed a deed on the 23rd July 1916 (page 9 of the paper-book) by which they partitioned a portion of the immoveable property, *viz.*, the houses and shops. But Counsel for the appellant contends that, notwithstanding this partition, they continued to be members of a joint Hindu family as regards the rest of the property which

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remained undivided. He relies on *Gaurishankar Parabhuram v. Almaram Rajaram* (1) which supports his contention. But with all respect we cannot agree with the view taken by the learned Judges of the Bombay High Court. The very conception of a joint Hindu family involves joint ownership of all the family property by its members, and consequently the moment the partition took place between the plaintiff and Atma Ram in 1916, even though it was a partition of only a portion of the joint property, they ceased to be members of a joint Hindu family. The case for the defendant is also supported by the plaintiff's own application and affidavit dated the 7th July 1917 filed in a suit which he and his brother had instituted against one Ganpat Rai for the possession of a half share in a garden. Atma Ram died during the pendency of that suit, and the plaintiff stated in his application and affidavit that *Musammatt Gur Devi* was Atma Ram's sole heir. Another fact which is noteworthy is that in the account-books of the family Atma Ram's *khata* is separate from the plaintiff's, as the latter has admitted. We have no hesitation in agreeing with the lower Court that the plaintiff and Atma Ram were not members of a joint Hindu family at the time of the latter's death.

We also agree in the finding that the defendant's unchastity has not been proved. No doubt it appears that unchastity was imputed to her, the allegation being that a child to whom she had given birth was illegitimate but the evidence produced against her is wholly unreliable, the statements of the witnesses in regard to her misconduct being purely hearsay.

We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 18 B. 611; 9 Ind. Dec. (N. S.) 916.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, No. 1226 OF 1920.

March 10, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

SULTAN AND OTHERS—DEFENDANTS—
APPELLANTS
versus

WARYAM—PLAINTIFF—RESPONDENT.

Muhammadian Law—Marriage—Option of puberty—Ignorance of marriage, effect of.

Under the Muhammadian Law a girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of the marriage, and the option is prolonged until she is acquainted with the fact that she has the right to repudiate the marriage.

Bismillah Begam v. Nur Mohammad, 63 Ind. Cas. 702; 19 A. I. J. 845; 3 U. P. L. R. (A) 186; 44 A. 61; (1922) A. I. R. (A) 155, relied on.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 20th February 1920, affirming that of the Senior Subordinate Judge, Jhang, dated the 13th January 1920.

Lala Ram Chand Manchanda, for the Appellants.

JUDGMENT.—The plaintiff has been given a decree for restitution of conjugal rights, the Subordinate Judge finding that the defendant, Sahiban, who was born on the 12th August 1903, was married to the plaintiff when she was 4 or 5 years old, her brother, acting as her guardian, and that, although the marriage has not been consummated, she has lost her right of repudiating it as she did not exercise, the right immediately on attaining puberty, but repudiated the marriage for the first time when she filed her written statement in Court on the 4th July 1919, when she was nearly 16 years of age. The District Judge has affirmed the decree of the First Court, and the defendants have preferred a second appeal.

The judgment of the learned District Judge does not comply with the requirements of the law, as he has given only his bare finding on the issues without stating his reasons for them. It is, however, not necessary to remand the case for a proper judgment to be written by him as we think that even on the facts found the suit should be dismissed.

There is nothing to show that Sahiban,

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who was only 4 or 5 years old when she was married, had any knowledge of the marriage before the suit was instituted, and it stands to reason that she could not exercise her option of repudiating the marriage so long as she was ignorant that a marriage had taken place. That a girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of it is recognized in Wilson's Anglo-Muhammadan Law, 5th Edition, on page 95, and in Amir Ali's Muhammadan Law, Volume II, 4th Edition on page 426, and it has also been held in *Bismillah Begam v. Nur Mohammad* (1), that the option is prolonged until the girl is acquainted with the fact that she has the right to repudiate the marriage.

It was not till the 23rd May 1919 that Sahiban was served with a summons in the suit. She was not present in Court at the next hearing, which took place on the 2nd June, and the case was adjourned to the 17th June in order that she might attend and make a statement about her age. She appeared on the 17th but was not questioned, and the Court postponed the case to the 4th July, for the examination of the plaintiff. On that date the written statement was filed, in which Sahiban repudiated the marriage.

There was thus no unreasonable delay on her part in repudiating the marriage when she came to know that the plaintiff was claiming her as his wife. We hold that she had not lost her option of repudiation, and that the suit must, therefore, fail.

We accept the appeal *ex parte*, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

Z. K.

Appeal accepted.

(1) 63 Ind. Cas. 702; 19 A. L. J. 845; 3 U. P. L. R. (A.) 186; 44 A. 61; (1922) A. I. R. (A.) 155.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1068 of 1920.

March 5, 1923.

Present.—Sir Shadi Lal Kt., Chief Justice, and Mr. Justice Zafar Ali.

Musammat NAWAB BIBI, MINOR,
THROUGH THE GUARDIANSHIP OF
LABHU AND ANOTHER—DEFENDANTS
—APPELLANTS

VERSUS

ALLAH DITTA PLAINTIFF AND
PHAGU—DEFENDANT—RESPONDENT.

Muhammadan Law—Restitution of conjugal rights—Marriage by way of exchange—Puberty—Presumption.

The father of the defendant, a Muhammadan girl, married her to plaintiff while she was still an infant in order to procure for himself the hand of the plaintiff's sister by way of exchange. Several years after the marriage and nearly two years after defendant had attained puberty, the plaintiff sued for restitution of conjugal rights:

Held, that under the circumstances the defendant was justified in denying the plaintiff's right to restitution of conjugal rights, which could not, therefore, be enforced.

The age of puberty is generally fixed at 14 in the male and 12 in the female but according to Muhammadan Law a girl must be presumed to have reached puberty on completing the fifteenth year of her life. [p. 897, col. 1.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 21st February 1920, reversing that of the Munsif, First Class, Shakargarh, District Gurdaspur, dated the 14th October 1919.

Lala Mehr Chand Mahajan, for the Appellants.

Lala Mul Chand, R. S., for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for restitution of conjugal rights. The parties are Mussalmans of a low caste known as Bharai. The First Court dismissed the suit finding that the alleged marriage was not proved. On appeal the learned District Judge came to the contrary conclusion and decreed the suit. It is contended in this Court on behalf of the alleged wife (appellant) that even if she was married, the plaintiff, under the circumstances of the case, was not entitled to a decree for restitution of conjugal rights. We are of opinion that this contention must prevail though the finding of the learned District Judge on the question of marriage being one of fact cannot be interfered with on second appeal. According to the

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plaintiff's own showing the marriage took place so far back as the 21st March 1905 when she was a child less than three years of age, and he was only about one year older than she. Her mother was dead and her father, in order to procure for himself the hand of the plaintiff's sister in marriage, married this infant daughter to the plaintiff by way of exchange. Therefore, it is clear that he made a sacrifice of her to serve his own selfish purpose without any regard to her future welfare. The plaintiff did not lay claim to her and did not care to bring her to live with him even after she had attained puberty. The age of puberty is generally fixed at 14 in the male and 12 in the female but, according to Muhammadan Law, a girl must be presumed to have reached puberty on completing the fifteenth year of her life which the appellant did in June 1917. The plaintiff neglected her all this time and did not institute the suit till the 4th March 1919. She is at present over 20 years of age and is, therefore, quite justified in denying the plaintiff's claim to conjugal rights against her. Therefore, we accept the appeal and dismiss the plaintiff's suit. The parties to bear their own costs throughout.

Z. K. & N. H.

*Appeal allowed.***LAHORE HIGH COURT.**

CIVIL REVISION PETITION No. 410 OF 1922.

January 12, 1923.

Present:—Mr. Justice Abdul Raoof.

Muhammad BEGUM—PLAINTIFF

—PETITIONER

versus

JAFAR HASSAN—DEFENDANT

—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 7, 15—Application for leave to sue as pauper, dismissal of, for want of prosecution—Fresh application, whether barred.

The rejection of an application for leave to sue as a pauper for failure of the applicant to press it, is a bar to a subsequent application for leave to sue as a pauper in respect of the same right. [p. 898, col. 1.]

Ranchod Morar v. Bexanji Edulji, 20 B. 86; 10 Ind. Dec. (N. S.) 616, *Naraini Kaur v. Makhani Lal*, 17 A. 526; A. W. N. (1825) 105; 8 Ind. Dec. (N. S.) 636, relied on.

Petition, under section 44 of Act IX of 1919, for revision of the order of the Senior Subordinate Judge, Ludhiana, dated the 22nd February 1922.

Sheikh Umar Bakhsh, for the Petitioner.

Dr. Sir Mohammad Iqbal, Kt., for the Respondent.

JUDGMENT.—This is an application asking this Court to revise an order refusing to allow the applicant to sue as a pauper. The applicant first made an application on the 23rd of November 1920, for permission to sue as a pauper. On the 30th of November 1920 some sort of compromise was effected between the applicant and the opposite party in consequence of which the applicant did not press her application and the Court on the 1st of December made an order refusing the application on the ground that it was not pressed. On the 25th of August 1921 the applicant applied for a review of the order of refusal but the review was not granted. The present application was made on the 3rd of October 1921 in respect of the same right to sue and was rejected on the ground that in consequence of the compromise the petitioner was not entitled to sue. The question which I have to decide is whether this application is barred or not by the provisions of O. XXXIII, r. 15, Civil Procedure Code. This rule provides that "an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right."

It was contended on behalf of the applicant that r. 7, O. XXXIII, Civil Procedure Code, under which it is said the order of refusal was made contemplates an inquiry into the question of pauperism and that it is only after holding such an enquiry that the Court can make an order under that rule either allowing or refusing to allow the applicant to sue as a pauper. The argument is that as the first application was rejected without an enquiry into the pauperism of the petitioner the order of refusal cannot be said to have been made under rule 7 and that, therefore, the order of refusal made on the first application cannot be a bar to the present application. A similar question under almost similar circumstances was raised before the Bombay High Court

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in the case of *Ranchod Morar v. Bezanji Edulji* (1) and it was held "that the order rejecting the plaintiff's first application was an order under section 409 of the Code of Civil Procedure; that both the applications were made in respect of the same right to sue, and that the order rejecting the first application operated as a bar under section 413 of the Code to the entertainment of the second application." Rule 7 of O. XXXIII of the present Code makes the same provision as was contained in section 409, Civil Procedure Code, and rule 15 of the same Order is almost the same as section 413 of the old Code. In the Bombay case the Court had made an order of refusal as the petitioner had refused to go on with his application. In the present case also the petitioner had refused to press her application in consequence of the alleged compromise.

A further contention was put forward on behalf of the petitioner, that in this case there was no order of refusal but simply an order rejecting the application and, therefore, neither rule 7 nor rule 15 applied. A similar argument was put forward in the Bombay case and the learned Judges held that section 409 was the only section in the Code under which the order rejecting the application could have been made and that, therefore, it must be taken to be an order of refusal. In the case of *Naratul Kuar v. Makhan Lal* (2) the learned Judges of a Division Bench at page 528 are reported to have made the following observation:—

"It is obvious from section 413 that when an order under section 409 is made, there is a bar to any further application to sue as a pauper."

Following the two above decisions I must hold that the present application is barred. The application is rejected with costs.

Z. K.

Application rejected.

- (1) 20 B. 86; 10 Ind. Dec. (N. S.) 616.
- (2) 17 A. 526; A. W. N. (1895) 106; 8 Ind. Dec. (N. S.) 636.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 565 OF 1919.

February 5, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

Musammal DIYAN—PLAINTIFF—
APPELLANT

versus

HIRA NAND AND OTHERS—DEFENDANTS—
RESPONDENTS.

Custom—Succession—Step-mother, right of, to succeed step-son—Aroras of Montgomery District—Hindu Law—Succession—Disability—Lunatic—Person unable to manage affairs—Pleadings, construction of.

In cases where custom is alleged, a duty is imposed on the Court to endeavour to ascertain the existence and nature of that custom. [p. 900, col. 1.]

Fatima Bibi v. Gul, 127 P. R. 1893, *Kartar Singh v. Mathar Singh*, 94 P. R. 1898, *Lorendi v. Krishen Kaur*, 149 P. R. 1888 and *Daya Ram v. Sohail Singh*, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.), followed.

Prayaga Doss Jee Varu v. Venkama Naidu, 44 Ind. Cas. 641; 23 M. L. T. 1371 (1918) M. W. N. 346; 7 L. W. 477, *Raja Rup Singh v. Rani Baisni*, 7 A. 1; 11 L. A. 149; 4 Sar. P. C. J. 533; A. W. N. (1884) 246; 3 Ind. Dec. (N. S.) 902 (P. C.), *Azhimanila Veetil Kannu Pillai v. Kayinari Gopalan Nair*, 26 Ind. Cas. 3371 (1914) M. W. N. 883, *Arabar Rahaman v. Ismail Ebrahim*, 27 Ind. Cas. 373, *Ganpat v. Daulat Ram*, 68 P. R. 1904; 123 P. L. R. 1904; *Khair-ul-nisa v. Bahadur Ali*, 27 P. R. 1906; 11 P. L. R. 1906; 17 P. W. R. 1906, referred to.

The fact that a particular tribe has in many matters adopted agricultural custom, cannot by itself afford a basis for the deduction that in the said tribe a custom exists by which a step-mother succeeds to her step-son. [p. 900, col. 2.]

There is no general custom in the Punjab recognising the succession of the step-mother to a step-son. On the contrary, a step-mother's right to succeed to her step-son according to the general custom has been negatived, and it is for the person setting up such a right to satisfy the Court by the production of instances where step-mothers have succeeded that such a custom exists. [p. 900, col. 2.]

Among *Aroras* of the Montgomery District a step-mother is not entitled by custom to succeed to her step-son. [p. 901, col. 2.]

Obiter dictum:—A man may be incapable of looking after his affairs without being a lunatic within the meaning of that term for the purpose of preventing his succession under the Hindu Law. [p. 901, col. 1.]

The assumption of control by the Court of Wards of the property of a person does not imply lunacy such as would cause a disability to succeed under the Hindu Law. [p. 901, col. 1.]

Surti v. Narain Das, 12 A. 520; A. W. N. (1890) 110; 6 Ind. Dec. (N. S.) 1082, relied on.

First appeal from a decree of the Senior Subordinate Judge, Montgomery, dated the 3rd March 1919.

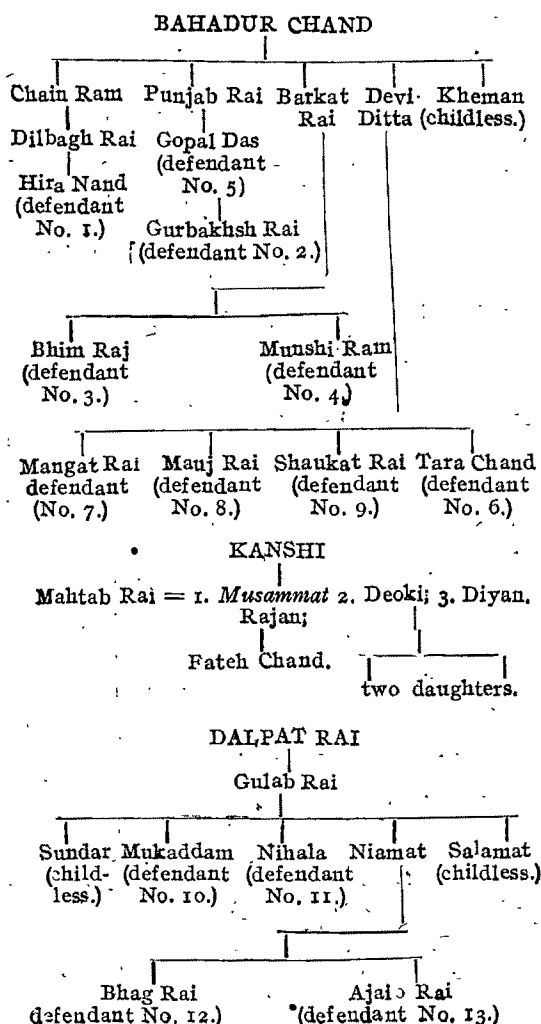
DIYAN V. HIRA NAND:

Bakhshi Tek Chand, and Lala Mehr Chand Mahajan, for the Appellant.

Pandit Shes Narain, R. B., for the Respondents.

JUDGMENT.—A preliminary point was disposed of by our order dated the 23rd January 1923, and a short adjournment granted as we were informed that there was a possibility of a compromise being effected. Negotiations have fallen through, and the appeal has been heard on the merits.

One Nibahu Ram had three sons, Bahadur Chand, Kanshi Ram and Dalpat Rai. The parties to this case are the descendants of these three sons and the following pedigree-tables will be of assistance in the case:—



The plaintiff is *Musammat Diyan*, one of the widows of Mahtab Rai, on whose death his entire estate, real and personal descended to his son Fateh Chand. This Fateh Chand was said to have been insane. In any event, he was not capable of managing his own affairs with the result that the Court of Wards took over his estate. Fateh Chand died unmarried in December 1914. On the 14th of August 1915 the suit out of which this appeal has arisen was instituted by *Musammat Diyan* for a declaration that she was entitled to possession of the property left by her deceased step-son, Fateh Chand, during her lifetime as against the said Fateh Chand's collaterals. The parties are *Aroras* owning considerable estates in several villages in the Montgomery District, and *Musammat Diyan* alleged that they were governed by *zemindara* custom under which she was entitled to succeed to her step-son.

The Trial Court found that the property was not ancestral and that the plaintiff had failed to prove any general agricultural custom which would give her the right to succeed to her step-son. He, therefore, dismissed the suit, holding at the same time that the plaintiff might have succeeded if she had alleged a special custom among *Aroras* placing the mother and the step-mother on the same footing as regards succession to a deceased son. This remark was due apparently to the fact that the Trial Court had come to the conclusion that among agriculturists as a whole a step-mother was allowed to succeed to her step-son.

Mr. Tek Chand for *Musammat Diyan* has contended that the Trial Court has placed too narrow a construction on the plaint and that on the finding arrived at by him it should have decreed the suit. He further contended that the evidence on the record amply proved that the parties to this case were governed by agricultural custom under which a step-mother can succeed to her step-son. He urged that by using the expression '*zemindara* custom' in the plaint the plaintiff meant the general custom as followed by the agriculturists in the Montgomery District and that under this custom a step-mother's right was recognised and that, therefore, there was no need to specifically mention the

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existence of a special custom as suggested by the learned Senior Subordinate Judge. It was also urged that, inasmuch as Fateh Chand was a lunatic at the time of his father's death, had the parties been governed by Hindu Law, the said Fateh Chand would not have succeeded. The fact that he did succeed, it was claimed, pointed to the parties (*Aroras*) being governed by custom. In support of the contention that the learned Senior Subordinate Judge had taken too narrow a view of the pleadings, our attention was drawn to *Prayaga Doss Jee Varu v. Venkama Naidu* (1), *Raja Rup Singh v. Rani Baisni* (2), *Azhimanilla Veetil. Kannu Pallai v. Kayinari Gopalan Nair* (3), *Arabar Rahaman v. Ismail Ebrahim* (4), *Ganpat v. Daulat Ram* (5) and *Khair-ul-nisa v. Bahadur Ali* (6). We are inclined to accept the contention that the learned Senior Subordinate Judge took too narrow a view of the pleadings and we are in general agreement with *Fatima Bibi v. Gul* (7), *Kartar Singh v. Mathar Singh* (8), *Lorendi v. Kishan Kaur* (9) and *Daya Ram v. Soheli Singh* (10), that in cases where custom is alleged, a duty is also imposed on the Court to endeavour to ascertain the existence and nature of that custom.

Mr. Tek Chand then took us through the evidence, oral and documentary, on the record. This evidence shows that in matters relating to succession *Aroras* follow agricultural custom. It was argued from this that it should be presumed that the said *Aroras* were also governed by a custom by which a step-mother was entitled to succeed to a step-son. In this respect our attention was drawn to *Harbans Lal v. Atra* (11), *Taj Muhammad v. Sayad Muhammad* (12), *Nur Muhammad v. Khuda*

(1) 44 Ind. Cas. 641; 23 M. L. T. 1371 7 L. W. 477; (1918) M. W. N. 346.

(2) 7 A. 1; 11 I. A. 149; 4 Sar. P. C. J. 533; A. W. N. (1884) 246; 3 Ind. Dec. (N. S.) 902 (P. C.).

(3) 26 Ind. Cas. 337; (1914) M. W. N. 883.

(4) 27 Ind. Cas. 373.

(5) 68 P. R. 1904; 123 P. L. R. 1904.

(6) 27 P. R. 1906; 11 P. L. R. 1906 17 P. W. R. 1906.

(7) 127 P. R. 1893.

(8) 94 P. R. 1898.

(9) 149 P. R. 1888.

(10) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.).

(11) 53 Ind. Cas. 858.

(12) 34 Ind. Cas. 126; 122 P. R. 1916; 48 P. L. R. 1917; 94 P. W. R. 1916.

Bakhsh (13) and *Ram Lal v. Gopi* (14). We are unable, however, to agree to this proposition. The fact that the tribe to which the parties belong have in many matters adopted agricultural custom is no doubt a fact to be considered in deciding whether or not the said tribe have adopted the particular custom set up by the plaintiff. That *Aroras* do follow custom in many matters cannot be denied, *vide Nathu Mula v. Bihari* (15), *Laeko Bai v. Asa Nand* (16), *Mokanda v. Balli Singh* (17), *Pilambar v. Ganesha Ram* (18), *Anant Ram v. Hukman Mal* (19) and *Budhu Ram v. Muhammad Din* (20) but in none of these cases was this particular custom with which we are now concerned under consideration.

So far as this Province is concerned, we have been unable to find any general custom recognising the succession of a step-mother to a step-son. Indeed, at page 88 of *Notes on Punjab Custom* by Ellis, it is said that the step-mother has no right ordinarily except to maintenance, and this proposition is also laid down in *Rattigan's Digest of the Customary Law*, pages 30 and 31. This proposition is also supported by *Kirpi v. Ramjas* (21), *Kanhaya Singh v. Premi* (22) and *Bishen Das v. Mansa Devi* (23). It seems to us, therefore, that, if anything, a step-mother's right to succeed to her step-son according to the general custom has been negatived and it is for the plaintiff in the present case to clearly satisfy us by the production of instances, where step-mothers have succeeded that such a custom exists.

The fact that Fateh Chand succeeded to his father cannot by itself be regarded as

(13) 34 Ind. Cas. 135; 125 P. R. 1916; 93 P. W. R. 1916; 49 P. L. R. 1916.

(14) 25 Ind. Cas. 710; 24 P. R. 1914; 58 P. W. R. 1914; 196 P. L. R. 1914.

(15) 67 P. R. 1888.

(16) 144 P. R. 1882.

(17) 85 P. R. 1884.

(18) 148 P. R. 1890.

(19) 62 P. R. 1902; 102 P. L. R. 1902.

(20) 32 Ind. Cas. 315; 86 P. R. 1915; 196 P. L. R. 1915; 165 P. W. R. 1915.

(21) 153 P. R. 1889.

(22) 20 Ind. Cas. 876; 322 P. L. R. 1913; 166 P. W. R. 1913.

(23) 23 Ind. Cas. 536; 47 P. R. 1914; 60 P. L. R. 1914; 176 P. W. R. 1914.

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sufficient proof of the family being governed by custom. It is true that in the plaint it was alleged that Fateh Chand was a lunatic at the time of his father's death, but this fact was denied in the pleadings and there is no real evidence to support the assertion. A man may be incapable of looking after his affairs without necessarily being a lunatic within the meaning of that term for the purposes of preventing his succession under the Hindu Law. It was held in *Surti v. Narain Das* (24), that the assumption of control by the Court of Wards of the property of a person did not imply lunacy such as would cause a disability to succeed. A reference to the *riwaj-i-am* of this district shows that the question of a step-mother's right to succeed to her step-son was never considered although various other matters were brought forward, namely, questions relating to adoption, *khana damadi* and widow re-marriage. On general rules we are, therefore, unable to hold that the custom set up can be deduced. It was, however, contended that the said custom had been proved by the instances on the record and this view has undoubtedly been taken by the learned Senior Subordinate Judge in deciding issue No. 4. An examination of those instances, however, does not seem to us to warrant the conclusion arrived at by the Court below.

The first, Exhibit P.-14, relates to the succession to one Budhu a minor, who was succeeded by his father's two widows. This was a case amongst Brahmans and there was nothing whatever to show the existence of any other possible heirs. The mutations show that the two widows were living in the same house and clearly they were both entitled to maintenance at least.

Exhibit P.-24 refers to the same property as also does P. 25, which mutation shows that on the death of Budhu's mother his step-mother took the property. We cannot regard this instance as of any value.

Exhibit P.-17 relates to the succession to an occupancy tenancy, the last occupancy tenant being Dharam Chand, an *Arora*. He died without issue and without leaving a widow. His mother and step-mother

were treated as heirs and the mutation was attested by Dharam Chand's paternal uncle. The area was not large. We cannot regard this instance as of any great value to prove the custom set up.

In Exhibit P.-29, Tara Singh and his step-mother succeeded jointly to the property of Tara Singh's father Rattan Singh, an *Arora*. This is not a case of succession by a step-mother to a step-son and cannot establish the custom set up.

Exhibit P.-26 is on the same footing as P.-29, and affords no assistance.

Exhibit P.-27 relates to *Khahis* and was not a succession to a step-son.

After a careful consideration of this evidence we are unable to hold that the custom set up by the plaintiff in this case has been proved. The fact that the tribe to which the parties belong are in many respects governed by custom cannot by itself afford a basis for the deduction that in the said tribe a custom exists by which a step-mother succeeds to her step-son.

Arguments were addressed by the learned Counsel as to whether the defendants-respondents with the plaintiff formed a compact village community. It is not necessary for us to discuss this question and we would only note that the history of the villages in which this family holds property appears to show that the said villages are owned almost entirely by this family.

It is clear that under Hindu Law *Musammat* Diyan would not succeed to her step-son Fateh Chand. The *riwaj-i-am* affords her no assistance, inasmuch as it is silent as to this question and the evidence on the record does not, in our opinion, prove the custom set up. We accordingly dismiss this appeal with costs.

A. K.

Appeal dismissed.

(24) 12 A. 530; A. W. N. (1890) 110; 6 Ind. Dec. (N. S.) 1082.

FATEH DIN V. KISHEN LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 260 OF 1922.

March 28, 1923.

Present:—Mr. Justice Lindsay and
Mr. Justice Daniels.

FATEH DIN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

KISHEN LAL.—PLAINTIFF—RESPONDENT.

*Transfer of Property Act (IV of 1882), s.
68—Mortgage security—Diminution in value.*

A mortgage security will be considered diminished in value within the meaning of section 68 of the Transfer of Property Act, if its letting value has decreased, even though the property itself has undergone no change.

Where a person who mortgaged his *shr* plots with possession stipulated to pay Rs. 76 as interest on the mortgage-money and executed a simultaneous *kahuli* to rent the plots from the mortgagee at the amount but, at the time of the fixation of rent by the Revenue Court as ex-proprietory tenant, objected to the amount, and the Rent Court fixed the rent at Rs. 27:

Held, that the value of the security had diminished within the meaning of section 68 of the Transfer of Property Act and the mortgagee could sue for the mortgage money.

Second appeal against the decree of the District Judge, Agra, dated the 23rd November 1921.

Mr. N. P. Asthana, for the Appellants.
Mr. Panna Lal, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which a usufructuary mortgagee sued for his mortgage-money on the ground of not having obtained possession of the full property mortgaged to him. Two points were in issue and have been found by the Court below. In the first place, at the time of the mortgage it was stipulated that the mortgagors should pay Rs. 76 a year as interest on the mortgage-money. The mortgagors executed a simultaneous *kahuli* which was really part of the same transaction, agreeing to rent the plots from the mortgagee at a rent of Rs. 76. At the time of fixing rent by the Revenue Court they objected that Rs. 76 was in excess of the rent which they were liable to pay as ex-proprietary tenants—the plot mortgaged was *shr* plot—and rent was fixed at Rs. 27-4-7. The learned District Judge has held in favour of the defendants-appellants on this point on the ground that the value of the security was

not diminished within the meaning of section 68 by this transaction. We are unable to agree with the learned District Judge on this point. The value of a property depends to a large extent upon the income which is obtainable from it and property yielding an income of Rs. 27 a year is obviously of much lesser value than property yielding an income of Rs. 76 a year.

The second point urged by the plaintiff was that certain plots had been inserted in the mortgage-deed which did not belong to the mortgagors and of which the plaintiff was, therefore, unable to obtain possession. The lower Appellate Court finds this to have been the fact, and under section 68 (c) of the Transfer of Property Act has given the plaintiff a decree for the mortgage-money. It is contended in this Court that section 68 (c) is not applicable on the ground that it is not proved that the mortgagors deliberately inserted these plots in the deed knowing that they had no title to them. This circumstance is, however, immaterial. Under section 65 of the Transfer of Property Act the mortgagor is deemed to contract that he has the interest which he professes to have in the mortgaged property, and, further, under section 68 (c) of the Act, whenever the mortgagor fails to deliver possession of the property to the usufructuary mortgagee the latter is entitled to sue for his mortgage money. On both issues, therefore, we find in favour of the plaintiff. We accordingly uphold the decree of the Court below and dismiss the appeal with costs including in this Court fees on the higher scale.

M. A. A. & N. H.

Appeal dismissed.

GANWA v. JOTI PRASAD.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 67 of 1922.

November 24, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Fforde.

GANWA AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

JOTI PRASAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I Art. 10—
Pre-emption, suit for—Property in possession of
tenants—Physical possession—Limitation.*

Whether the subject of a sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards became susceptible of physical possession.

Property which is in the possession of a tenant does not admit of physical possession within the meaning of Art. 10 of Sch. I to the Limitation Act.

Letters Patent Appeal from the decree dated 7th February 1922 passed by Mr. Justice LeRossignol in Civil Appeal No. 1930 of 1921 and published as 69 Ind. Cas. 418 reversing that of the District Judge, Ambala, dated the 6th July 1921.

Lala Mehr Chand Mahajan, for the Appellants.

Mr. Devi Dial, for the Respondents.

JUDGMENT.—This appeal arises out of an action for the pre-emption of a plot of agricultural land, and the sole question for determination is whether the claim was barred by limitation. Now the undisputed facts are as follows:—

The sale was effected on the 11th February 1918, but the property sold was at that time in possession of tenants who were not evicted until June 1918. It appears that a sale-deed was subsequently executed and registered in September 1918.

It is beyond dispute that Art. 10 of the First Schedule to the Indian Limitation Act of 1908 governs the action, but the matter in controversy is whether the first part of the third column of that Article or the second part applies to the claim. Now, it has been repeatedly held both by this Court as well as by the Allahabad High Court that property, which is in the possession of a tenant does not admit of physical possession within the meaning of that Article. This principle is firmly established, and it is now too late to question its correctness.

Whether the subject of the sale does or

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does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards became susceptible of physical possession. The date of the sale is the crucial date for deciding whether the first part of the Article governs the action, and it is common ground that on that date the property in question was in the possession of tenants. We must, therefore, hold that the subject-matter of the sale did not admit of physical possession and that the second part of the Article prescribes the rule of limitation applicable to this case.

The sale-deed was registered in September 1918 and the action, which was brought within one year from that date, was not barred by the law of limitation. We accordingly accept the appeal and, reversing the judgment appealed against, we restore the order of the District Judge, remanding the case for re-decision. The vendees must pay the costs incurred by the plaintiff in this Court as well as in the Court of the learned Judge in Chambers.

Z. K.

MADRAS HIGH COURT.

CIVIL SUIT No. 661 of 1920.

March 16, 1922.

Present:—Mr. Justice Kumaraswami Sastri.
ABDUL WAHAB SAHIB—PLAINTIFF—

APPELLANT

versus

M. ROKIA BIBI SAHIRA AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 2 (2),
O. XXVI, rr. 11, 12—Letters Patent (Mad.)
cl. 15—Partnership suit—Dispute as to terms
of partnership—Reference by Judge of whole
suit to Official Referee, validity of—Order, whether
appealable—Order, whether can be questioned in
same proceeding—Consent of parties, effect of—
Functions of Court and Commissioner.*

In a suit on the Original Side of the High Court for dissolution of an alleged partnership and accounts, the defendants disputed the terms of partnership. When the suit came on for trial, the Judge referred the whole suit to the Official Referee to determine what share the plaintiff

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had in the business and then to take a full account of the partnership. The Official Referee without taking accounts submitted a report as to the terms of the partnership, its duration and shares of parties. The consideration of the report came up again before another Judge. On objections being taken to the report :

Held, (1) that the order of the Judge referring the whole suit to the Official Referee was neither a "decree" within the meaning of section 2 (2) of the Code of Civil Procedure, nor a "judgment" within the meaning of clause 15 of the Letters Patent and was, therefore, not appealable ;

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. L. J. (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1 (F.B.), followed.

(2) that the Official Referee had no power to decide questions as to terms of partnership, its duration or the shares of partners and the adjudication by him of these questions was *ultra vires* and the order of reference by the Judge could not confer jurisdiction on the referee to decide them. [p. 906, col. 1.]

(3) that, however, neither the order of reference nor the report of the Official Referee could be treated as mere nullities and in the same suit and the same proceedings it was not open to the parties to get behind the said order until it were reversed or modified in appeal or review.

Leardard v. Bull, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.). *Mtnakshi Naidu v. Subramanya*, 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.). *Rajlakshmi Dasi v. Katayanes Dasee*, 12 Ind. Cas. 464; 38 C. 639, *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan*, 6 M. I. A. 134; 19 B. R. 50, *Raja Har Narain Singh v. Chaudhrain Bhagwan Kuar*, 13 A. 300; 18 I. A. 551; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283; 7 Ind. Dec. (N. S.) 189 (P. C.), distinguished.

George Henry Hook v. Administrator-General of Bengal, 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 48 I. A. 147; 25 C. W. N. 915; 14 L. W. 221 (P. C.). *Munugl Pershad Ditch v. Grijia Kant Lakshmi*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.). *Sukhnath Rai v. Nehal Chand*, 59 Ind. Cas. 801; 42 A. 661; 18 A. L. J. 644; 2 U. P. L. R. (A.) 240, *Gomathan Alamelu v. Komandur Krishnamachari*, 27 M. 118, *Tuljaram Row v. Gopala Aiyar*, 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. T. 229; 32 M. L. J. 434, *Sashikanta Acharyya v. Raja Sarat Chandre Rat Chaudhuri*, 70 Ind. Cas. 6; 34 C. L. J. 415, *Krishna Behari Roy v. Bunwari Lal Roy*, 2 I. A. 283; 1 C. 144; 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth P. C. J. 213; 1 Ind. Dec. (N. S.) 93 (P. C.). *Bent Ram v. Nanku Mal*, 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138 (P. C.). *Rajeswara Sethupati Avergal [Raja of Ramnad] v. Velusami Tevar*, 59 Ind. Cas. 880; 25 C. W. N. 581; 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 23 Bom. L. R. 701, *Ex parte Manohar Bhivrao*, 2 B. H. C. R. 374, and *Sadastva Pillai v. Ramaling Pillai*, 15 B. L. R. 383; 24 W. R. 193, relied on,

There is a sharp division between the functions of a Judge disposing of a suit and of a Commissioner like an Official Referee who is merely to aid the Judge in taking accounts rendered necessary for the passing of a final decree. The function of the Court is to determine the substantive rights of parties where they are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts having regard to the declaration of the rights of parties made by the Judge in passing the preliminary decree. His powers to deal with the question are not limited simply to matters of arithmetic but he has, for the purpose of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters ancillary thereto. [p. 907, cols. 1 & 2.]

The powers of an Official Referee in Madras, limited as they are, must be sought for in the Civil Procedure Code and the Original Side Rules, and, in partnership suits, he is only a permanent Commissioner whose duty it is to take accounts and make enquiries contemplated by the Code and the Rules.

A distinction has to be drawn between cases where a Court having no jurisdiction to try the suit and cases where a Court having jurisdiction, passes an order which it is incompetent to pass. [p. 908, col. 2.]

An order without jurisdiction passed in a suit which the Court has jurisdiction to entertain and try cannot be treated as a nullity by the same Court in subsequent proceedings.

When a Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But, when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit. [p. 908, col. 1.]

The Rules of Practice and Procedure of the English Courts do not form part of the substantive rules on the Original Side of the Madras High Court.

Mr. C. P. Ramaswami Iyer, Advocate General, for the Appellant.

Mr. T. Ethiraja Mudaltar, for the Respondents.

JUDGMENT.—This matter arises out of a report submitted by the Official Referee in pursuance of an order dated the 5th of April 1921. The suit was filed by the plaintiff for a dissolution of partnership and for the taking of the partnership accounts, the case for the plaintiff being that he and his father, the deceased Hajee Abdul Ghani Sahib, were trading in partnership

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from the 1st of September 1915 on the terms mentioned in the plaint. The defendants are sued as the legal representatives of the deceased Hajee Abdul Ghani Sahib. Defendants Nos. 1 and 3 filed written statements denying that the partnership was carried on on the terms mentioned in the plaint and alleged that the plaintiff worked in the business only up to the end of October 1917 and that he had overdrawn his share of the profits. The 2nd defendant filed a written statement putting the plaintiff to the proof of his claim. The 4th defendant is the plaintiff himself and is on record as one of the legal representatives of his father.

The following issues were settled:—

(1) What were the terms of the partnership between the plaintiff and the deceased Hajee Abdul Ghani Sahib?

(2) What was the duration of the said partnership?

(3) Are the sums referred to in paragraphs 9 and 10 of the plaint assets of the partnership?

(4) What are the shares of the parties as heirs in the estate of the deceased Hajee Abdul Ghani Sahib?

(5) To what relief are the parties entitled?

When the suit came for trial, Coutts-Trotter, J., without determining any of the matters in controversy in the suit passed the following order on the 8th of April 1921:—"The whole case is referred to the Official Referee to determine what share the plaintiff had in the business carried on by the deceased Hajee Abdul Ghani Sahib and having determined that, to take a full account as in an ordinary partnership action and report to this Court." The 1st defendant states that this order was passed by consent of all parties, but this is not admitted by the plaintiff nor does the order purport to have been passed by consent. In pursuance of this order what is called an *interim* decree was drawn up by the office.

Objections have been filed to the Official Referee's report by the plaintiff. The Official Referee in the report submitted has not taken an account but has confined his report to the determination of Issues Nos. 1, 2 and 4, *viz.*, as to the terms of the partnership, its duration and the shares of the parties. The objection taken by the plaintiff

is, that the Official Referee had no jurisdiction to go into these questions; that the order referring the whole suit to him by Coutts-Trotter, J., was without jurisdiction and is *ultra vires*, and that, even if the Official Referee had power to go into these questions, his decision is wrong on the merits. It is contended for the defendants (1) that the Official Referee has power to go into the matter; (2) that, even if he has no power, the order of Coutts-Trotter, J., referring the whole suit to him cannot be questioned in this suit so long as it remains in force and has not been set aside either by review or by way of appeal, and (3) that section 97 of the Civil Procedure Code prevents the correctness of a preliminary decree not appealed against from being disputed in appeal from any final decree that may be passed and so a *scintilla* bars any objection to proceedings in the suit necessary for the obtaining of the final decree.

As regards the objection founded on section 97 of the Civil Procedure Code, the order is not an *interim* decree or even a judgment within the meaning of the Letters Patent. Rule 15 of O. XX of the Civil Procedure Code provides that where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit. Section 2, sub-clause (2), of the Civil Procedure Code, defines decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and the explanation states that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. In order, therefore, for an order to be a preliminary decree the Court should dispose of finally some

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at least of the matters in controversy. In the present case there is nothing disposed of. All that the learned Judge states is, that the whole work is to be done by the Official Referee, no rights of the parties having been adjudicated upon. Nor is the order of the 8th of April a judgment within the meaning of clause 15 of the Letters Patent, as there is no adjudication on any matter. I need only refer to *Tuljaram Row v. Alagappa Chettiar* (1), where the definition of judgment is fully discussed by a Full Bench of this Court. Sir Arnold White, C. J., observes as follows:—"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

As regards the powers of the Official Referee to go into the questions. I am of opinion that he has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. So far as the Official Referee is concerned, there are no provisions in the Civil Procedure Code or in the Original Side Rules analogous to O. XXXVI of the Rules of the Supreme Court which deals with Referees and O. LV, which deals with the powers and duties of Masters, and, therefore, it is not necessary to consider the procedure in English Courts or the English decision based on those rules in arriving at a conclusion as to the powers of the Official Referee of this Court. There is no Statute constituting the office of the Official Referee, and his powers have, therefore, to be determined with reference to the provisions

of the Civil Procedure Code and the Original Side Rules. So far as the Code is concerned, section 75 enacts that, subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to examine any person to make a local investigation; to examine or adjust accounts; or to make a partition. O. XXVI refers to Commissions issued in pursuance of the powers conferred by section 75, and rules 11 and 12 refer to Commissions to examine or to adjust accounts. Rule 11 enacts that in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a Commission to such person as it thinks fit directing him to make such examination or adjustment, and rule 12 enacts that the Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings, which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination. Clause (2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further enquiry as it shall think fit. Rules 15 to 18 contain general provisions as to the expenses of the Commission, the powers of the Commissioner to examine parties, witnesses and documents and the appearance of the parties before the Commissioner. Prior to the appointment of the Official Referee in the year 1914 the practice of the Court was to appoint Commissioners *ad hoc*, whenever accounts had to be gone into in partnership, partition and administration actions. The practice was usually for a Vakil to be appointed who submitted his report, and the matter was disposed of by the Judge in Chambers in the Reference Court. This procedure having been found to be dilatory and inconvenient, it was thought desirable that there should be an officer of Court to do what was usually done by the Commissioner appointed and an Official Referee was appointed; but the rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners. Order XXIII of the Original Side Rules

(1) 8 Ind. Cas. 340; 35 M. L. J. (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1. (F. B.)

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refers to the procedure in cases of reference to a Judge in Chambers and the provisions of that Order relate to cases where the Judge takes the accounts himself. O. XXIV relates to reference to Commissioner or arbitrator. O. XXIV-A refers to proceedings before the Official Referee and rule 1 provides that, subject to the rules hereinafter contained, O. XXIV of the Original Side relating to accounts and enquiries referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee. O. XXIV-A while it prescribes the procedure to be followed by the Official Referee does not give him the powers which are conferred by the English Supreme Courts Rules on the Official Referee or Master. Rule 4 of O. XXIV-A has been referred to but it does not confer on the Referee all the powers of a Judge or constitute him a Judge of the Court. All that it states is that in matters within his competence he shall conduct the enquiry in the same manner as a Judge in Chambers hearing references. It seems to me that the Official Referee's powers, limited as they are, must be sought for in the Civil Procedure Code and the Original Side Rules and that, having regard to the provisions referred to by me above, the Official Referee is in partnership suits only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and the Rules. There has to be a sharp division between the function of a Judge disposing of a suit and a Commissioner who is to aid the Judge in taking accounts rendered necessary for the passing of a final decree. I think that the function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has, for the purposes of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at con-

clusions as to the state of accounts between the parties, power to take evidence and deal with matters auxiliary thereto. He is not a Judge of the Court but only a Commissioner and I think that the adjudication by him of these questions which, under the Code and the Rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights of the parties are solely within the province of a Judge and matters of detail, *i. e.*, the working out of those rights either by taking out accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee. While it is conceded by Mr. Ethiraja Mudaliar for the defendants that there is nothing in the Code or in the Rules which gives the Official Referee powers to dispose of questions in dispute as to the substantive rights of the parties his contention is that in the absence of any provisions in the Code or in the Rules, the English Rules of Practice should apply, but no authority is cited for the proposition that the Rules of Procedure of the English Courts form part of the substantive rules on the Original Side. It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side except in so far as our own rules modify them.

The question, however, remains as to how far I have power in these proceedings to treat the order of Coutts-Trotter, J., and the report of the Official Referee as mere nullities. It is contended by the Advocate-General for the plaintiff that, if Coutts-Trotter, J., had no jurisdiction to pass the order referring the whole suit to the Official Referee, no consent of parties, even if it was given at the time of the passing of the order, would affect the question, and that the proceedings before the Official Referee would be a nullity thereby leaving the whole matter in the same position as it was when the order was passed and

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reference is made by him to *Ledgard v. Bull* (2); *Minakshi Naidu v. Subramanya* (3); *Rajlakshmi Dasi v. Katayane Dasee* (4); *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan* (5) and *Raja Har Narain Singh v. Chaudhrain Bhagwant Kwar* (6). There can be little doubt that, so far as the authorities go, want of jurisdiction in a Judge to try a suit renders the proceedings void and that no amount of consent could confer jurisdiction where no jurisdiction exists. The principle has thus been laid down by their Lordships of the Privy Council in *Ledgard v. Bull* (2): "When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit." The authorities cited, however, refer to objection being taken either in appeal from the decision or in subsequent suits or proceedings. The cases cited by the Advocate-General do not touch the question as to how far in the same suit and in the same proceedings, it is open to the parties to get behind an order passed, however incorrect that order may be. No authority has been cited in favour of the contention of the Advocate-General that I ought to go behind the order of Coutts-Trotter, J., and the authorities I shall refer to are against the contention. In *George Henry Hook v. Administrator-General of Bengal* (7), their

(2) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.).

(3) 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 34; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(4) 12 Ind. Cas. 464; 38 C. 639.

(5) 6 M. L. A. 134; 19 B. R. 50.

(6) 13 A. 300; 18 I. A. 53; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283; 7 Ind. Dec. (N. S.) 189 (P. C.).

(7) 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 48 I. A. 147; 25 C. W. N. 915; 14 L. W. 221 (P. C.).

Lordships of the Privy Council held, that the principle of *res judicata* is applicable to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit. The order of Coutts-Trotter, J., standing as it does unreversed or unmodified either by appeal or review, must, I think, be taken to bind the parties in subsequent proceedings in the suit, and that the only remedy of the plaintiff is to carry the order in appeal. I have already pointed out that in the present case no appeal lies at present, but under the Code an order passed which is not subject to appeal can be objected to after the passing of the final decree which under the Code can be appealed against. I think also, that a distinction has to be drawn between cases where the Court has no jurisdiction to try the suit and cases where the Court having jurisdiction passes an order which it is incompetent to pass. It cannot be disputed that in the present case Coutts-Trotter, J., had jurisdiction to try the suit though, in the view I take, he had no jurisdiction to refer the whole suit to the Official Referee for disposal. In *Mungul Pershad Dickit v. Grija Kant Lahiri* (8) it was held by their Lordships of the Privy Council that where a Court having jurisdiction to try an issue has given an erroneous decision, such decision must, if unreversed, be treated as valid. I may also refer to *Sukhnath Rai v. Nehal Chand* (9). It has been held that where a decree is passed by a Court not having jurisdiction and the decree is not appealed against objection cannot be taken in execution proceedings which forms a continuation of the suit. In *Gomatham Alamelu v. Komandur Krishnamacharlu* (10) a suit on a mortgage was instituted in a District Munsif's Court, which was competent to try a suit of its nature and value, but the mortgaged lands were situate outside the jurisdiction of the District Munsif, who would, therefore, have had no jurisdiction, if objection was taken, to pass a mortgage-decree affecting

(8) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(9) 59 Ind. Cas. 801; 42 A. 661; 18 A. L. J. 644; 2 U. P. L. R. (A.) 240.

(10) 27 M. 118.

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the lands. Such a decree was passed and when the decree-holder applied for an order absolute and for execution of the decree objection was taken that the Court had no jurisdiction to entertain the suit and that the decree passed by it could neither be made absolute or be executed. It was held that the decree was not a nullity and that the judgment-debtor should not be allowed to object to the validity of the decree in the course of its execution. In *Tuljaram Raw v. Gopala Aiyar* (11) it was held that erroneous orders should be vacated by proper proceedings and should not be made the subject of collateral attack by the parties. In *Sashikanta Acharyya v. Raja Sarat Chandra Rai Chaudhuri* (12) it was held that the validity of an order at one stage of a litigation, unless forthwith challenged by appropriate proceedings in a Superior Tribunal, must be regarded as conclusive between the parties and cannot be questioned or collaterally attacked at a later stage, and reference was made to *Krishana Behari Roy v. Bunwari Lal Roy* (13), *Mungul Pershad Dikhit v. Gria Kant Lahiri* (8), *Ram Kirpal v. Rup Kuari* (14), *Beni Ram v. Nanhu Mal* (15), *George Henry Hook v. Administrator-General of Bengal* (7) and *Rajeshwara Sethupati Avergal [Raja of Ramnad] v. Velusami Tavar* (16). I may also refer to *Ex parte, Manohar Bhivray* (17) and *Sadasiva Pillai v. Ramalinga Pillai* (18).

It is argued by the Advocate-General that a distinction should be drawn between processual irregularities and fundamental defects of jurisdiction, but it seems to me that the decisions, I have referred to above do not support the view that an order

(11) 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. T. 229; 32 M. L. J. 434.

(12) 70 Ind. Cas. 6134 C. L. J. 415.

(13) 2 I. A. 283; 1 C. 144; 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93 (P. C.).

(14) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718; (P. C.).

(15) 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138 (P. C.).

(16) 59 Ind. Cas. 880; 25 C. W. N. 581; 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 23 Bom. L. R. 701 (P. C.).

(17) 2 B. H. C. R. 374.

(18) 15 B. L. R. 383; 24 W. R. 193.

without jurisdiction passed in a suit which the Court had jurisdiction to entertain and try can be treated as a nullity by the same Court in subsequent proceedings.

In the view I take of the case, I think that, so far as the proceedings on the Original Side are concerned, I must treat the order passed by Coutts-Trotter, J., as valid. The reference will proceed on that footing. The objections to the Official Referee's report will be considered on the merits.

V. N. V. & N. H.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 241 OF 1921.

July 21, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Abdul Qadir.

KANSHI RAM AND ANOTHER—
DEFENDANTS—APPELLANTS

VERSUS

SHARAF DIN AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 53, 56—*Temporary Injunction—Injunction, whether limited to subordinate Courts—Civil Procedure Code* (Act V of 1908), s. 151, O. XXXIX, rr. 1, 2—*Temporary Injunction, grant of—Inherent jurisdiction.*

Section 56 of the *Specific Relief Act*, which occurs in the Chapter relating to perpetual injunctions, has no application to temporary injunctions which are by the express words of section 53 left to be regulated by the Code of Civil Procedure.

A Court can issue a temporary injunction staying proceedings in a Court not subordinate to it.

The Code of Civil Procedure is not exhaustive and the Courts have inherent jurisdiction to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone they exist.

Manohar Lal-Mahabir Pershad v. Jai Navain-Babu Lal, 55 Ind. Cas. 403; 2 L. L. J. 283, relied on.

A Court can issue a temporary injunction staying execution of a decree in a proper case even though no ground, such as is mentioned in O XXXIX, r. 1 or r. 2, of the *Civil Procedure Code*, has been alleged or proved.

LAKHMI DAS V. MEHR CHAND.

Letters Patent Appeal from a decree of Mr. Justice Broadway, in Miscellaneous Appeal No. 1214 of 1921, dated the 10th November 1921 and published as 66 Ind. Cas. 161.

Lala Hukam Chand, for the Appellants.

Mr. Des Raj Sawhney, for the Respondents.

JUDGMENT.—The circumstances which have given rise to this appeal are briefly as follows:—

On the 14th August 1919 the appellants, Kanshi Ram-Ram Das, obtained a decree for possession of a house by the ejectment of one Nur Din, and in execution of that decree the respondent, Sharaf Din, raised objections which were rejected by the Executing Court. The objector has now instituted a suit for a declaration that he is not liable to be evicted from the house and has also obtained an injunction prohibiting the execution of the decree pending the decision of the suit. The order of the Subordinate Judge granting the injunction has been upheld by Mr. Justice Broadway, and the main question in this appeal under clause 10 of the Letters Patent is whether the Subordinate Judge was authorised by law to grant the temporary injunction.

The learned Vakil for the appellants contends that as the Munsif who was executing the decree was not subordinate to the Subordinate Judge, the latter could not issue an injunction staying proceedings in the Munsif's Court. This contention is based upon clause (b) of section 56 of the Specific Relief Act, but it is clear that section 56 which occurs in the Chapter relating to perpetual injunctions, has no application to temporary injunctions which are, by the express words of section 53, left to be regulated by the Code of Civil Procedure. If any authority on the subject were needed, we would refer to *Amir Dulhyn v. Administrator-General of Bengal* (1).

The only other question requiring determination is whether the Subordinate Judge could issue a temporary injunction staying the execution of a decree, when no ground, such as is mentioned in O. XXXIX, r. 1 or r. 2, had been alleged or proved. Now

there can be no doubt that this case is not covered by the provisions of O. XXXIX, but it has been held in a Division Bench judgment of this Court reported as *Manohar Lal-Mahabir Pershad v. Jal Narain-Babu Lal* (2) (Letters Patent Appeal No. 17 of 1920) that the Code of Civil Procedure is not exhaustive, and that the Court has inherent jurisdiction to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which alone it exists. The same view has been taken by the Punjab Chief Court in *Manohar Lal-Mahabir Pershad v. Jal Narain-Babu Lal* (2).

We are not, therefore, prepared to hold that the Subordinate Judge had no jurisdiction to grant the temporary injunction. On the merits, no ground for our interference with the judgment of the learned Judge has been established. The appeal is therefore, dismissed with costs.

N. H.

Appeal dismissed.

(2) 55 Ind. Cas. 403; 2 L. L. J. 283.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 100 OF 1921.

June 21, 1922.

Present:—Mr. Justice Scott-Smith.

LAKHMI DAS AND OTHERS—

PLAINTIFFS—APPELLANTS.

versus

MEHR CHAND AND OTHERS—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appellant having good case on merits—Admission of appeal after limitation.

The fact that an appellant has a good case on the merits, is not a good ground for the exercise of the Court's discretion under section 5 of the Limitation Act for the admission of the appeal after expiry of limitation.

Appeal from a decree of the District Judge, Jullundur, dated the 19th August 1920.

Diwan Mehr Chand, for the Appellants.
Mr. Fakir Chand, for the Respondents.

(1) 23 C. 351; 12 Ind. Dec. (N. S.) 235.

MUHAMMAD UMAR v. FAYAZ UD-DIN.

JUDGMENT.—A preliminary objection is raised by Counsel for the respondents that this appeal is barred by time. The order appealed from is dated 19th August 1920 and the appeal was filed in this Court on the 20th November 1920, but was returned on the 30th November 1920 by the office because a copy of the First Court's judgment had not been filed with the memorandum of appeal. It was re-filed along with a copy of the First Court's judgment on the 10th December 1920. At that time the appeal was admittedly time-barred. *Molu Mal v. Sri Ram* (1) is an authority in support of the contention that the memorandum of appeal in second appeal to the High Court must be accompanied by a copy of the First Court's judgment and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by time. The same view was taken in Civil Appeal No. 2583 of 1920 which was reported as *Dyala v. Hiru* (2). Dewan Mehr Chand on behalf of the appellant admits that the appeal is barred by time but urges that it be admitted to hearing under section 5 of the Limitation Act. The only thing that he could urge is that on the merits his client has got a good case. This may or may not be so, but it does not appear to me to be a good ground for the exercise of this Court's discretion under section 5. A valuable right has accrued to the defendants by reason of the appeal having become barred by time and, therefore, I think that the appeal should not be admitted to hearing unless sufficient cause is shown. None has been shown and I, therefore, dismiss the appeal but I leave the parties to bear their own costs in this Court.

W. C. A.

Appeal dismissed.

(1) 63 Ind. Cas. 331 2 L. 227; 3 U. P. L. R. (L.) 92.

(2) 67 Ind. Cas. 670; 3 L. L. J. 255.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 234 OF 1918.

January 20, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

MUHAMMAD UMAR AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

FAYAZ-UD-DIN AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 16 (secondly)—“Structure”, meaning of.

The owner of a “building or other structure” on a site, within the meaning of section 16 (secondly) of the Punjab Pre-emption Act, is like a co-owner in the property sold and, therefore, his right of pre-emption is inferior only to a co-sharer therein.

The word “building” or “structure” is not defined in the Punjab Pre-emption Act, but, for the purposes of section 16 (secondly) of the Act, the word structure can be applied to a wall or a shed or any other unsubstantial erection, for which the word “building” cannot be used. Therefore, not only the owner of a building on a site, but also of an erection of a less substantial kind has a right of pre-emption in respect of it.

Second appeal from the decree of the District Judge, Delhi, dated the 21st August 1917, affirming that of the Subordinate Judge, Second Class at Delhi, dated the 29th May 1917.

Lals Durga Das and Sardha Ram, for the Appellants.

Lals Jagan Nath and Hargopal, for Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—The only question for us to decide in this second appeal, which arises out of a pre-emption suit, is, whether the Courts below have rightly interpreted clause “secondly” of section 16 of the Punjab Pre-emption Act (I of 1913) in holding that the sheds, etc., existing on the site pre-empted, which had been erected by the defendant vendee before the sale when he held the land on a lease, were structures within the purview of the said clause “secondly.”

The site in question is situated on the margin of a public road in Delhi and is about 210 square yards in area. The defendant originally obtained from the owner a lease of it for three years and 11 months from the 31st January 1913 to the end of December 1916 to start a work-

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shop there, and for that purpose he constructed therein three extensive sheds supported on wooden poles with roofs of iron sheets. As the level of the site was much higher than that of the road he constructed a stone wall along side the road up to the height of its level. Further, he constructed a latrine and a *katcha* wall with a door in it to serve as an entrance. The learned District Judge inspected the place and says in his judgment:—"I have inspected these erections and I have not the least hesitation in concurring with the lower Court and holding that they were erected before the sale and that they amount to "other structures" within the meaning of section 16, "secondly," Pre-emption Act.* * * The structures, although not of a very massive nature are by no means of a temporary kind. The place is being used as a *kar-khana* and the wooden pillars are well driven into the earth, and the roofing is sufficient to protect workers from the inclemencies of the weather." These structures were valued by an Overseer at Rs. 594-10-0.

It was argued on behalf of the plaintiff-appellant that the clause "secondly," did not contemplate temporary structures of this kind; that the word "structure" signified a building or edifice of large dimensions; that the defendant was entitled to only the materials of the structures because he had to remove the same on the expiration of the term of his lease and could not be said to be the owner of a structure or building; that the building or structure according to clause "secondly" shall cover the whole of the site while the structures in the present case do not do so, and that the place in the order of priority given to this class of pre-emptors indicates that his rights should be of a very superior nature. We are of opinion that these contentions are quite untenable. What the law contemplates is, that the owner of the 'building or other structures' on a site is like a co-owner in the property sold, and, therefore, his right of pre-emption is inferior only to a co-sharer therein. The word "building" or "structure" is not defined in the Act but it may be stated that every building is a structure though every structure is not a building and the word "structure" can be applied to a wall or a shed or any other unsubstantial

erection for which the word 'building' cannot be used. Therefore, not only the owner of a building on a site but also of an erection of less substantial kind, has a right of pre-emption in respect of it. It is true that on the expiration of the lease the defendant lessee was liable to remove the structures, but it does not follow from this that at the time of the sale he was not the owner thereof. Further, the structures practically cover the whole of the site leaving a space in the centre to be used as a courtyard. Therefore, it cannot be said that they do not cover the whole of the site.

We are, therefore, of opinion, that the clause "secondly" was rightly interpreted by the Courts below and we dismiss the appeal with costs.

S. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL, APPEAL, NO. 794 OF 1917.

November 10, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.
GANGARAM BALKRISHN SAWANT—
PLAINTIFF—APPELLANT

versus

VASUDEO DATTATRAYA KIRLOSKAR
AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11
—*Partition suit—Res judicata between co-defendants.*

Where an adjudication between the co-defendants is necessary to give the appropriate relief to plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be conflict of interest between the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. [p. 914, col. 1.]

Ramchandra Narayan v. Narayan Mahadev, 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142, followed.

GANGARAM BALKRISNA V. VASUDEO DATTATRAYA.

Ramchandra v. Abaji, (1886) P. J. 15, explained.

In a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants and a party claiming or resisting partition, whether he is plaintiff or defendant, is bound by the decision of the Court. [p. 914, col. 2.]

Hari Annaji v. Vasudev Janardhan, 23 Ind. Cas. 944; 38 B. 438; 16 Bom. L. R. 283; referred to.

Nalini Kanta v. Sarnamoyi Debye, 24 Ind. Cas. 294; 17 Bom. L. R. 1; 27 M. L. J. 176; 1 L. W. 607; 16 M. L. T. 544; (1914) M. W. N. 948; 21 C. L. J. 23; 19 C. W. N. 531 (P. C.), noticed.

Second appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 484 of 1912, confirming the decree passed by the Subordinate Judge at Malvan, in Civil Suit No. 271 of 1909.

M. SRS. G. N. Thakor with S. Y. Abhyankar, for the Appellant.

M. SRS. S. R. Bakhale and P. B. Shingne, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit for partition of property alleged to be joint family property, claiming one-tenth share therein. The property, originally no doubt, was the joint family property of the Kirloskars. The pedigree of the family appears at page 23 of the print. It shows that several generations back the family had been split up into two branches, and undoubtedly, for years, various members of each branch have been alienating portions of the family property as if they were separately owned. Apparently, the allegation of the defendants who contest the plaintiff's suit is that there was a partition of the family property so far back as 1823. The evidence shows that the whole of the family property has got into the hands of strangers. The plaintiff seeks to set aside the alienations made by various members of the family, and to get back one-tenth of what was originally the family property on the ground that the property is still joint, and that he is entitled, in spite of those alienations, to his proper share therein. The first issue, the main issue in the suit, was whether the plaintiff's property was the joint property of the parties, Kirloskars. That issue was found in the negative. Both the lower Courts

have come to the conclusion that, very many years ago, there had been a partition certainly between the two brothers, and the plaintiff's branch had nothing to do with the other branch. The plaintiff, however, relies upon the principle of *res judicata*, as estopping the defendants from contesting his claim to partition.

The plaintiff's contention has been disallowed in both the lower Courts, and has been fully argued by the appellant's Counsel in this Court. The plaintiff relies upon the proceedings in Suit No. 345 of 1890. That was a suit filed by Sakharam, one of the five sharers of Rama's branch in the pedigree, at page 23. The plaint is drawn in a very ambiguous manner. It stated that "certain lands and the whole village of Kirloo, formed the undivided joint ancestral property of the plaintiff and defendants Nos. 1—4 and 10—21, the share of the plaintiff and defendants Nos. 1—4 being half and that of defendants Nos. 2—21 half; that these latter held separate property as their share from a long time, the plaintiff's share in his own branch is one-fifth and not the whole property one-tenth; that if defendants Nos. 10—21 confirm the old private partition the plaintiff should be awarded one-fifth of such property as is held by his own branch or otherwise one tenth in the entire property." Owing to various alienations which had already been then made, the only contesting defendant in that suit was defendant No. 5 who set up a mortgage by other members of Sakharam's branch. Sakharam contended that that mortgage was not binding on his share. That contention prevailed. It is quite true that the decree seemed to have directed that the plaintiff was entitled to one-tenth of the whole property, but a direction in the decree is given that if the plaintiff's share in the *Khasgi* lands held by his own branch consisting of himself and his own brothers can be made up from other lands held by that branch of similar quality then, in that case, the lands mortgaged to defendant No. 5 should in partition be allotted to the shares of defendants Nos. 1—4 and continued in the possession of defendant No. 5.

There is no evidence to show how that decree was carried out or whether in execution the plaintiff obtained any properties

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that were in the possession of members of the other branch or their alienees.

But the question now before us is, whether the other persons who were entitled to nine-tenths of the whole property were barred by the decision in that suit from contending thereafter that the nine-tenths which remained in their hands was not joint family property, so that they were bound by the finding in that suit to partition nine-tenths on a partition being asked for by any member of the other branch. Apart from that, it is clear to my mind that there is no direct finding that the whole of the property which was originally joint was still joint at the time of this decree.

The principle to be followed in deciding the question whether a matter is *res judicata* as between co-defendants in a suit was laid down in *Ramchandra Narayan v. Narayan Mahadev* (1). The head-note says:

"Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group."

Applying that dictum to the facts of this case, even assuming that all the defendants in the suit of 1890 collectively resisted the claim to a share made against them as a group by the plaintiff, and were defeated, unless it could be shown that there was a necessity that the question whether the nine-tenths was joint family property in their hands should be decided in order to give relief to the plaintiff, then no question of *res judicata* could arise in a later suit between those parties. It is obvious from the judgment in the suit of 1890 that the present question was never at issue. There was

no necessity to decide whether as between¹¹ the persons who might be entitled to the remaining nine-tenths of the family property that property in 1890 was joint or separate. The decision in *Ramchandra v. Abaji* (2) is not in conflict with the decision in *Ramchandra Narayan v. Narayan Mahadev* (1) as that decision was referred to by Mr. Justice West and distinguished. In the former case their Lordships referred to certain Calcutta cases in which it was laid down that,—

"The material point for deciding whether a matter had become *res judicata* under section 13 is whether it was directly and substantially in issue between the same parties and was finally decided. If the issue is clearly raised between the several parties to the suit and adjudicated, it matters not that the parties were marshalled in the one case differently from the other."

That is an entirely different question from the one which came before this Court in *Ramchandra Narayan v. Narayan Mahadev* (1), where the test was whether there was the necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants, and whether it was decided. That decision has been consistently followed by this Court. I need only refer to the decision of *Hari Annaji v. Vasudev Janardhan* (3).

No doubt, in a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants, and a party claiming or resisting partition, whether he is plaintiff or defendant, is bound by the decision of the Court. But in this case none of the parties were claiming or resisting partition except the plaintiff, and, therefore, any questions regarding partition which might thereafter arise between the defendants in that suit remained open to be decided. Nor is the decision in *Nalini Kanta v. Sarnamoyi Debya* (4) of any assistance to the plaintiff. In that case there had been a succession of suits for partition

(2) (1886) P. J. 15.

(3) 23 Ind. Cas. 944; 38 B. 438; 16 Bom. L. R. 283.

(4) 24 Ind. 294; 17 Bom. L. R. 1; 27 M. L. J. 76; 1 L. W. 607; 16 M. L. T. 544; (1914) M. W. N. 948; 21 C. L. J. 23; 19 C. W. N. 531 (F. C.).

(1) 11 B. 215; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 1, 2.

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by various members of the family until there was only one left who had not filed a suit for partition, with the result that all the members who had filed suits had got their shares, and the balance of the property remaining in the hands of the last member of the family represented his share. He claimed that as a result of the various partitions what was left to him was less than his legitimate share in the family property. He sought to re-open the various partitions which had taken place in consequence of the suits brought by the other members of the family, and it was held that the various partitions made were binding upon him. That does not in any way touch the question now before us whether between the defendants in the suit of 1890, the question whether the property was joint or separate is *res judicata*. What the plaintiff seeks to do in this suit is to recover a share in the whole property after his own interest in his own branch had been alienated and after the other members of the other branch had alienated their properties. It is perfectly clear that he is not entitled to upset the various dealings with the family property which had taken place over a very lengthy period. The original plaintiff seems to have alienated his interest, whatever it might be worth, in this property pending the first appeal, and the present appellant is really a purchaser of litigation. In my opinion the appeal must be dismissed with costs.

Crump, J.—I agree.

M. D. J.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

NO. 1609 OF 1922.

January 29, 1923.

Present.—Mr. Justice Martinez.

MAHMUD SHAH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

TALAB HUSSAIN SHAH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151.

O. XLI, r. 23, O. XLIII, r. 1 (4)—Remand for re-decision after amendment of plaint—Appeal, whether lies.

Order XLI, r. 23 of the Civil Procedure Code applies only when the case has been decided by the First Court on a preliminary point.

An Appellate Court has power to make an order of remand under section 151 of the Civil Procedure Code, when O. XLI, r. 23 of the Code does not apply.

Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Limited, 41 Ind. Cas. 598; 44 C. 929; 26 C. L. J. 49; 21 C. W. N. 877, relied on.

An order of remand made under section 151 of the Civil Procedure Code is not appealable.

An Appellate Court holding that on the plaint as it stood any decree which might be passed in favour of the plaintiff would be incapable of execution owing to vagueness, remanded the case to the Trial Court for a fresh decision after amendment of the plaint:

Held, that the order of remand was not one under O. XLI, r. 23 of the Civil Procedure Code, not being on a preliminary point, and was not, therefore, appealable.

Miscellaneous second appeal from the order of the District Judge, Multan, dated the 6th April 1922, reversing that of the Subordinate Judge, Multan, dated the 10th January 1922.

Lala Gobind Ram Khanna, for *Lala Fakir Chand*, for the Appellants.

Mr. M. Sleem, for the Respondents.

JUDGMENT—The plaintiffs were given a decree by the First Court for possession of three out of four *khasra* numbers which they claimed. Both parties appealed to the District Judge, who was of opinion that it would be difficult to fix the actual boundaries of the land in suit by reference to the field numbers given in the plaint to which no plan was attached and that any decree that might be passed in favour of the plaintiffs would be practically incapable of execution owing to vagueness. He held, therefore, that there was no proper plaint before the Court and, setting aside the decree, he remanded the case for a fresh decision to be given after the plaint had been properly amended and a proper plan of the property placed on the file. From that order the defendants have appealed to this Court.

A preliminary objection is taken on behalf of the respondents that no appeal lies as the order of the lower Appellate Court

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is one passed under section 151 of the Civil Procedure Code and not under O. XLI, r. 23. This objection must prevail. O. XLI, r. 23 applies only where the case has been decided by the First Court on a preliminary point, whereas it is clear that the First Court's decision in the present case has been given on the merits and not on a preliminary point. There is no doubt that an Appellate Court has power to make an order of remand under section 151 where O. XLI, r. 23 does not apply [see *Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Limited* (1)] and it must be held that the order passed by the lower Appellate Court in the present case was one under that section and is not appealable.

Counsel for the appellants urges that the appeal should be treated as a revision, but it does not appear to me that there is a sufficient reason for so treating it.

The appeal is dismissed, but as there would have been a good deal to say in the appellant's favour if the appeal had been heard on its merits, I direct that the parties shall bear their own costs in this Court.

Z. K.

Appeal dismissed.

(1) 41 Ind. Cas. 598; 44 C. 929; 26 C. L. J. 49; 21 C. W. N. 877.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 3294 OF 1917.

January 9, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

THE FIRM RUP CHAND-JIVAN SINGH,
THROUGH JAWAND SINGH, AND OTHERS—
DEFENDANTS—APPELLANTS

versus

THE FIRM ICHO MAL-NATHU MAL,
THROUGH NATHU MAL—PLAINTIFFS—
AND ISHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual, open and current account, what is.

An open account is one which is continuous or current, uninterrupted or enclosed by settlement or otherwise, consisting of a series of transactions. [p. 917, col. 2.]

A current account is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be, ascertained. [p. 917, col. 2.]

A mutual account is an account which shows reciprocity of dealings between the parties and not an account having items on one side only though made up of debits and credits. [p. 917, col. 2; p. 918, col. 1.]

Ram Pershad v. Harbans Singh, 6 C. L. J. 158, relied on.

In order that an account might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. [p. 918, col. 1.]

Hirada v. Gadigi, 6 M. H. C. R. 142, relied on.

A mutual account is made up of matters of set-off, or, in other words, an account between parties who have a mutual and alternate course of dealings under an implied agreement that one account may and shall be set off against the other *pro tanto*. [p. 918, col. 1.]

The plaintiff firm was employed by the defendant firm to buy grain and sell it at a profit on behalf of the latter. The plaintiff firm was to supply funds for making these purchases, the defendant firm making a few advances in the beginning by way of margin money. The plaintiff firm was entitled to charge commission on the sales and purchases made on the defendant firm's behalf. In a suit by the plaintiff firm to recover a certain amount as balance due from the defendant firm on the transactions it was found that, except in the beginning, when the defendant firm made some advances by way of margin money, the balance of the account had never been in favour of the defendant.

Held, that it could not be said that the account between the parties was a mutual account within the meaning of Art. 85 of Schedule I to the Limitation Act, and the suit, therefore, was not governed by that Article. [p. 918, col. 1.]

Second appeal from the decision of the District Judge, Jhelum, dated the 30th August 1917, modifying that of the Senior Subordinate Judge, Gujrat, dated the 12th March 1917.

Mr. Nanak Chand, for the Appellants.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—These are two appeals against a decision of the District Judge of Jhelum, dated the 30th August 1917, and have arisen out of an action for the recovery of Rs. 3,474-5-6, principal and interest, brought by the plaintiffs under the following circumstances:—

The plaintiffs, who are a firm of commission agents carrying on business at Dinga, in the Gujrat District, were employed by

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the defendants' firm of Rup Chand-Jivan Singh to buy grain at Dinga and to sell it at a profit by exporting it to Karachi and other places. The plaintiffs were to supply funds required for making these purchases, the defendants only making a few advances in the beginning by way of margin money, and were to charge commission on the sales and purchases made by them on the defendants' behalf. The defendants were also liable to pay interest on the advances made by the plaintiffs for making these purchases for the defendants. It appears that the real purchasers of the goods were the second set of defendants Messrs. Sham Das, Diwan Chand and Ganda Mal of Mithalak, in the Jhelum Canal Colony, and that the first set of defendants were merely acting as their guarantee brokers. The plaintiffs had, however, nothing to do with the Mithalak firm and their dealings with the first set of defendants were as between principal and principal. The plaintiffs allege that from the 11th July 1910 to 14th July 1911 they made purchases to the extent of Rs. 58,998-9-6 and that they credited the defendants with a sum of Rs. 57,435-4-6.

On the 4th June 1915, they brought the present suit for the recovery of Rs. 1,563-5-0, principal, being the balance due on these accounts, with Rs. 1,796, interest, plus a further sum of Rs. 115-0-6 due on account of miscellaneous charges alleged to have been incurred by them over these transactions. The suit, which was at first instituted against the firm of Rup Chand-Jivan Singh alone, was resisted by the defendants on a variety of grounds, but the main grounds of their defence were, (1) that the suit was barred by limitation under Art. 85 of the Indian Limitation Act, and (2) that their guarantee did not extend to the goods covered by the following three invoices on which, according to the accounts filed by the plaintiffs, an approximate sum of Rs. 1,200 remained due:—

(1) *Har* 1967:—Rs. 302.

(2) *Asauj* 1967 —Rs. 4,462.

(3) *Katak* 1967 —Rs. 2,409.

The defendants admitted their liability for the payment of Rs. 305-2-3 only, and denied that any interest was claimable by the plaintiffs. On these pleadings the Mithalak firm of Sham Das-Diwan Chand

was also impleaded as a defendant in the suit. The Subordinate Judge found that the suit could not be regarded as one for the recovery of balance due upon a mutual, open and current account where there have been reciprocal demands between the parties and that it was within limitation. He further found that the goods covered by the three invoices in question had been ordered by the second set of defendants without the knowledge of their guarantee-brokers, and that, consequently, no liability could attach to the latter in respect of those goods. He accordingly decreed the plaintiffs' suit to the extent of Rs. 305, principal, and Rs. 121, interest, against both sets of defendants, and passed a decree for Rs. 1,367, principal, and Rs. 518, interest, (total Rs. 1,885) against the second set of defendants alone.

On appeal the learned District Judge agreed with the Subordinate Judge in holding that the suit was within limitation, but differed from his findings on the question of the liability of the first set of defendants as to the three invoices in dispute, and also on the question of their liability to pay interest. The result of his findings was, that the liability of the first set of defendants as to the principal amount claimed was enhanced by a further sum of Rs. 1,200, but the plaintiffs' claim as to interest was disallowed. The decree against the second set of defendants was, however, allowed to remain in tact.

Against this decision two appeals have been preferred to this Court, one by the plaintiffs and the second by the first set of defendants, namely, Messrs. Rup Chand-Jivan Singh. The first contention raised on behalf of the defendant-appellants is that the suit is barred by limitation, and that the learned District Judge was wrong in holding that Art. 85 did not apply. In our opinion on this contention has no force, and must be overruled. It is well settled that an open account is one which is continuous or current, uninterrupted or unclosed, by settlement or otherwise consisting of a series of transactions. A current account has been held to be an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be, ascertained. Mutual accounts

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are accounts which show reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits—*Ram Pershad v. Harbans Singh* (1). In the case of *Hirada v. Gadigi* (2) it was observed by Mr. Justice Holleway that, in order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. In *Hajee Syud Mahomed v. Ashrufoonnissa* (3) Mr. Justice Pontifex held that, if the balance was sometimes in favour of the defendant, but generally in favour of the plaintiff, the banker, the account between them would hardly be a mutual one. This principle is very clearly explained in Wood on Limitations, section 278, where it is pointed out that mutual accounts are made up of matters of set-off, or, in other words, are accounts between parties who have a mutual and alternate course of dealings under an implied agreement that one account may and shall be set off against the other *pro tanto*. In the present case it is impossible to say that there were such dealings between the parties in the course of business when sometimes the balance was in favour of one party and sometimes of the other. With the exception of the first few months after the commencement of the accounts when the defendants made a few deposits with the plaintiffs, there never was an occasion when the balance was in favour of the defendants. In these circumstances, it is clear that the account was not an open, current and mutual account within the meaning of Art. 85 of the Indian Limitation Act and that the suit was within time.

Next, it is argued that the goods covered by the three consignments of *Har, Asauj* and *Katak*, 1967, of the aggregate value of Rs. 7,174 were ordered by the Mithalak firm of Sham Das-Diwan Chand independently of these defendants, and that as the latter never received any Railway Receipts relating

to these consignments they are not responsible. In our opinion, there is force in this contention, and it must prevail. The learned District Judge has not given a clear and definite finding on the question of the defendants' liability on these consignments, and we are not impressed with the arguments of Dr. Nand Lal, that the question being one of fact cannot be agitated in second appeal. The learned District Judge is of opinion that, though the plaintiffs have failed to prove that the Railway Receipts relating to these consignments passed through the hands of the first set of defendants Rup Chand-Jivan Singh, yet as the guarantee was a continuous one and as the defendants did not make any attempt to withdraw their guarantee they must be deemed to have ratified these transactions. We do not think that such an inference is legally possible under the circumstances of this case. There is no evidence, express or implied, that the defendants ever ratified these transactions, and the letters relied on by the plaintiffs' Counsel do not bear any such interpretation. The transactions were never brought on to the books of the guarantors, and there is no evidence that they guaranteed the transactions of the Mithalak firm to an unlimited extent. In the absence of any evidence that the defendants either had previous knowledge of the transactions or that they accepted their liability as to these transactions in any other way, we must hold that they are not responsible.

As to interest we do not see any reason why it should not be allowed on the principal sum decreed in favour of the plaintiffs. The sum of Rs. 305 found to be due from the defendants has been outstanding for a long time, and must be paid back with interest at a reasonable rate.

The result is that we accept both the appeals and in modification of the order of the Court below decree the claim of the plaintiffs to the extent of Rs. 305 only with interest at Rs. 6 per cent. per annum from the 10th July 1910, the date on which the accounts were opened, till the date of realization. The decree against the second set of defendants passed by the Court of first instance will stand. As both sides have succeeded in part we think it equitable

(1) 6 C. L. J. 158.

(2) 6 M. H. C. R. 142.

(3) 5 C. 759; 6 C. L. R. 112; 2 Ind. Dec. (N. S.) 1091.

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to order that they should bear their own costs throughout and we order accordingly.
Z. K. *Appeals accepted.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1667 OF 1922.
January 30, 1923.

Present :—Mr. Justice Abdul Raoof.

CHUHAR MAL—DEFENDANT—APPELLANT
versus

BIRA RAM AND ANOTHER—PLAINTIFFS,
PAIRA RAM, MINOR, THROUGH
Musarnmat SOBAGRI, HIS MOTHER,
—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Civil Procedure Code (Act V of 1908), O. XLII, r. 2—Appeal, second—Time spent in obtaining copy of Trial Court's judgment, whether can be excluded.

Under section 12 of the Limitation Act only the time requisite for obtaining copies of the judgment and decree appealed against can be excluded in computing the period of limitation prescribed for the appeal. In the case of a second appeal the appellant is not entitled to the exclusion of the time spent in obtaining a copy of the Trial Court's judgment although under r. 2, which has been added by the Lahore High Court to O. XLII of the Civil Procedure Code, a copy of the Trial Court's judgment must be filed along with the memorandum of appeal.

Second appeal from a decree of the District Judge, Multan, dated the 14th March 1922, reversing that of the Munsif, First Class, Mailsi, District Multan, dated the 26th October 1921.

Mr. Anant Ram, for the Appellant.

Lala Har Gopal, for Lala Dharam Chand, for the Respondents.

JUDGMENT.—A preliminary objection is taken to the hearing of this appeal on the ground that the appeal was filed beyond time and is, therefore, time-barred. The following facts will disclose the nature of the objection raised :—

The judgment appealed against is dated the 14th March 1922. An application for copy of the judgment and decree was made on the 19th May 1922. Copies of the judgment

and the decree were delivered on the 20th of May 1922. According to this calculation, the appellant was entitled to 90 plus 2 days and the appeal ought to have been filed on the 14th June 1922 at the latest. It was, however, filed on the 15th June 1922, i.e., one day beyond time. Mr. Anant Ram, the learned Counsel for the appellant, contends that his client was entitled to an exclusion of the time occupied in obtaining the copy of the judgment of the Trial Court as well. The application for obtaining copy of the judgment of the First Court was made on the 25th May 1922 and it was delivered on the 12th June 1922. The time requisite for obtaining copy of the judgment of the First Court was 18 days. If these days be allowed to the appellant the appeal is within time. The learned Counsel for the respondent, however, relies on the Full Bench decision in the case of *Narsingh Sahai v. Sheo Prasad* (1) and contends that as long as section 12 of the Limitation Act is not amended, only the time requisite for obtaining copy of the judgment appealed against and of the decree can be excluded. I myself took the same view in the case of *Madan Gopal v. Malawa Ram* (2) and followed the Full Bench decision of the Allahabad High Court. Mr. Anant Ram, Counsel for the appellant, on the other hand, has relied upon a Division Bench ruling to be found in an unauthorised report reported as 36 P. W. R. 1921 [*Rala Ram v. Diwan Chand* (3)]. The facts of the case decided by the Division Bench in the above ruling are not fully stated in the judgment. The following are the observations made therein :—

"Counsel for the respondent has raised a preliminary objection that this appeal is barred by limitation, but his objection neglects the fact that O. XLII, r. 2, Civil Procedure Code, has been made a rule of the Court, and as under that rule it was necessary for the appellants to obtain and file a copy of the judgment of the Court of first instance the appeal is within time."

The attention of the learned Judges in the above-mentioned case does not appear

(1) 42 Ind. Cas. 855; 40 A. I. R. 15 A. L. J. 835 (F. B.).

(2) 68 Ind. Cas. 777; (1923) A. I. R. (L.) 96.

(3) 63 Ind. Cas. 928; 36 P. W. R. 1921; 3 I. L. J. 390.

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to have been drawn to the provisions of section 12 of the Limitation Act. The precise question raised before me was neither considered nor decided by the learned Judges in that case.

Mr. Anant Ram, Counsel for the appellant, has asked me to extend the time in this case under section 5 of the Limitation Act and treat the appeal as within time. In support of this prayer the learned Counsel has stated certain facts. Mr. Har Gopal on behalf of the respondents rightly objects that I should pay no attention to those facts because the appellant has not taken the care to file an affidavit. There is force in this objection. I am, therefore, constrained to hold that this appeal is barred by time. I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 295
OF 1920 (CONNECTED WITH SECOND

CIVIL APPEAL, NO. 942 OF 1919).

November 9, 1921.

Present.—Mr. Justice Ryves and Mr.
Justice Gokal Prasad.

Babu RAM LALLAN SINGH, MINOR,
THROUGH MUSAMMAT DULHIN DHUNRAJ
KUNWARI—PLAINTIFF—APPELLANT
versus

HARAKH NARAIN RAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 96—Execution of decree—Sale—Property in possession of tenants—Formal possession, delivery of, effect of—Possession, suit for—Limitation—Hindu Law—Joint family—Mortgage, usufructuary—Necessity—Interest, whether can be all wed.

Zemindari property which is let out to tenants for cultivation is not property of a nature of which actual possession can be obtained by an auction-purchaser. Therefore, in the case of such property, the delivery of formal possession to the auction-purchaser under the provisions of O. XXI, r. 96, Civil Procedure Code, gives a fresh start of limitation. [p. 99., col. 1.]

Jang Bahadur Singh v. Hunwant Singh, 63 Ind. Cas. 212; 19 A. L. J. 469; 43 A. 520 (F. B.), distinguished.

Where a usufructuary mortgage of joint family property is challenged by a co-parcener, and a portion of the mortgage-money is found to have been paid for necessity the mortgagee is not entitled

to interest on that amount as a condition of delivery to the plaintiff of his share of the mortgaged property. [p. 922, col. 1.]

Second appeal from the decision of the District Judge, Gorakhpur, dated the 5th of April 1919.

Mr. Shiva Prasad Sinha, for the Appellant.

Mr. Harnandan Prasad, for Mr. Iswar Saran, for the Respondents.

JUDGMENT.—This appeal and the connected Appeal No. 942 of 1919 arise out of one suit. The appeals are by two sets of defendants. The facts which have given rise to these two appeals are briefly as follows:—Ishri Prasad Rai was the owner of an eight-pie share in a certain village. He hypothecated the aforesaid share to Babu Udit Narain Rai under two hypothecation bonds of the 24th of June 1876 and the 2nd of July 1877, respectively. Later on, five pies out of the hypothecated property were sold in execution of a Revenue Court decree against the mortgagor and were purchased by his brother Dip Narain and his nephews, Chiranjit and Jaimangal, on the 20th of March 1882. Ishri Prasad Rai died later on and his widow, Musammat Sona Kunwar, succeeded to a Hindu widow's interest in the property. It appears that on the 3rd of September 1890 Musammat Sona Kunwar made a gift of the whole of the eight-pies share to her daughter's son Mahabajrang Dat. Chiranjit and his brother, Jaimangal, who were two out of the three purchasers of the five-pies share were own brothers and members of a joint Hindu family. Jaimangal died without leaving any issue and Chiranjit became the owner of his share also by right of survivorship. He sued for possession of a two-thirds of the property purchased at auction and obtained a decree against the donee Mahabajrang Dat on the 16th of March 1895. Babu Udit Narain, the mortgagee, died and after his death a suit for sale was brought by his son, and later on, the son also having died during the pendency of the suit, his widow, Musammat Sheobarta Kuari, obtained a decree for sale on the two mortgages against Chiranjit, Dip Narain and Mahabajrang Dat on the 15th of December 1896. On the 20th of December 1902 in execution of this decree the mortgaged property

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was sold and was purchased by the father of the plaintiff and defendant No. 4 and he obtained possession on the 18th of October 1905. This is how the plaintiff claims a title in the property. On the 20th of November 1902 the defendants Nos. 1-3 purchased two-thirds of the five-pies share purchased by Chiranjit and Jaimangal in execution of a simple money-decree passed under section 90 of the Transfer of Property Act. Defendant No. 4, whose father had purchased the whole of the eight-pies share mortgaged a portion of it consisting of specified plots to defendant No. 5. This is how the other defendants have been impleaded in the suit. The plaintiff says that the mortgage by defendant No. 4, who was a member of a joint Hindu family with the plaintiff, is unlawful and void as against the plaintiff. His further contention is that he, along with defendant No. 4, owned the property purchased by them in execution of the mortgage-decree and defendants Nos. 1 and 2 being purchasers in a simple money-decree have no right to withhold possession from them. It will be important to bear in mind that to the suit which terminated in the decree on 15th December 1896 Chiranjit was impleaded as a party after the death of *Musammal Sona Kunwar*, the widow of the mortgagor. He was, along with others, impleaded as a representative of *Sona Kunwar* and not as a purchaser of the mortgaged property.

The points raised by defendants Nos. 1-3 are, firstly, that they were not made parties to the suit as purchasers and hence they had no opportunity of redeeming the mortgage and they should now be given an opportunity to do so and the plaintiff's suit dismissed, and, secondly, that the plaintiff's suit is barred by limitation.

The First Court decreed the plaintiff's claim for possession of half of the property. On appeal by the two sets of defendants the lower Appellate Court has in the appeal by defendants Nos. 1-3 passed the following order, "I, therefore, modify the decree of the Court below by dismissing the suit for possession of half of three-pies 5½ *chatahs* share together with joint possession of the *sir* and *khudkashi* lands appertaining to this share." And in the appeal by defendant No. 4 he has passed a decree for possession of half of the lands

entered in the mortgage-deed of the 5th of February 1917 on payment of Rs. 350 with interest at 6 per cent per annum from the 5th of February 1917 to the date of the payment. The plaintiff comes here in second appeal, and the first point taken in this appeal is that Chiranjit having been a party to the suit for sale in execution of which the plaintiff's predecessor-in-title purchased the property, the defendants, who represent Chiranjit, are now debarred from raising the plea that, as purchasers in execution of a simple money-decree, they have still got a right to redeem the property.

It is contended on behalf of the defendants in reply that they were made parties to that suit as heirs and legal representatives of the widow of *Ishri Prasad Rai* and could not have pleaded their own subsequent purchase, having regard to the express provisions of O. XXII, r. 4 of the Code of Civil Procedure.

In our opinion we do not see how the defendants have been prejudiced by this action of the mortgagee. The mortgage-decree certainly gave six month's time to the defendants-judgment-debtors for payment of the mortgage-money. If these defendants wanted to save their property they could have repaid the money within the time allowed. They were parties to that decree and cannot now be heard to say that they had not an opportunity of redeeming this mortgage. They have no title as against the plaintiff. The second point taken in this appeal is that the suit is barred by limitation inasmuch as the plaintiff did not obtain actual possession of the property sold to him and reliance is placed on a Full Bench ruling of this Court in the case of *Jang Bahadur Singh v. Hanwant Singh* (1).

In our opinion that ruling does not apply to a case like the present one in which the property is *zemindari* property and is let out to tenants for cultivation and is not of a nature of which actual possession could be obtained by the purchaser as in the case of a house. We think the delivery of formal possession to the predecessor-in-title of the plaintiff gave a fresh starting point of limitation

(1) 63 Ind. Cas. 212; 19 A. L. J. 469; 43 A. 520 (F. B.).

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and the present suit is within time from that date and is not barred by limitation. So that, so far as the defendants Nos. 1-3 are concerned, there is no valid reason why the claim should have been dismissed against them.

Coming now to the Second Appeal No. 942 of 1919 by the plaintiff against defendant No. 5, namely, Nageshar Prasad, the main ground argued before us was that the defendant had failed to show that any part of the mortgage-money had been taken for legal necessity. On this question there is a distinct finding by the lower Appellate Court that defendant No. 4, the manager of the family, had need to borrow a sum of Rs. 350 for payment of revenue. This is a finding of fact behind which we cannot go. The result is, that the mortgage in favour of defendant No. 5 is binding on the family property to the extent of Rs. 350. The learned Judge of the Court below seems to have been under the misapprehension that this amount was to carry interest. It was a usufructuary mortgage and we do not see on what principle the learned Judge has thought fit to award interest at 6 per cent, per annum on the amount he has found to have been advanced for legal necessity. The question of interest was the second point raised in the appeal. We think that the decree of the lower Appellate Court, so far as it makes the payment of interest on Rs. 350 conditional to the plaintiff getting a decree for half of the mortgaged land entered in the deed of the 5th of February, 1917, should be discharged.

An objection has been taken on behalf of defendant No. 4 that he ought to have been allowed Rs. 81 in addition to the amount of Rs. 350 allowed to him and also that the decree of the Court below is bad as regards costs. We think that the objection regarding Rs. 81 cannot be sustained. The finding is that Rs. 350 only represented the amount required for legal necessity and we cannot add Rs. 81 to it. As regards costs, having regard to the circumstances of the case and the way the parties have fought it out, we think it unnecessary to interfere with the discretion exercised by the Court below. The result is that we set aside the decree of the District Judge except as to costs and restore the decree of the Court of first instance with the modification that

the decree for possession of half of the mortgaged property is to be subject to the payment of Rs. 350 by the plaintiff to defendant No. 5. So far as these appeals are concerned the parties will bear their own costs.

Z. K.

Appeals decreed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 745 OF 1921.

January 23, 1923.

Present:—Mr. Justice Scott-Smith.

DIWAN CHAND—PLAINTIFF—PETITIONER
versus

RAM LABHAYA MAL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 148, 149
—Decree conditional on payment of additional Court-fees by certain date—Extension of time—Power of Court.

Where a decree is passed in favour of a plaintiff conditionally on his paying additional Court-fees by a certain date and the condition is entered in the decree, the Court passing the decree has no jurisdiction to extend the time fixed for the payment except on a review of judgment. The remedy of the plaintiff is either by way of review or by way of appeal. [p. 923, cols. 1 & 2.]

Sajjadi Begam v. Dilawar Hussain, 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625, relied on.

Petition, under section 44 of Act VI of 1918, for revision of an order of the Subordinate Judge, First Class, Jhelum, dated the 15th July 1921.

Lala Jagan Nath, for the Petitioner.

Mr. Dev Raj Sawhney, for Mr. Anant Ram, for the Respondents.

JUDGMENT.—The material facts of the case out of which the present application for revision arises are as follows:—

Plaintiff-petitioner on the 21st May 1921 obtained a decree for pre-emption of a house conditional on his paying Rs. 2,800 on or before the 18th June 1921. The Court also by its decree directed that the plaintiff should pay up Court-fee *ad valorem* upon Rs. 2,800 by the 23rd May, and that if he did not do so the suit should stand dismissed with costs. The plaintiff did not pay up the Court-fee by the 23rd May and on the 26th May made an appli-

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cation for extension of time offering to pay up the required amount then. The Court held that, no doubt, it would have had power to extend the time for payment of the Court-fee under section 148 of the Civil Procedure Code, but that the decree dismissing the suit in default of payment on the 23rd May stood in its way, and that decree could only be modified upon an application for review or upon appeal. The Court, therefore rejected the application.

The plaintiff has come up to this Court on the revision side and it is contended that the Court had power under sections 148 and 149 of the Civil Procedure Code to grant time for the payment of the Court-fee and to extend the period even though that originally fixed might have expired. The lower Court thought that section 10 of the Court-Fees Act applied, but, in my opinion, it does not. The case was not one where the Court had to fix the market-value after an investigation. The plaintiff sued for pre-emption upon payment of Rs. 1,100 alleging that the price entered in the deed of sale had not been fixed in good faith. The Court held that the price entered in the deed had been fixed in good faith and had actually been paid. In accordance with its finding it was necessary for the Court to demand additional Court-fee and to allow the plaintiff to pay the additional sum and to fix the time for its payment under sections 148 and 149 of the Civil Procedure Code. It is contended for the respondents that sections 148 and 149 could not apply in the present case after the suit had been dismissed because the Court was then *functus officio*. Counsel relies upon *Sajjadi Begam v. Dilawar Husain* (1), which appears to me to be exactly on all fours with the present case. There the Court had made a decree in plaintiff's favour conditional on her paying an extra Court-fee of Rs. 20 within a week and had decreed that if this extra Court-fee was not paid the suit was to stand dismissed. The High Court held that once the term of deposit had been embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own discretion save on an application for review of judgment. It held according-

ly that the Court had no jurisdiction to extend the time limited by the decree.

In my opinion, it is clear that in the presence of the decree dismissing the suit the plaintiff could not be granted an extension of time for payment of the Court-fee upon the application made by him in that behalf. His proper course was either to ask the Court to review its decree or to appeal. I accordingly reject the present application, but, having regard to the circumstances of the case, I make no order as to costs.

Z. K.

*Application rejected.***LAHORE HIGH COURT.**

CIVIL REVISION PETITION No. 657 OF 1922.

January 20, 1923.

Present:—Mr. Justice Zafar Ali.T. W. V. ELVERS—DEFENDANT—
PETITIONER*versus*THE AMERICAN MOTOR COMPANY,
THROUGH LATIF AHMAD—PLAINTIFF
—RESPONDENT.*Civil Procedure Code (Act V of 1908), O. XXVI, r. 4—Commission to examine defendant as his own witness, when may be issued.*

Defendant, who was residing in the territory of a Native State, more than 200 miles from the Court in which the suit was pending, and who was the only witness on his own behalf, applied for a commission for his examination as a witness. The application was rejected and an *ex parte* decree was passed against him. On revision:

Held, that this was a fit case in which a commission ought to have issued for the examination of the defendant as his own witness; and that the *ex parte* decree must be set aside and the suit decided afresh after the examination of the defendant on commission.

Petition, under section 25 of Act IX of 1887, for revision of a decree of the Judge, Small Cause Court, Rawalpindi Cantonment, dated the 6th May 1922.

Mr. M. Obaidulla, for Mr. O'Connor, for the Petitioner.

Sheikh Hassan Din, for the Respondent.

JUDGMENT.—This is a petition in revision by a defendant-judgment-debtor

(1) 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625.

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for an order to set aside an *ex parte* decree passed against him by the Judge of the Cantonment ~~Small Cause~~ Court, at Rawalpindi, on the ground (1) that he erred in refusing to examine him as his own witness, and (2) that he had no jurisdiction to try the case.

(2) is not pressed before me, but as regards (1) the facts are as below:—

The defendant at the time of the trial of the case resided in Kishtwar in the Kashmir State, at a distance of more than 200 miles from Rawalpindi, and so his Counsel presented an application to the Court below to issue a commission to examine him at Kishtwar. This application was eventually rejected and as the defendant could produce no evidence in defence, the suit was decreed. I am of opinion that, under the circumstances stated above, the lower Court was wrong in refusing to issue a commission for the examination of the defendant as his own witness. He had no other witness, nor could be expected to come all the way from Kishtwar to defend the action personally or to appear in the witness-box. Therefore, I accept this petition, set aside the *ex parte* decree with the direction that the suit should be decided afresh after examining the defendant as his own witness. A commission must be issued for his examination as he does not reside within British India, and his place of residence is more than 200 miles by road from Rawalpindi. Parties to bear their own costs in this Court.

Z. K.

Petition accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. III OF 1922.

January 17, 1923.

Present.—Mr. Justice Campbell.

LEHNA SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGAT RAM—PLAINTIFF—SANT SINGH AND OTHERS—DEFENDANTS—APPELLANTS.

Punjab Courts Act (VI of 1918), s. 41 (3)—

Error of law or procedure in deciding question of custom—Burden of proof, wrong allocation of—Appeal, second—Certificate whether necessary.

The words "notwithstanding anything in sub-section (1) of this section," with which sub-section (3) of section 41 of the Punjab Courts Act commences, preclude a Court of second appeal, in the absence of a certificate, from going into the question whether the first Appellate Court has erred in law or procedure in deciding a question of custom. [p. 925, col. 2.]

Nur Ali v. Bahawal, 31 Ind. Cas. 386; 34 P. R. 1916; 54 P. W. R. 1916, distinguished.

A second appeal on a question of custom cannot be entertained, in the absence of a certificate, on the ground that the *onus probandi* was wrongly placed by the lower Appellate Court. [p. 925, col. 2.]

Arora v. Imam Bakhsh, 23 Ind. Cas. 352; 4 P. W. R. 1914; 28 P. L. R. 1914, followed.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 28th October 1921, affirming that of the Munsif, Second Class, Pathankot, District Gurdaspur, dated the 30th July 1920.

Lala Faqir Chand, for Mr. Anant Ram, for the Appellants.

Lala Durga Das, for the Respondents.

JUDGMENT.—The suit here was by certain persons, claiming to be the reversioners of a childless proprietor named Sant Singh, for a declaration that a gift of ancestral land by Sant Singh to one Nanak, son of Santa Singh's brother, Lehna Singh, should not affect their reversionary rights. They asserted, *inter alia*, that Nanak was not the legitimate son of Lehna Singh because (a) no marriage took place between Lehna Singh and the mother *Musammât Lachmi*, and (b) even if there was a marriage ceremony, the marriage was invalid under custom, because *Musammât Lachmi* was a *Chhinbi* woman and Lehna Singh was a *Jat*.

The defendants, Lehna Singh and Nanak, pleaded that there had been a marriage and a valid marriage, that Nanak was a nearer heir than the plaintiffs, and that the gift was a good one.

Among the issues framed by the Trial Court were the following:—

(2) Did Lehna Singh go through a *chadar ondozi* ceremony with *Musammât Lachmi*?

(3) If so, was this ceremony illegal and invalid according to custom or law?

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The plaintiffs led evidence to prove that there had been no marriage, that *Musammāt* Lachhmi was a *Chhimbi*, and that there could be no legal marriage; tie between her and a *Jat*. The defendants produced witnesses to the contrary, from whom it was elicited in cross-examination that *Musammāt* Lachhmi had a former husband who was alive at the time of the alleged *chadar andazi* ceremony.

The First Court held that there had been a *chadar andazi* ceremony and that it was not necessary to decide issue (3) as the gift was otherwise invalid. The plaintiffs were granted a decree.

The defendants appealed and the learned District Judge dismissed their appeal on one sole point, namely, that the defendants' witnesses had stated *Musammāt* Lachhmi's first husband to have been alive at the time of the alleged *chadar andazi* that, consequently, it lay upon the defendants to prove that such a *chadar andazi* constituted a marriage valid by custom, and that they had produced no evidence on the point. The learned District Judge noticed that the *onus* of issue (3) had been placed upon the plaintiffs but held that the defendants had not been prejudiced.

The defendants have preferred a second appeal without a certificate, under section 41 (3) of the Punjab Courts Act, for which they applied unsuccessfully.

The question for decision is whether any second appeal by them can lie without such certificate.

The appellants' case is that they are not challenging any decision regarding the existence or validity of any custom and that they merely want a remand because the plaintiffs never pleaded that the marriage was invalid on account of the existence at the time of another husband and because they had no opportunity of meeting an attack based upon that fact.

The decree of the lower Appellate Court is a decree that no custom exists by which the *chadar andazi* ceremony in question, performed in the lifetime of *Musammāt* Lachhmi's first husband, can take effect as a valid marriage between the parties to it. The appellants want a Court of second appeal to set this aside on the ground that the lower Appellate Court acted contrary to law or was guilty of a substantial error

in procedure in coming to a decision regarding the non-existence of a custom validating the marriage without the appellants having had an opportunity of proving that the first husband had repudiated *Musammāt* Lachhmi and of thereby establishing that a custom validating the marriage does exist. The question raised in appeal is thus the existence of a custom by which a *Jat* can contract a valid marriage with a *Chhimbi* woman whose first husband, though alive, has repudiated her.

The words "notwithstanding anything in sub-section (1) of this section," with which sub-section (3) of section 41 of the Punjab Courts Act commences, preclude, in these circumstances, a Court of second appeal, in the absence of a certificate, from going into the question of whether the first Appellate Court has erred in law or procedure. This is made clear in *Arura v. Imam Bakhsh* (1) where it is also pointed out affirmatively that a second appeal in such circumstances cannot be entertained on the ground that the *onus probandi* was wrongly placed by the lower Appellate Court.

The appellant's learned Counsel relies upon *Nur Ali v. Bahawal* (2) where it was held that the question raised in second appeal was not the validity or existence of a custom but whether the validity or existence of a custom was a question before the lower Appellate Court and that a second appeal lay without a certificate. The facts of that case, however, differ from those of the present. Here the issue regarding the validity of the marriage was drawn in general terms, and, although it is true that there was no specific plea that the marriage, if it took place, was bigamous and, therefore, a nullity, evidence was led on this point by the plaintiffs, for there could be no other explanation of the questions put by them in cross-examination to the defendants' witnesses about the first husband. The defendants knew that the answers elicited had come on to the record and they could have applied for a further opportunity to contradict or explain them. They cannot be said to have been taken unawares in the lower Appellate Court

(1) 23 Ind. Cas. 352; 4 P. W. R. 1914; 28 P. L. R. 1914.

(2) 31 Ind. Cas. 386; 34 P. R. 1916; 54 P. W. R. 1916.

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and it cannot be said that the sole question of invalidity before the Courts below was whether the *chadar andazi* was invalid by reason of the woman being a *Chhimbi*.

I hold that no second appeal is competent without a certificate, and dismiss the appeal with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 25 OF 1921.

March 13, 1923.

Present.—Justice Sir Walter S. Schwabe, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts-Trotter.

R. M. P. V. CHOKALINGAM CHETTIAR

—PLAINTIFF—APPELLANT

versus

S. PALANI AMBALAN—

DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 13 (3), 187—Improvements made by ryots after Act—Landlord, right of, to recover rent at wet rates under contract made before Act.

Under section 13 (3) of the Madras Estates Land Act, a landholder is not entitled to recover rent at wet rates from his *ryots* for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense after the Act came into force but on the strength of a contract made before the Act was passed.

Dictum of *Venkata Perumal v. Ramudu*, 27 Ind. Cas. 688; 39 M. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, not followed.

The intention of the Legislature in framing sections 13 and 187 of the Madras Estates Land Act was to refuse to contracts made before, equally with contracts made after, the passing of the Act any effect on the relation between the *ryot* and the landholder.

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, in Second Appeal No. 999 of 1920, on the file of the High Court, preferred against the decree of the District Court of Ramnad, at Madura, in Appeal Suit No. 694 of 1919, preferred against the decree of the Court of the Special Deputy Collector of Ramnad, at Manamadura, in Suit No. 277 of 1919.

Mr. C. V. Ananthakrishna, for the Appellant.

Mr. S. T. Srinivasagopalachari, for the Respondent.

JUDGMENT.—The question is, whether the plaintiff, landholder, is entitled to recover rent at wet rates from his tenant, the defendant, for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense. The plaintiff claims that he is entitled to wet rates on the strength of a contract contained in Exhibit D of the year 1885, before the Estates Land Act was passed. The improvements were made after it was passed. Krishnan J. held that, in the circumstances, the plaintiff is not entitled to rely on his contract with reference to section 13 (3) of the Estates Land Act.

It is no doubt true that, as the plaintiff contends, such a contract would have been enforceable under the previous law, section 11 of Act VIII of 1865. The only authority relied on by the plaintiff is a dictum of Kumarasam Sastri, J., in *Venkata Perumal v. Ramudu* (1), a case in which both the contract and the improvements were made before the passing of the present Act. The dictum was, therefore, unnecessary for the learned Judge's decision. The considerations which weigh with us are that, (1) the wording of section 13 (3) exempts the *ryot* from liability to pay a higher rate of rent in consequence of improvements made at his sole expense, notwithstanding any usage or contract to the contrary and that wording is absolutely general; (2) that, as Krishnan, J., has observed, the connected reference to usage renders it unlikely in the extreme that the Legislature intended to except contracts made before the Act, but not enforceable before it, from this provision; (3) the *ryot* is referred to in section 13 (3) as becoming liable to pay a higher rate of rent, inconsistently with the view that he had already become liable under a previous contract. Lastly, section 187 (1) must be read with section 13 and in the former the reference is to "contracts made before or after the passing of this Act." This indicates clearly that the intention of

(1) 27 Ind. Cas. 688; 39 M. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.

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the Legislature was to refuse to contracts made before, equally with contracts made after, the passing of the Act, any effect on the relation between the *ryot* and the landholder.

Taking this view, we dismiss the appeal with costs.

V. N. V.

*Appeal dismissed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL NO. 2664 OF 1918.

November 16, 1922.

Present.—Mr. Justice LeRossignol and Mr. Justice Zafar Ali.

NANAK CHAND—DEFENDANT—
APPELLANT.

versus

MUHAMMAD ZAHUR-UD-DIN—
PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 2 (7), 17 (1) (d)—Construction of document—Agreement to lease—Registration.

Defendant executed a document in plaintiffs' favour whereby he acknowledged the receipt of a certain sum as earnest-money and agreed to lease to the plaintiff a certain area of land for five years on an annual rental of Rs. 180:

Held, that the document was an agreement to lease and required registration under section 17 (1) (d), read with section 2 (7), of the Registration Act.

Second appeal from a decree of the District Judge, Ludhiana, dated the 24th June 1918, modifying that of the Junior Sub-Judge, Second Class, Ludhiana, dated the 16th April 1918.

Lala Fakir Chand, for the Appellant.

Sheikh Umar Bakhsh, for the Respondent.

JUDGMENT.—The plaintiff came into Court on the strength of a document by which he alleged that Sarab Dayal defendant No. 1 on the 8th May 1917 acknowledged receipt of Rs. 25 as earnest-money and agreed to lease plaintiff 2 *bighas*. 14 *biswas* of land for five years

on an annual rental of Rs. 180. He alleged that defendant No. 1, instead of executing a formal lease in his favour, had leased the land to defendant No. 2 and had given him possession. He further alleged that defendant No. 2 had full knowledge of the agreement with plaintiff and prayed for possession of the land and for an order to compel defendant No. 1 to execute a lease in accordance with the terms of the agreement. He asked in the alternative for damages of Rs. 1,000 against defendant No. 1. The first Court found that both defendants had joined in a fraud on the plaintiff and decreed him possession for five years, and the District Judge on appeal confirmed the decree holding, that it was unnecessary that a formal lease in plaintiff's favour should be executed.

In second appeal it is urged that the document on which the plaintiff's claim is based is not merely a receipt for earnest-money but is an agreement to lease; that it is inadmissible in evidence to prove the contract as it should have been registered, and that consequently no oral evidence in support of the contract is admissible. In our opinion the contention for the appellant must prevail. In his plaint the plaintiff refers to the document as embodying the agreement between himself and defendant No. 1 and it is obvious that it is more than a mere receipt. The terms of the lease, its duration and the annual rent and the date on which possession is to be given, are set forth in detail in this document, and there can be no doubt that it is an agreement to lease. Now, under section 2 (7) of the Registration Act a lease includes an agreement to lease. In this respect an agreement to lease must be discriminated from an agreement, and under section 17 (1) (d) of the same Act all leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, must be registered. The lease in question, reserving as it does an annual rent of Rs. 180 does not belong to a class of leases which may be exempted by the Local Government under the proviso to section 17 (1) (d) of the Registration Act.

In this view, the plaintiffs' suit is unsupported by any evidence and must be dismissed. We accordingly accept the appeal and dis-

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miss the plaintiff's suit with costs throughout.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

No. 559 OF 1922.

November 24, 1922.

Present:—Mr. Justice Broadway.

NAND SINGH—INSOLVENT—APPELLANT
versus

S. LACHHMI NARAIN SINGH—

OFFICIAL RECEIVER, AND OTHERS—

CREDITORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 (p)—Punjab Land Revenue Act (XVII of 1887), s. 70—Insolvency—Panchotra paid to Lambardar, whether exempt from attachment.

The amount of *panchotra* paid to a *Lambardar* does not fall within section 60 (p) of the Civil Procedure Code or section 70 of the Punjab Land Revenue Act and is not exempt from attachment on the insolvency of the *Lambardar*.

Miscellaneous first appeal from an order of the District Judge, Ambala, dated the 17th January 1922, ordering that the house of the insolvent should be sold through the Naib Nazir, Kharak, and his land should be leased through the Collector.

Sardar Kharak Singh, for the Appellant.

JUDGMENT.—Nand Singh, an undischarged bankrupt, a *Lambardar* and *Jagirdar* in the Ambala District, has preferred this appeal against the order of the District Judge, Ambala, dated the 17th January 1922, directing the Receiver to sell a house belonging to the insolvent and to arrange through the Collector, for the farming out of his land, some 100 *bighas* in area. The order also directs the insolvent to pay into Court all *panchotra* money in his hand. Mr. Kharak Singh has appeared for Nand Singh, and no body has appeared on the other side.

So far as the house is concerned, inasmuch as the appellant is an agriculturist and as it is said that this is the only house he possesses, it appears to be not liable to be sold. The order relating to this house is, therefore, set aside.

In regard to the *panchotra* money Mr. Kharak Singh urged that it, too, was not liable to attachment under the provisions of section 60, Civil Procedure Code. He also referred to section 70 of the Punjab Land Revenue Act. I am unable to see that the income of the *panchotra* is covered by these sections. *Qua* this, the order will stand.

Next, it was urged that the Receiver only suggested in his report that three-fourths of the land should be farmed through the Collector, but the Court has directed that all the land should be so farmed. It has been pointed out in the grounds of appeal that two-fifths of the entire holding of the appellant is under mortgage, the mortgagees being in possession, and Mr. Kharak Singh urged that a provision should be made for the maintenance of the insolvent and his family suitable to his condition in life, not as an undischarged bankrupt, but as a *Lambardar* and a *Jagirdar*. The proposition appears to me somewhat novel. As, however, the Receiver has reported that three-fourths of the land belonging to the insolvent was sufficient and there is the order of the District Judge *qua* the whole land, I direct that only three-fourths of the appellant's land should be farmed through the Collector.

To this extent the appeal is accepted. No order as to costs.

Z. K.

Appeal accepted.

EMPEROR V. ZAWAR HUSSAIN.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 114 OF 1923.

March 21, 1923.

Present:—Mr. Justice Walsh, and Mr. Justice Ryves.

EMPEROR—PROSECUTOR

VERSUS

ZAWAR HUSSAIN—ACCUSED.

U. P. Excise Act (IV of 1910), s. 60—Cocaine, unlawful possession of—Possession, meaning of.

A man is not ordinarily liable for the criminal acts of his agent. But he is so liable where, being authorised to traffic in prohibited goods under a license, and subject to restrictions, he puts a servant in to carry on the business for him, and the servant acts outside the restrictions. If *mens rea* is relevant, it must be shown that the principal had knowledge. [p. 931, col. 1.]

For the purposes of preventive Statutes, such as the Excise Acts, there may be and often is, in commercial dealings, possession, other than that which may be called strict legal possession. In such cases, control or dominion may amount to criminal possession, although actual legal possession, such as that of a bailee or an agent, may be in another. [p. 931, col. 1.]

Emperor v. Gajadhar, 25 A. 262; A. W. N. (1903) 29; *Emperor v. Ghulam Hussain*, 44 Ind. Cas. 975; 40 A. 420; 16 A. L. J. 323; 19 Cr. L. J. 447, followed.

Criminal appeal by the Local Government against an order of the Magistrate, First Class, Saharanpur, dated the 31st July 1922.

Mr. Lalit Mohan Banerjee, Government Advocate, for the Crown

Mr. G. W. Dillon, for the Accused.

JUDGMENT.

Walsh, J.—This is a Government appeal against the acquittal of one Zawar Hussain, on a charge tried by a First Class Magistrate of Saharanpur, for "possessing cocaine" without lawful justification. No lawful ground for the possession, if any, was suggested.

The case presents another example of the sort of travesty of justice of which this Court has had too much reason to complain of late in magisterial proceedings. The case lies in a small compass. The first witness was called on the 27th of March, within eight days of the date of the alleged offence. The last witness was not called till

about the 7th of July, and the judgment was delivered on the 31st of July, after what must have been an enormous expenditure of money and magisterial time. We have been compelled to go through a mass of irrelevant matter, and a judgment consisting of twelve closely printed pages of wearisome discussion of superfluous details, and laborious reflections on side issues, of no importance to any one, in which the real issue has been almost totally obscured.

The prosecution made the initial error of trying to establish that Zawar Hussain lived on the premises; an issue which was bound to fail and which undoubtedly accounts for much of the waste of time for which the Magistrate was not responsible. The Magistrate, in the end, decided that Zawar Hussain did not live on the premises, and that he had no knowledge of the cocaine which was seized. As to the former of these issues, it is clear that he was right. As to the latter, we differ from the decision. We think that it is clearly established that Zawar Hussain used the house for concealing cocaine, and that if he had been charged under section 60 A, as amended by Act IV of 1919, he must have been convicted. The Government Advocate asked for a conviction under this section, but the accused was not charged under it, nor was this Court asked in the notice of appeal to alter the charge. Mr. Dillon, who represented the accused and argued his case with great force and fairness, objected on substantial grounds of hardship to this course. We are of opinion that we ought not now to try the accused on a fresh charge.

The question, therefore, which we have to decide is, whether the finding that Zawar Hussain was not in possession of the cocaine seized was one at which the Magistrate has arrived against the weight of the evidence.

The material facts are simple, and clear. On his own showing, Zawar Hussain is a notorious trafficker in cocaine. He has already been in prison for illicit dealing. He would have us believe that he is now a reformed character, and has been helping the authorities to catch other offenders. It may be so. The fact is not inconsistent,

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either with his guilt, or with his innocence in this case. He is a prominent, if not the leading member of his family, which live, either in, or around, the house raided. He is the owner, either in whole or in part, of the house which he had let on an agreement in writing to his brother-in-law, from year to year and went through the quite unnecessary formality of getting it registered. He lived in another house close behind, a few yards away, and was naturally an occasional, if not a frequent visitor to his brother-in-law. The unusual course, that a near relative and neighbour, was taken of putting the agreement of tenancy into precise terms in writing, and by it Zawar Hussain reserved to himself a locked apartment containing some of his goods. Bashir Hussain, the tenant, was called for the defence, and swore that he and his brother-in-law were not on visiting terms. This is quite incredible.

One Gopal Narain, whom the Magistrate has criticised severely, and who was responsible for the allegation that the accused lived in the house, had reported that cocaine was hidden in the house which he believed to be the residence of Zawar Hussain. Mr. Young, Superintendent of Police, went on the 20th of March, with a large body of officials and constables, and raided the house. As he approached the place in a motor-car Gopal Narain pointed out to Mr. Young that Zawar Hussain was seated at a mosque situated in one of the angles of the sort of square which included the house to be raided, and the house of the accused. Mr. Young's attention was distracted by the traffic, and he was not able to look in the direction indicated. But it is inconceivable that Gopal Narain would have risked an idle falsehood, having no reason to know that accused was not at the house to be visited, or had not made off, as he afterwards, disguised as a woman, tried to do. It is, therefore, certain that the accused was sitting near by.

Outside the house raided eight persons were found seated. These included the tenant and brother-in-law of the accused, two of his brothers, one of whom lived also at the house, and, significantly enough, the accused's *karinda*. Inside the house were certain female members of the family. Much time has been wasted over the question

whether one was the wife, or mistress of the accused, and over the identity of one who was shortly afterwards delivered of a child. These questions only bear on the issue whether the house was the residence of the accused. But, after a long and elaborate search, a considerable quantity of cocaine 9 oz. 6 grs., said to be worth about Rs. 1800, was discovered in the false bottom of a large box, in a room chained from the inside, and occupied, at the moment, by one of the females. Zawar Hussain had been sent for, but he deliberately kept away. He was in the immediate neighbourhood, and his conduct shows that he knew there was good reason for dissociating himself from the results of the search. An innocent man would naturally be anxious to assist the authorities, and to satisfy them of his *bona fides*. Letters addressed to the accused were found in the house.

The box in which the cocaine was secreted was a very large and heavy one, the presence of which in the house must have been known to the occupants. It was designed to prevent the discovery of its secret contents and not to promote it. This destroys the feeble suggestion of the defence that it had been planted on the people of the house by their enemies; enemies would scheme that cocaine should be found, and not a box which almost defied discovery of its contents. The box had not even the tempting attractions of the Wooden Horse of Troy and the conduct of the tenants in concealing and guarding it is inconsistent with its suggested character of an unwelcome intruder. The enemies of Zawar Hussain would hardly plant a box in a house which, according to him, every one except Gopal Narain knew was not his residence. The time, moreover, to acquaint the authorities with the wicked trick which had been played upon them was when Mr. Young and his party arrived to search. The box, carefully housed and guarded, was indeed surrounded by the family and agents of the accused. It is not suggested that any of them was able to obtain and trade, the cocaine to this extent; Bashir was paying a rent, if he paid any, of Rs5 per month; and the inference from all these circumstances is irresistible that the box was being kept for Zawar

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Hussain in the house of his brother-in-law, in whose actual physical possession it was.

We have perused the mass of defence evidence without finding anything satisfactorily established, which is inconsistent with this view. It is not possible to say that Zawar Hussain was the sole owner, or the true owner. Bashir Hussain, the tenant and brother-in-law, swore to a new and startling story that one Buddhoo had suddenly deposited the box there the night before, as part of his luggage. This mysterious individual was expected to follow up this advance guard by arriving in force with the rest of his luggage "later on". But nothing more seems to have been heard of him. The notion that a man would abandon nearly Rs. 2,000 worth of cocaine to its fate in this way, requires more evidence than this to satisfy us of its truth. The onus was clearly thrown on the accused to prove the true ownership or at least to account for its presence in the custody of his relative and tenant, and he has failed to do either.

Mr. Dillon's view of the law applicable is perfectly sound. A man is not ordinarily liable for the criminal acts of his agent, except in those cases where, being authorized to traffic in prohibited goods under a license, and subject to restrictions, he puts a servant in to carry on the business for him, and his servant acts outside the restrictions. If *mens rea* is relevant, it must be shown that the principal had knowledge. But there may be, and often is, in commercial dealings, possession other than that which may be called strict legal possession, for the purposes of a preventive Statute such as this. Control, or dominion, may amount to criminal possession, although actual legal possession, such as that of a bailee, or an agent, may be in another. In *Emperor v. Gajadhar* (1) opium found in the house of a neighbour of the owner, who had left it with the neighbour for the night for safe keeping, was held to be in the possession of the owner. In *Emperor v. Ghulam Hussain* (2) the owner of fire-arms, who held a license to carry arms, had died. His widow and his minor son continued to live in the

house where the fire-arms were kept. The mother was the legal owner, and the manager of the house. There was ground for holding that the youth had cleaned, and looked after them, if he had not actually used them. It was held that the son was rightly convicted of being in possession of them without a license.

We, therefore allow the appeal, and convict Zawar Hussain of having been in unlawful possession of these 9 oz. of cocaine.

It is a bad case, not merely because of the amount seized, and on account of the previous conviction, but also on account of the nature of the defence set up. We, therefore, sentence Zawar Hussain to two years' rigorous imprisonment from the date of his surrender to his bail, or arrest, in the event of his failing to surrender, whichever happens first.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1128 OF 1922.

February 22, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

GANESH SAHU—ACCUSED—PETITIONER
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Penal Code (Act XLV of 1860), s. 411—Stolen property, several articles of, found in possession of accused—Trial in respect of some—Acquittal—Subsequent trial in respect of remaining articles, legality of.

Several articles of property stolen from different persons were found in possession of the accused. He was tried in respect of some of the articles upon a charge under section 411 of the Penal Code and was acquitted. He was subsequently prosecuted under the same section in respect of the other properties found in his possession on the same date, but there was no evidence that the articles were received at different times:

Held, that under section 403 of the Criminal Procedure Code the second trial was illegal. [p. 932, col. 1.]

Queen-Empress v. Mahan, 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 919 and *Ishan Mucht v. Queen-Empress*, 15 A. 511; 7 Ind. Dec. 925, followed.

Application for revision under section 435, Criminal Procedure Code.

(1) 25 A. 262; A. W. N. (1903) 29.

(2) 44 Ind. Cas. 975; 40 A. 420; 16 A. L. J. 323; 19 Cr. L. J. 447.

INDAR SINGH v. EMPEROR.

Babu *Dasarathi Sanyal*, with him Babu *Lalit Mohan Sanyal*, for the Petitioner.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Newbould, J.—The petitioner in this case has been convicted under section 411, Indian Penal Code, on the charge of having been in dishonest possession of stolen property on the 7th December 1921. It appears that on that date several articles of property were found in the room occupied by the petitioner. In respect of some of them he was prosecuted and after being convicted under section 411, Indian Penal Code, by the Trying Magistrate he was acquitted on appeal. He has now been tried and convicted in respect of other properties found in his possession on the same date. There was evidence that the different articles which were the subject of the charges in the two trials were stolen from different persons, but there is no evidence that they were received at different times. The facts of the case cannot be distinguished from those of *Queen-Empress v. Makhan* (1) which follows the decision of a Divisional Bench of this Court in *Ishan Muchi v. Queen-Empress* (2). On this authority we hold that the second trial was illegal under the provisions of section 403, Criminal Procedure Code.

We accordingly make this Rule absolute and set aside the conviction and sentence passed on the petitioner and direct that he be discharged from his bail-bond.

W. C. A. Rule made absolute.

(1) 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 919.

(2) 15 C. 511; 7 Ind. Dec. (N. S.) 925.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1165 OF 1922.

January 23, 1923.

Present.—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar,

INDAR SINGH—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.

Criminal trial—Prosecution, failure of, to produce all witnesses, effect of.

The mere fact of the non-production of some of their witnesses by the prosecution cannot, in any way, affect the credibility of witnesses who are produced. [p. 933, col 2; p. 934, col. 1.]

Appeal from an order of the Sessions Judge, Gujranwala, dated the 21st November 1922.

Mr. Morton, for the Appellant.

Mr. Zafarulla Khan, for the Respondent.

JUDGMENT.—On the 27th July 1922 one Kharak Singh, a Hindu *Jat* of the village Shahpur, in the Gujranwala District, is alleged to have been murdered by Indar Singh, appellant. The crime is said to have been committed early in the morning shortly after sunrise, and to have been witnessed by one Partap Singh (P. W. No. 2) who was planting paddy in a field close by and by certain other persons who have also been produced as witnesses on behalf of the prosecution in this case. The exact reason of the quarrel which led to this unfortunate incident is not known, but it is clear from the evidence of Radha Kishen, *Patwari*, (P. W. No. 10) and Sant Singh, *Zaildar*, (P. W. No. 7) that Indar Singh, appellant, and his father Rup Singh were not on good terms with Kharak Singh, deceased, owing to a dispute with regard to field No. 780 which was in the possession of the deceased and his uncle for a large number of years, though recorded in the Revenue papers as the property of Rup Singh, father of the appellant. It is also in evidence that, shortly before the murder was committed, a *panchayat* was held in the village to settle this dispute but that it did not lead to any successful results. An amicable settlement not having been arrived at, an application was made by Rup Singh to the Revenue Authorities on the 18th July 1922 that the boundary lines of his fields should be demarcated. This application is on the record, and is marked as Exhibit P. H. It appears that, before this application could be disposed of, the deceased Kharak Singh arranged to sow paddy in the field in dispute, and with this object in view engaged the services of one Ilahi Bakhshi, *Changar*, (P. W. No. 4), so that even if Rup Singh succeeded in the application made by him to the Revenue Authorities, he might not be able to get immediate possession of the field in question. This conduct

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on the part of the deceased evidently appears to have been resented by Indar Singh and his father Rup Singh, and it is alleged that on the morning of the 27th July 1922 when Kharak Singh was taking paddy plants to his field, he was followed by Indar Singh and Rup Singh and when the former came near his field, he was struck several blows from behind by Indar Singh with a *Chhavi* which the latter had in his hands. Partap Singh (P. W. No. 2) saw this, and raised an alarm which brought Rukin Din (P. W. No. 3) Sundar Singh (P. W. No. 5) and Ilahi Bakhsh (P. W. No. 4) towards the spot. None of these witnesses, however, went near the spot, nor did anyone of them make any serious effort to arrest the accused, as it is alleged that the appellant threatened to inflict injuries upon them also if they dared to interfere. Kharak Singh was killed on the spot, and then the accused is alleged to have run away. After his departure the witnesses went up to the place where Kharak Singh was lying and found that he had already succumbed to his injuries.

Partap Singh then went to the *thana* and lodged the First Information Report in which he distinctly mentioned the name of Indar Singh as the perpetrator of the crime. Investigations were at once started but Indar Singh could not be found. On the 30th July 1922, however, Indar Singh was arrested at the house of his sister at the village of Kullawala, and marks of certain injuries were found on his person. The medical evidence shows that these injuries had been inflicted by a blunt weapon, but there is no evidence to show as to how they were caused. It is possible that Kharak Singh had a *lathi* in his hand and that he struck Indar Singh with this *lathi* when he was attacked, but no evidence has been produced on this point and it is idle to speculate as to how these injuries were caused.

In the course of the investigation it was also found that the weapon with which the crime had been committed had been made over by the accused to one Mangal Singh. Mangal Singh has been produced as a witness, and has deposed to his having received the *kulhari* from Indar Singh on the day that the crime is alleged to have been committed.

On these facts Indar Singh was charged with the murder of Kharak Singh, and committed to the Sessions to take his trial under section 302, Indian Penal Code. The learned Sessions Judge has found him guilty of the offence of murder and has sentenced him to the penalty of death. The convict has appealed. His case is also before us under section 374 of the Criminal Procedure Code for confirmation of the sentence of death passed upon him by the Sessions Judge.

There is ample evidence on the record in support of the prosecution story as set out above. Partap Singh (P. W. No. 2), Rukna (P. W. No. 3), Ilahi Bakhsh (P. W. No. 4) and Sundar Singh (P. W. No. 5) all of whom are eye-witnesses, of the crime, have appeared as witnesses, in the case, and have stated that they saw the injuries being inflicted, and that it was Indar Singh who inflicted these injuries on the deceased. We see no reason to doubt the testimony of these witnesses, and the learned Counsel for the appellant has not been able to give any satisfactory reason why their evidence should be rejected.

It is contended by Mr. Morton that it was stated in the First Information Report that one Labh Singh, *Lambardar*, and three other *Changars* had also reached the spot where the murder had been committed but that they have not been produced in evidence and that this fact detracts very greatly from the value of the evidence which has been produced on behalf of the prosecution. In our opinion this contention has no force. Ilahi Bakhsh, one of the *Changars*, has been produced as a witness, and has deposed to his having seen the injuries being inflicted on the deceased. Labh Singh and the other two *Changars* have, of course, not been produced, but it is quite possible that they may have reached the spot after the attack was over and that they may not have been the actual eye-witnesses of the crime. In these circumstances, the prosecution may well have thought, that it was entirely unnecessary to produce these persons as witnesses in the case or there may be some other good reason for their non-production which is not clear from the record; but in any case it is clear that the mere fact of their non-production cannot

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in any way affect the credibility of the witnesses that have been produced.

The accused denied his presence on the spot and set up an *alibi*. He further stated that Partap Singh (P. W. No. 2) had more motive to murder Khafak Singh, inasmuch as the former was carrying on an illicit intimacy with *Musammât Atri*, aunt of the deceased, which was resented by the latter. The evidence as to *alibi* is most unconvincing, and we have no hesitation in holding that no reliance can be placed upon it. As to Partap Singh's intimacy with *Musammât Atri*, we do not find any evidence on the record in support of this plea, and we are clearly of opinion that the learned Sessions Judge was right in holding that the plea was palpably false and that it should be rejected.

The murder was a most brutal one, and the medical evidences show that the deceased received as many as seven injuries on his head and other parts of his person, causing extensive fracture of the skull and resulting in his voice-box and his wind-pipe being cut. From the nature of the injuries inflicted and from the nature of the weapon used in inflicting them it is clear that the accused must have intended to cause death and that he was guilty of murder.

After a careful consideration of the entire evidence on the record, we hold that the offence has been fully established and that the appellant has been rightly convicted of murder. We uphold the conviction and, confirming the sentence of death, we dismiss the appeal.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 985 of 1922.

January 12, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

HARI SATYA BISHNU AND OTHERS
—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Cognizance taken by different Magistrates, legality of.

Proceedings under sections 120 A and 420, Penal Code, were taken against the accused in the Court of a Deputy Magistrate before whom the case remained pending and no evidence was taken up to a certain date, when a formal complaint was laid before the District Magistrate by the Police on which the District Magistrate took proceedings which ended in the committal of the accused to the Court of Session:

Held, that there was no illegality in the District Magistrate taking cognizance of the case, as, though the law prevents a person being tried twice over for the same offence, there is no provision that if cognizance is taken by two different Magistrates at different times the trial can be before one of them only. [p. 935, col. 1.]

Criminal Revision against an order of the District Magistrate, Howrah, dated the 10th October 1922.

Babu *Manmatha Nath Mukherjee*, for the Petitioners.

Messrs. *B. L. Mitter*, Standing Counsel, and *S. Sen*, Counsel, for the Crown.

JUDGMENT.

Newbould, J.—The two petitioners have been committed for trial on the charge of conspiring to commit the offence of cheating punishable under section 120 B and section 420, Indian Penal Code. The Rule is to show cause why that commitment should not be quashed on the ground that the offence of conspiracy having already been taken cognizance of by Mr. B. N. Mukherjee, Deputy Magistrate, no other Magistrate had jurisdiction to take cognizance of it again so long as Mr. B. N. Mukherjee was in seisin of the case, therefore, the proceedings before the learned District Magistrate have been wholly *ultra vires* and are fit to be set aside.

It appears that on three separate Police reports Mr. B. N. Mukherjee took action against the petitioners and others in respect of this conspiracy and required them to give bail to answer the charge. The cases

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before Mr. B. N. Mukherjee remained pending and no evidence was taken up to the 28th June. On the 28th June a formal complaint was laid before the District Magistrate by the Police charging the petitioners and other persons with being members of this conspiracy and on that complaint the District Magistrate took proceedings which ended in the commitment of these petitioners to the Court of Session. On the day when the District Magistrate took cognizance of this complaint Mr. B. N. Mukherjee passed an order which amounted to a discharge of the persons who were appearing before him in the cases of which he had taken cognizance in connection with this conspiracy.

We are unable to hold that there is any illegality in the District Magistrate taking cognizance of the case which would justify us in quashing this commitment on a point of law. In the first place, it must be remembered that no prejudice against the petitioners has been alleged and it would appear that it was rather to their benefit that the case against them should be dealt with in one single proceeding rather than before the Deputy Magistrate in three separate proceedings. We have not been shown there is any provision of the Criminal Procedure Code which prevented the Magistrate from taking cognizance of the offence because another Magistrate had previously taken cognizance. The law prevents a person being tried twice for the same offence. But there is no provision that if, as in this case, cognizance is taken by two different Magistrates at different times the trial can be before one of them only. There seems to be no reason why the trial should not proceed before either of the Magistrates who have taken cognizance irrespective of the one having taken cognizance before or after the other. The only section of the Code which in any way renders duplicate proceedings illegal is section 403 which has no application whatever to the present case. But multiplicity of trials can be always prevented by the sections providing for the transfer of cases. But here is no question of multiplicity of trials. There has been only one trial, and unless the District Magistrate's action in taking cognizance was in itself illegal there was no illegality in that trial. I hold that there

was no illegality in the part of the District Magistrate in taking cognizance of the case and, therefore, there is no ground for quashing the commitment. The Rule is discharged.

Suhrawardy, J.—I agree in the order proposed to be passed. I wish to add that I am not convinced that the complaint which was subsequently filed before the District Magistrate was for all practical purposes the same as that which was filed and taken cognizance of by the Deputy Magistrate.

W. C. A.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 56 OF 1923.

April 11, 1923.

Present:—Mr. Justice Ryves.

MAQSUD HUSAIN AND ANOTHER—
ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 297—Trespass in place of worship—Trespass, meaning of—Sexual intercourse in mosque—Offence.

The word 'trespass' in section 297 of the Penal Code does not mean criminal trespass as defined in other parts of the Code. In this section it must be taken to have been used in its original meaning as covering any injury or offence done coupled with entry upon property. [p. 936, col. 1.] *Queen-Empress v. Subhan*, 18 A. 395; *A. W. N.* (1896) 119; 8 Ind. Dec. (N. S.) 969, *Ram Prasad v. Emperor*, 12 Ind. Cas. 300; 33 A. 773; 8 A. L. J. 927; 12 Cr. L. J. 532, *In re Ratna Mudali*, 10 M. 126; 1 Weir 256; 3 Ind. Dec. (N. S.) 839 relied on.

Where a man and a woman enter a mosque and have sexual intercourse in it they are guilty of an offence under section 297 of the Penal Code.

Criminal revision against an order of the Sessions Judge, Moradabad, dated the 22nd December 1922.

Mr. G. W. Dillon, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Maqsud Hussain and Musammat Allahbandi were convicted by a

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Magistrate of the First Class under section 297 of the Indian Penal Code. Their appeal was rejected by the learned Sessions Judge and they have come here in revision. The facts found are as follows:—

In *Muhalla* Kal, in the town of Sambhal, there is a mosque, somewhat dilapidated, which was built by the father of Khan Bahadur Khan, the chief witness in the case. On the night of 11th October last which was the *chehlum*, there were illuminations in this *Muhalla*. Khan Bahadur Khan was one of the persons who had organised these illuminations and at about 11 o'clock that night he was about to enter the mosque to say his evening prayers when, in consequence of information given to him by some boys, he went back to the illuminations and fetched three other Muhammadans and entered the mosque. There they found Maqsud Hussain and Musammal Aliahbandi lying on a cot having sexual connection. The witnesses ran up and seized them both and dragged them outside. A number of Muhammadans at once came up and were so horrified at the desecration of the mosque that they handled the accused somewhat roughly. These are the facts found and they are amply borne out by the evidence. The learned Counsel for the applicants raises two points (1) that no trespass has been proved against the accused within the meaning of the section.

He argues that the word "trespass" in that section must have the same meaning as criminal trespass in other parts of the Code. As long ago as 1896 it was held by a learned Judge of this Court in *Queen-Empress v. Subhan* (1) that the word trespass in the section must be taken in its original meaning and as a word which covered any injury or offence done and to couple it with entry upon property. That decision has remained unchallenged for 27 years. It was quoted with approval in *Ram Prasad v. Emperor* (2) by a Divisional Bench of this Court and the same view seems to have been taken by a Bench of the Madras High Court in *In re Ratna Mudali* (3). In my opinion this argument, therefore, fails.

(1) 18 A. 395; 1 A. W. N. (1896) 119; 8 Ind. Dec. (N. S.) 969.

(2) 12 Ind. Cas. 300; 33 A. 773; 8 A. L. J. 927; 12 Cr. L. J. 532.

(3) 10 M. 126; 1 Weir 256; 3 Ind. Dec. (N. S.) 839.

The second argument put forward is that what really happened was that the accused and the woman had gone into the mosque solely with the intention of looking at the illuminations and had taken the cot with them merely to sit on it when under a moment of impulse they misconducted themselves, and that, therefore, there was no intent within the meaning of the section. I do not propose even to consider this argument because it is based only on the ingenuity of Counsel and is not supported by any evidence and is in fact flatly contradicted by the statements of the accused themselves and their evidence. According to them they were not inside the mosque at all. There was no cot and there was no misconduct. The conviction, therefore, in my opinion, was right and the sentence appropriate. I reject the application.

Z. K.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1123 of 1922.

February 21, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Sukrawardy.

DARAJUDDIN AKANDA AND ANOTHER
—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 363—Kidnapping—Muhammadan minor wife—Custody of husband—Lawful custody—Removal of wife—Offence.

The husband of a Muhammadan girl who has not attained puberty is not the lawful guardian of her person under the Muhammadan Law, and in the absence of proof that he was lawfully entrusted with the care and custody of the minor so as to make the explanation to section 361 of the Penal Code applicable, the forcible removal of such a girl from his custody is not an offence punishable under section 363 of that Code. [p. 937, col. 1.]

Criminal revision against an order of the Sessions Judge, Dinajpur, dated the 25th November 1922, affirming that of the Deputy Magistrate, Dinajpur, dated the 14th August 1922.

KANSHI RAM v. EMPEROR.

Babu Bimal Chandra Das Gupta, with him Babu Debendra Narain Bhattacharjee, for the Petitioners.

JUDGMENT.—The petitioners have been convicted of kidnapping a girl named Sahya Khatun from lawful guardianship and sentenced under section 363, Indian Penal Code, to two months' rigorous imprisonment each. The girl in question is a Muhammadan girl whose age according to the case for the prosecution is 8 or 9 and according to defence about two years less.

This Rule was granted on the ground that the husband of the girl from whose care she was taken was not her lawful guardian under the Muhammadan Law, nor was he proved to have been lawfully entrusted with the care or custody of the minor so as to make the explanation of section 361, Indian Penal Code, applicable. We hold that the Rule must be made absolute on this ground. The husband of a Muhammadan girl who has not attained puberty is not the lawful guardian of her person under the Muhammadan Law. The lawful guardian of such a person is ordinarily her mother, and in the present case, since the mother is dead the lawful guardian is the mother's mother who is also the mother of the petitioner Darajuddin. The learned Magistrate in his explanation states that the minor girl was in temporary guardianship of her husband on behalf of his maternal grandmother who was the lawful guardian. But there is no finding in either of the judgments nor do the facts seem to support the view that the maternal grandmother entrusted the girl's husband with the care or custody of the minor.

That being so, we make this Rule absolute. We set aside the conviction of and the sentence passed on the petitioners, we acquit them of the charge under section 363, Indian Penal Code, and direct that their bail-bonds be discharged.

W. C. A.

Rule made absolute.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 635
OF 1922.

November 21, 1922.

Present:—Mr. Justice Moti Sagar.

KANSHI RAM—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 517, 520—Application for restoration of property—Limitation—Power of Court.

No period of limitation is prescribed for an application under section 517 or 520 of the Criminal Procedure Code, and such an application can always be made within a reasonable time of the termination of the proceedings in which the property in dispute was produced. [p. 938, col. 1.]

The words "make any further orders that may be just" in section 520 of the Criminal Procedure Code are intended to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under section 517 of the Code. [p. 938, col. 2.]

During the investigation into a case of theft, certain currency notes were produced before the Police by the petitioner. One T. was eventually convicted of criminal misappropriation in respect of the notes and the notes were made over to the complainant under the orders of the Magistrate. The petitioner was subsequently tried and convicted of an offence under section 411 of the Penal Code in respect of the notes, but was acquitted by the Sessions Judge on appeal. Nearly six months after his acquittal he applied to the Sessions Judge for restoration of the notes to him. The Sessions Judge rejected the application on the ground that it was barred by limitation:

Held, (1) that the application was in no sense an appeal against the order of the Magistrate making over the notes to the complainant but an independent application to the Sessions Judge himself with a view to his taking action under section 520 of the Criminal Procedure Code; [p. 938, col. 1.]

(2) that as such, no period of limitation was applicable to it; [p. 938, col. 1.]

(3) that under section 520 of the Code the Sessions Judge was possessed of very wide powers and could pass any order that he deemed just. [p. 938, col. 2.]

Petition, under section 439 of the Criminal Procedure Code for revision of the order of the Sessions Judge, Karnal, dated the 11th February 1922.

Lala Anant Ram Khosla, for Mr. Raj Krishna, for the Petitioner.

Mr. Ram Lal, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an application in revision against an order passed by the Sessions Judge of Karnal under section 520, Criminal Procedure Code.

BHABANI PROSAD MOITRA V. HARI CHARAN BHATTACHARJEE.

The facts are briefly these:—

One Rahim Bakhsh, a *Lambardar*, lost a large sum of money in currency-notes in January 1920. In May, the Police received information that the notes were in the possession of one Thana, a *Kumhar* of Ramgarh. As a result of this information, Thana was prosecuted and convicted of criminal misappropriation.

During the investigation, Thana informed the Police that he had given notes for Rs. 500 to Kanshi Ram, the present petitioner, who was one of his creditors. Kanshi Ram is alleged to have admitted his guilt before the Police and to have given up Rs. 400 in cash. Proceedings were taken against him, and he was convicted by an Honorary Magistrate under section 411, Indian Penal Code, of the offence of dishonestly receiving stolen property knowing the same to be stolen property. On appeal to the Sessions Judge the conviction was set aside, and the petitioner was acquitted. No orders were passed by the Trial Court or by the Sessions Judge with respect to Rs. 400 which had been recovered from him by the Police in the course of the investigation and made over to the complainant by the order of the Magistrate on the conviction of Thana in June 1920.

In January 1922, about six months after his acquittal, Kanshi Ram made an application to the Sessions Judge for the restoration of this money. The Sessions Judge rejected the application on the ground that it was barred by limitation.

In my opinion the order of the learned Sessions Judge is erroneous and must be set aside. The application for the return of Rs. 400 made by the petitioner was in no sense an application by way of an appeal against the orders of the Trying Magistrate directing return of the money to the complainant but an independent application to the Sessions Judge himself with a view to his taking action under sections 517 and 520, Criminal Procedure Code. No period of limitation is prescribed for such an application and it could, in my opinion, always be made within a reasonable time of the date that an accused person is acquitted of the crime with which he is charged. It appears that the learned Sessions Judge has entirely overlooked the provisions of sec-

tion 520, Criminal Procedure Code, under which he is possessed of very wide powers to pass any orders that might be just. The words "and make any further orders that may be just" in section 520 are obviously intended to cover cases of this nature and to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under section 517, Criminal Procedure Code.

I would reverse the orders of the Sessions Judge and return the case with directions that he should hear the application and decide the same according to law after giving notice to the complainant.

Z. K.

*Orders reversed;
Case returned.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION NO. 289
OF 1923.

April 20, 1923.

Present:—Mr. Justice Buckland and Mr. Justice Cuming.

BHABANI PROSAD MOITRA *alias*
DOMAN CHANDRA MOITRA—
PETITIONER

versus

HARI CHARAN BHATTACHARJEE—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367—Judgment in criminal case, contents of—Failure to consider essential points.

Accused was convicted of offences under sections 426 and 447 of the Penal Code. It did not appear from the judgment that the Magistrate had considered the knowledge or the intention with which the accused had done the act complained of as constituting mischief, or that he had come to any conclusion as to whether the accused entered into or upon property in the possession of the complainant or what his intention was, if he did so:

Held, that the judgment was bad and could not be allowed to stand. [p. 939, col. 1.]

Though a Magistrate is at liberty to refer to the evidence in a criminal proceeding in a manner equally appropriate to civil proceedings he should not lose sight of the fact that he is dealing with a criminal matter and should ultimately dispose of the case purely from the standpoint of the Criminal law. [p. 939, col. 1.]

TEJA SINGH v. EMPEROR.

Babus Dasarathi Sanyal and Lalit Mohan Sanyal, for the Petitioner.

JUDGMENT.

Buckland, J.—The Judgment of the Trying Magistrate in this case is most unsatisfactory. He has not considered in his judgment the knowledge or the intention with which the accused caused the bamboofencing to be removed. Nor does it appear from his judgment that he came to the conclusion that the accused entered into or upon property in the possession of the complainant, or what his intention was in trespassing, if he did so. The result is that it is extremely difficult from the judgment to ascertain what was in the mind of the Magistrate when he convicted the accused under sections 447 and 426 of the Indian Penal Code. He seems to have discussed the case as if it was of a civil nature. Having done so, he had to deal with it as a criminal trial which in fact it was. It would have been much better if the Magistrate had considered whether or not the case was of a civil nature and if he came to the conclusion that only a civil wrong had been committed he should have said so and dealt with the case accordingly. If, on the other hand, he was of opinion that a criminal offence had been committed, though he might refer to the evidence in a manner equally appropriate to civil proceedings, he should not have lost sight of this fact that he was dealing with a criminal prosecution and ultimately he should have disposed of the case purely from the stand-point of the Criminal law. This judgment of the learned Magistrate, in my opinion, is neither the one nor the other.

The judgment and order of the Deputy Magistrate of Berhampore, dated the 6th December 1922, must be set aside. The case is a petty one, but, even so, in the circumstances, there must be re-trial. The case is, therefore, remanded in order that it may be tried by some other Magistrate and we leave it to the District Magistrate to nominate such Magistrate.

The sums ordered to be paid, if paid, will be refunded.

Cuming, J.—I agree with the order.

z. k.

*Order set aside;
Case remanded.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 1084 OF 1922.

January 29, 1923.

Present:—Mr. Justice Harrison.

TEJA SINGH AND OTHERS—APPELLANTS
versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 403—
Trial in Native State—Trial for same offence in
British India, legality of.*

A dacoity was committed in British India and the accused were shortly after caught in a Native State with the stolen property. They were tried and convicted by the State Court of an offence under section 411 of the Penal Code. After serving out their sentence they were tried in British India on a charge under section 395 of the Penal Code, but the evidence only established an offence under section 411 of the Code against them.

Held, that their trial by the State Court barred their trial by the Court in British India on the same facts and for the same offence, by virtue of the provisions of section 403 of the Criminal Procedure Code.

Criminal appeal from the order of the Magistrate, First Class, with section 30 powers, at Jullundur, dated the 31st October 1922.

Diwan Ram Lal, for the Appellants.

Mr. M. Saleem, for the Government Advocate, for the Respondent.

JUDGMENT.—A dacoity is said to have been committed in Mauza Kotla Heran, in the Jullundur District, on the night between the 14th and 15th March, two head of cattle being removed. On the following day three men were captured in the adjoining State of Kapurthala and were sent up for trial in the Kapurthala State on a charge under section 394, Indian Penal Code. The Sessions Judge of Kapurthala discharged them under section 394, but convicted them under section 411 and sentenced them to undergo two years' rigorous imprisonment. On appeal the High Court of Kapurthala reduced the sentence to one year, which they have undergone. On being released from Jail they were once more sent up for trial in the Jullundur District on a charge under section 395, Indian Penal Code, and have been convicted and sentenced to undergo imprisonment for a further period of five years. They appeal, urging that section 403, Criminal Procedure Code, bars the present trial and I have heard arguments at length on the question of whether

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the Kapurthala Sessions Judge had jurisdiction to try the case for an offence alleged to have been committed in British India. It is by no means clear whether the accused are the subjects of His Highness the Maharaja of Kapurthala or of the King-Emperor, there being one passage in the Magistrate's judgment in which they are apparently considered to be State subjects while on the other hand they are described as residents of a village in the Amritsar District. It is, I find, unnecessary to go into this point as the evidence on which they have now been convicted as opposed to the evidence on which they were convicted of receiving stolen property is neither convincing nor sufficient. It consists of the statement of one witness, a youth of 17 named Banta Singh (P. W. No. 2) who says that the six men broke into the enclosure on a dark night and removed the cattle, that he followed and saw them, that they then came back and tied him up. After they had been arrested with the stolen property he is said to have identified them. Agreeing with the Sessions Judge of Kapurthala and being by no means satisfied with this evidence I find that the only offence established against these men is under section 411, Indian Penal Code, of receiving stolen property. It is not contended that the Kapurthala Courts had not jurisdiction to try these men, whether they were British subjects or not for the offence committed in Kapurthala where they were caught with the stolen property. The only remaining point urged by Counsel for the Crown is that the Magistrate has rightly held that the Sessions Judge was not a competent Court inasmuch as there had been no committal proceedings and that this was very serious irregularity. In the judgment of the High Court this point was noticed but it was held that it did not vitiate the proceedings. This being so, I think the Magistrate was going beyond his province in questioning the jurisdiction of the Sessions Judge.

The accused, therefore, having once been tried and convicted and having undergone a sentence for the offence, they could not be tried again. I, therefore, accept the appeal and acquit them.

Appeal accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 272

OF 1923.

April 24, 1923.

Present.—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

NITYANANDA KOER—PETITIONER

versus

RAKHAHARI MISRA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 247—Acquittal—Revival of proceedings—Jurisdiction of Magistrate.

An order of acquittal passed under section 247 of the Criminal Procedure Code, so long as it is not set aside by a competent Court is a bar to fresh proceedings in respect of the same offence.

A Magistrate has no jurisdiction to revise proceedings in a case which has terminated in an order of acquittal under section 247 of the Criminal Procedure Code.

Rule against the District Magistrate, Burdwan.

Babu Panchanon Chowdhury, for the Petitioner.

Babu Jyotis Chunder Sarcar, for the Opposite Party.

JUDGMENT.—This Rule was issued calling upon the District Magistrate of Burdwan and on the complainant to show cause why the conviction of the petitioner and the sentence passed on him should not be set aside on the ground that a previous order of his acquittal which had been passed under section 247 of the Code of Criminal Procedure on the 8th August 1922, not having been set aside by a competent authority, the Magistrate had no jurisdiction to try and convict the petitioner for the same offences in respect of which the order of acquittal had been passed.

The facts which have given rise to the application on which this Rule was issued, shortly stated, are as follows:—The petitioner was summoned under sections 426 and 447 of the Indian Penal Code (both summons-cases) to appear on 24th July 1922. On that date a warrant was issued against the accused and the 8th August 1922 was fixed for the next hearing of the case. On the 8th August the Sub-Divisional Magistrate before whom the case was pending was absent and another Magistrate, Babu S. Ghose, was acting in his place and was in charge of the criminal business of the Sub-Division in accordance with the standing orders of the District

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Magistrate. When the case against the accused was put up before the last mentioned Magistrate, the complainant was found to be absent. Thereupon an order under section 247 acquitting the accused was passed. It appears that on the same date after the order of acquittal had been passed an application for the revival of the proceedings was presented to the Magistrate. On the 11th August 1922, the learned Magistrate revived the proceedings against the accused which had come to an end on the 8th August. Thereafter, the case was transferred to the file of another Magistrate, Maulvi Ezahar Hossain, and this last mentioned Magistrate tried the accused under sections 447 and 426 and convicted him on the 28th November 1922, and sentenced him to pay a fine of Rs. 50 and in default to undergo a rigorous imprisonment for six weeks.

It appears from the record of the case which is now before us that on the 8th August 1922, an order of acquittal under section 247 was passed by Babu S. Ghose. Now that order under section 247 was one which could only have been set aside by this Court if an application had been made for setting aside the same. No such application was made to this Court and it, therefore, follows that no competent authority has set aside the order of acquittal which had been passed on the 8th August 1922. Under these circumstances, the question arises, "was it open to the Magistrate to pass the order for revival of the proceedings on the 11th August 1922." We are of opinion that the Magistrate had no jurisdiction to set aside the order of acquittal passed under section 247 and revive the proceedings against the accused on the 11th August 1922. The order of acquittal was in existence on the 11th August 1922 and the order of acquittal not having been set aside by a competent authority is still in existence and it follows, therefore, that it operated as a bar on the 11th August 1922, and on all subsequent dates to a fresh trial of the accused under the sections mentioned above.

The Rule is, therefore, made absolute. The conviction and sentence are set aside and the fines, if paid, will be refunded.

Z. K.

*Rule made absolute.***MADRAS HIGH COURT.**

CRIMINAL REVISION CASE No. 374 OF 1922.

(CRIMINAL REVISION PETITION No. 323 OF 1921.)

January 31, 1923.

Present:—Mr. Justice Venkatasubba Rao.
KALIAPERUMAL NAIDU—PETITIONER
versus

BAVAJI SAHIB—ACCUSED—RESPONDENT.
Criminal Procedure Code (Act V of 1898), s. 250—Complaint, vexatious, to Village Magistrate—Compensation.

A person who makes a complaint to a Village Magistrate of a bailable offence, knowing that the latter must, in the ordinary course of his duty, report the substance of the complaint to the Police, gives information to a Police Officer within the meaning of section 250 of the Criminal Procedure Code just as effectively as if he went in person to the Police Station, and where the complaint is ultimately found to be frivolous or vexatious, an order directing the complainant to pay compensation is perfectly legal. [p. 942, col. 2.]

Nachimuthu Chetty v. Muthuswami Chetty, 24 Ind. Cas. 167; 39 M. 1006; (1914) M. W. N. 804; 27 M. L. J. 37; 15 Cr. L. J. 431, *Margasahaya Chetty v. Gandala Nadiabba*, 36 Ind. Cas. 843; 32 M. L. J. 78; 18 Cr. L. J. 11; (1917) M. W. N. 86; 5 L. W. 290 and *Thonohadavai Awalla v. Anniaman Mannil Kuttiah*, 36 Ind. Cas. 471; (1917) M. W. N. 155; 4 L. W. 73; 17 Cr. L. J. 503, followed.

King-Emperor v. Thammana Reddi, 25 M. 667; 2 Weir 318, *In re Arulanantham Pillai*, 13 Ind. Cas. 221; 22 M. L. J. 138; (1911) 2 M. W. N. 558; 10 M. L. T. 550; 13 Cr. L. J. 29, followed.

Petition, under sections 435 and 439 of the Code of the Criminal Procedure, 1898, praying the High Court to revise an order of the Court of the Additional District Magistrate, Tanjore, dated the 11th January 1922, in Criminal Revision Case No. 21 and Criminal Appeal No. 24 of 1921, preferred against an order of the Court of the Stationary Second Class Magistrate, Tanjore, in C. C. No. 392 of 1921.

Dr. S. Swaminathan, for the Petitioner.
Mr. V. L. Ethiraj, *Amicus Curie*, for the Accused.

ORDER.—The Second Class Magistrate of Tanjore directed P. W. No. 4 to pay to the accused a sum of Rs. 35 as compensation under section 250 of the Criminal Procedure Code, and the District Magistrate confirmed the order.

The facts are these: P. W. No. 1 lost a bull, P. W. No. 1 and P. W. No. 4 who

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were residents of a village called Ramsapatti, thereupon went to Ammapet, the village where the accused was living, and P. W. No. 4 gave information to P. W. No. 2 the Village Magistrate of Ammapet to the effect that a bull of P. W. No. 1 was stolen and that the accused was the thief. Before taking any action P. W. No. 2 desired to have a report from the Village Magistrate of Ramsapatti, who accordingly forwarded to him Exhibit A which confirmed the information given by P. W. No. 4. On the receipt of this report P. W. No. 2 communicated with the Police who charged the accused with theft or, in the alternative, receiving stolen property. It must be added that the Police, subsequent to the receipt of the communication from the Village Magistrate of Ammapet, but before charging the accused with the offence mentioned above, received from P. W. No. 1, the owner of the bull, information under section 153, Criminal Procedure Code. The lower Courts found that the accused was not guilty and directed P. W. No. 4 to pay compensation to the accused.

On behalf of P. W. No. 4 it is contended that the order directing him to pay compensation is, in the circumstances, illegal.

The final contention is that a Village Magistrate is not a Police Officer under section 250 and that as P. W. No. 4 gave information only to a Village Magistrate, an order could not be made directing him to pay compensation. Reliance is placed on *King-Emperor v. Thammana Reddi* (1) and *In re Arulanantham Pillai* (2) and these cases, no doubt, support the contention aforesaid. But a different view was taken in three later cases, *Nachimuthu Chetty v. Muthusami Chetty* (3), *Margasahaya Chetty v. Gandala Nadabba* (4) and *Thonokadavath Awalla v. Amman Mamthal Kuttiall* (5). The principle un-

derlying these decisions is tersely stated in the following passage in the judgment of Ayling, J., in *Nachimuthu Chetty v. Muthusami Chetty* (3): "In other words, a man who complains to a Village Magistrate of a bailable offence knowing that the latter must, in the ordinary course of his duty, report the substance of the complaint to the Police gives information to the Police just as effectively as if he went in person to the Police Station."

My own view coincides with that taken in the aforesaid three cases and I, therefore, hold that the information, though given to a Village Magistrate, comes within the terms of section 250.

Dr. Swaminathan has also argued that P. W. No. 2 before acting on the information of P. W. No. 4 obtained confirmation from the Village Magistrate of Ramsapatti and that this fact distinguishes the present case from the cases referred to above. I fail to see how P. W. No. 4's responsibility is in any manner affected by reason of the fact that P. W. No. 2 was cautious enough to obtain a report from a responsible person who might be supposed to give, as far as possible, a correct account of the occurrence.

It is next contended that, as P. W. No. 1, the owner of the bull, gave information under section 154, the order in question directing P. W. No. 4 to pay compensation is illegal. This argument again is untenable. The First Information to the authorities was that given by P. W. No. 4 and it led to the initiation of the proceedings. The subsequent information given by P. W. No. 1 is of no significance in deciding the question under consideration.

It is unnecessary to consider whether on the facts an order could also have been made against P. W. No. 1; but so far as P. W. No. 4 is concerned, he is liable, and I see no reason to interfere with the order passed.

As the accused is unrepresented in this Court, Mr. V. L. Ethiraj has at my instance argued the case on his behalf and brought to my notice the decisions referred to above and I desire to express my indebtedness to the learned Counsel.

V. N. V.

. *Petition dismissed.*

(1) 25 M. 667; 2 Weir 318.
 (2) 13 Ind. Cas. 221; 22 M. L. J. 138; (1911) 2 M. W. N. 558; 10 M. L. T. 550; 13 Cr. L. J. 29.
 (3) 24 Ind. Cas. 167; 39 M. 1006; (1914) M. W. N. 804; 27 M. L. J. 37; 15 Cr. L. J. 431.
 (4) 38 Ind. Cas. 843; 32 M. L. J. 78; 18 Cr. L. J. 11; (1917) M. W. N. 86; 5 L. W. 290.
 (5) 36 Ind. Cas. 471; (1917) M. W. N. 155; 4 L. W. 73; 17 Cr. L. J. 503.

PANCHAM v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 173 OF 1923.

March 22, 1923.

Present :—Mr. Justice Walsh.

PANCHAM

versus

EMPEROR THROUGH BACHHA AND

OTHERS.

*Criminal Procedure Code (Act V of 1898), s. 250—
Frivolous and vexatious prosecution—Compensation
—Formal notice to show cause, whether essential.*

Section 250 of the Code of Criminal Procedure does not require that in the case of a complaint being found frivolous or vexatious, the complainant must be 'called upon to show cause' why he should not be made to pay compensation; it only requires any objection which is urged to be recorded and considered. The section is not intended to multiply the proceedings but to be applied in a summary manner.

A party who has the right to make a formal objection and have it recorded can waive that right by his acquiescence.

Gulzar Lal v. Gunga Ram, 14 Ind. Cas. 652; 9 A. L. J. 170; 13 Cr. L. J. 268, distinguished.

Pandurang Narayan v. Laxman Babaji, 3 Bom. L. R. 777 and *Suchandi Kolitani v. Dom Kolita*, 5 C. W. N. 214, not followed.

Criminal Reference made by the Sessions Judge, Cawnpore.

FACTS.—The Trial Court, having come to the conclusion that the prosecution story was entirely false, and the complaint a vexatious one, acquitted the accused and ordered the complainant to pay Rs. 20 to each of the three accused. At the time the order of acquittal and compensation was passed the accused raised no objection and the Court did not specifically ask them to raise any objections or show cause why the order of compensation should not be passed against them. In revision to the Sessions Judge it was contended that the provision in section 250, Criminal Procedure Code, which lays down that 'before making any direction for payment of compensation the Magistrate shall record and consider any objection which the complainant may urge against the making of such direction' was imperative and the Magistrate was bound to call upon the complainant to show cause why he should not be ordered to pay compensation. The following rulings were cited in support of this contention:—*Pandurang Narayan v. Laxman Babaji* (1),

Suchandi Kolitani v. Dom Kolita (2) and *Gulzar Lal v. Gunga Ram* (3).

The Sessions Judge was of opinion that the contention was well-founded. Hence the reference.

JUDGMENT.—In my view the learned Sessions Judge has taken too technical a view of this matter which, if it is sound, is likely to defeat the ends aimed at by the section. He would have done better to examine the section rather than the cases. He has fallen into a trap in adopting the phraseology that the Magistrate should have "called upon the complainant to show cause." The section does not require anything of the kind and, if any body has said that he ought to go through any special formality of that kind, I beg respectfully to differ. In these Provinces there is too much "calling upon to show cause" about every trivial question. The section enables the Magistrate to compensate in the case of a frivolous or vexatious accusation, "by the order of discharge." It only requires any objection which is urged to be recorded and considered. It is clear that this section was not intended to multiply the proceedings but to be applied in a summary manner. If the complainant has no real objection to urge there is nothing to record, as the Joint Magistrate justly remarks. Multiplication of proceedings only adds unnecessarily to the burden upon the parties and in a small matter of this kind where the compensation is Rs. 20 each it would be obviously a remedy worse than the disease to issue formal notice. A party, moreover, who has the right to make a formal objection and have it recorded can waive that right by his acquiescence. As the District Magistrate says, unless the complainant in this case was dumb or imbecile there was nothing to prevent his objecting. I am not concerned to consider the decisions in other Provinces in a small matter of this sort. The authority quoted by the learned Sessions Judge from the Allahabad Law Journal is inapplicable because the order which was held to be bad was made in the absence of and behind the back of the party against

(2) 5 C. W. N. 214.

(3) 14 Ind. Cas. 652; 9 A. L. J. 170; 13 Cr. L. J. 268.

(1) 3 Bom. L. R. 777.

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(whom it was made. The order for compensation must stand. Let the record be returned to the lower Court.

M. A. A.

Record returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 91 OF 1923.

(CASE REFERRED NO. 17 OF 1923.)

March 12, 1923.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Odgers.

MADDU VENKAYYA—PETITIONER

versus

MADOU PAIDAMMA alias KAMIREDDI

PAIDAMMA AND ANOTHER—COUNTER

PETITIONERS.

*Criminal Procedure Code (Act V of 1898), s. 488—
Order of maintenance—Subsequent civil suit nega-
tiving relationship—Stay of maintenance order.*

Where the relationship, on which a maintenance order under section 488, Criminal Procedure Code, is based, has been declared by the final decree of a competent Civil Court not to exist, the person adversely affected is entitled to ask the Magistrate to abstain from giving any further effect to his order of maintenance.

Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba, 14 C. 276; 11 Ind. Jur. 296; 7 Ind. Dec. (N. S.) 183; *Illath Narayanan Moosad v. Kathil Itticherry Amma*, 42 Ind. Cas. 331; 33 M. L. J. 449; 22 M. L. T. 293; 6 L. W. 536; 18 Cr. L. J. 971; (1918) M. W. N. 65, followed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate, Vizagapatam, in R. C. No. 4052-22-C-2, dated the 6th November 1922.

Mr. P. R. Srinivasa Aiyangar, for the Petitioner.

The Public Prosecutor, for the Crown.
ORDER.—The petitioner in this case was directed by the Sub-Divisional Magistrate of Narasapatam, under section 488 of the Criminal Procedure Code, to pay maintenance at the rate of Rs. 3 a month for his illegitimate child.

He subsequently brought a suit in the District Munsif's Court of Yellamanchelli and succeeded in securing a final decision on appeal to the Subordinate Judge of Vizagapatam to the effect that the child was not his. On this he applied to the Sub-Divisional Magistrate drawing his attention to the decision of the Subordinate Judge and making the following prayer: "Your petitioner, therefore, prays your Honourable Court to abstain from giving further effect to the order dated May 21st 1918, the order awarding maintenance, in view of the decree and judgment of the Additional Subordinate Judge declaring that the second counter-petitioner was not born to the petitioner and that the petitioner is not bound to maintain her." This petition has been returned with the following endorsement: "The petitioner is free to seek whatever remedy he likes against the order of this Court which cannot be re-considered." The order of the Sub-Divisional Magistrate is obviously based on a misconception. There is no question of re-considering the order of maintenance for which no provision is made in the Code, but where the relationship on which the maintenance order is based has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance. This has been laid down in *Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba* (1) and it is in accordance with the view of the law taken by a Bench of this Court in *Illath Narayanan Moosad v. Kathil Itticherry Amma* (2), although in that case the learned Judges were dealing with a maintenance order passed after the decision of the Civil Court.

The order of the Sub-Divisional Magistrate is, therefore, set aside and he is directed to restore the petition to file and dispose of it in the light of the above remarks.

V. N. V.

Order set aside.

(1) 14 C. 276; 11 Ind. Jur. 296; 7 Ind. Dec. (N. S.) 183.

(2) 42 Ind. Cas. 331; 33 M. L. J. 449; 22 M. L. T. 293; 6 L. W. 536; 18 Cr. L. J. 971; (1918) M. W. N. 65.

RAM SEWAK RAI V. SHEO NAIK RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 800 OF 1921.

February 15, 1923.

Present:—Mr. Justice Ryves and Mr.
Justice Gokul Prasad.RAM SEWAK RAI AND OTHERS—DE-
FENDANTS—APPELLANTS

versus

SHEO NAIK RAI AND OTHERS—PLAINTIFFS
—RESPONDENTS.*Transfer of Property Act (I V of 1882), s. 68—
Compromise in execution of decree—Mortgage,
usufructuary, created—Registration, absence of—
Long recognition of mortgage by parties—Estoppel
—Hindu Law—Mortgage—Destruction of security
—Substitution—Government revenue paid by mort-
gagee—Recovery from mortgagor—Covenant, im-
plied.*

In 1869, the parties to a money-decree came to an agreement in execution of the decree, which was embodied in an application made to the Court. According to the agreement it was acknowledged that a certain sum was due to the plaintiff, and he was put in possession of certain plots of land belonging to the defendant, it being agreed that he should take the usufruct in lieu of the interest due on the debt, and that the defendant could redeem the land on payment of the amount of the debt. It was further agreed that if the plaintiff was dispossessed he should then proceed with the execution of the decree. The Court accepted the compromise and plaintiff obtained possession of the land. In 1920 the land was submerged by the action of a river and the plaintiff sued under section 68 of the Transfer of Property Act, requiring the defendant to give an equivalent security to the plaintiff for the land or to pay up the amount of the debt together with a certain sum paid by the plaintiff as Government revenue :

Held, (1) that even though the due formalities had not been complied with no objection to the validity of the mortgage could be taken after it had been acted upon by the parties for fifty years; [p. 946, col. 1.]

Abid Husain v. Asghar Husain, 19 Ind. Cas. 445; 11 A.L.J. 506, *Salamat-uz-zamani Begam v. Masha Allah Khan* 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 98, followed.

(2) that even if section 68 of the Transfer of Property Act was not applicable to the case owing to the fact that the mortgage had been created before the passing of that Act, the principles of Hindu Law, by which the parties were governed, applicable to such a case were exactly the same as those embodied in section 68; [p. 945, col. 1.]

(3) that the plaintiff having been compelled to pay the Government revenue owing to the inability of the defendant to do so; and in order to avoid being dispossessed from the land, the defendant was liable to pay the amount to the plaintiff; [p. 946, col. 1.]

(4) that the condition contained in the compromise that in the event of dispossession the remedy

of the plaintiff was to execute his decree could not apply to a case of diluvion; [p. 946, col. 2.]

(5) that, therefore, the plaintiff's suit must be decreed. [p. 946, col. 2.]

In every contract of usufructuary mortgage there is at least an implied contract for quiet possession and this implies a contract to pay the Government revenue in order to avoid dispossession for non-payment. [p. 946, col. 2.]

Second appeal from a decree of the District Judge, Ghazipur, dated the 4th April 1921.

Mr. U. S. Bajpai, for the Appellants.

Mr. Iqbal Ahmad, for the Respondents.

JUDGMENT.—In the year 1869 the predecessors of the plaintiffs put in execution a simple money-decree which they had obtained against one of the defendants and the predecessor-in-title of the others. In those proceedings the parties came to an agreement which was embodied in an application made to Court. According to that agreement it was acknowledged that the sum due to the plaintiffs was Rs. 301, and certain plots of land measuring 3 *bighas* 12 *biswas* belonging to the defendants were put into possession of the plaintiffs and it was agreed that they should take the usufruct in lieu of the interest due on the debt and that the defendant could redeem on payment of Rs. 301. It was further agreed that if the plaintiffs were dispossessed they should then proceed with the execution of the decree. The Court passed orders in terms of this compromise and the plaintiffs obtained possession. They remained in possession of the whole land until the year 1884, when, during the settlement, the area in their possession was reduced to 2 *bighas* 2 *biswas* and 13 *biswansis*. In the year 1916 that area was further reduced owing to diluvion and in 1920 the whole of it was submerged by the river. This suit was brought under section 68 of the Transfer of Property Act requiring the defendants to give an equivalent security to the plaintiffs for the land which had disappeared or to pay up the Rs. 301 plus Rs. 78 for damages and Rs. 185 for Government Revenue and interest said to have been paid by the plaintiffs for the defendants since the year 1877. The defendants resisted the suit on many grounds. They denied that the document created a mort-

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gage at all, it not being stamped or registered or attested. They further said that section 68 of the Transfer of Property Act had no application because the mortgage, if any, was executed long before the Act came into force. But the two main grounds on which the suit was resisted were that according to the terms of the compromise the plaintiffs' only remedy was to execute the decree and if they attempted to execute the decree the application would be barred by limitation because their cause of action arose in 1916 and this suit was filed in 1920. Furthermore, if the proceedings in execution were taken out then the items for Government Revenue and interest could not be added. The second main ground is, that there was no contract between the parties by which the plaintiffs could recover the Government Revenue. The Trial Court in an excellent judgment decreed the suit and that decree has been upheld by the lower Appellate Court. The defendants come here in second appeal, and reiterate the pleas taken in the Court below. In our opinion they have no force. All the arguments as to want of stamp, registration and so forth in the document of 1869 are set at rest by the principles laid down in the case of *Abid Husain v. Asghar Husain* (1) which was confirmed by their Lordships of the Privy Council on appeal, and in *Salamat-uz-zamani Begam v. Masha Allah Khan* (2). Assuming that all due formalities had not been complied with, it is far too late in the year 1920 to challenge a mortgage which has in fact been given effect to for over 50 years. As to the argument that section 68 of the Transfer of Property Act does not apply to mortgages executed before the Transfer of Property Act, it is enough to say that even if it does not the Hindu Law is exactly to the same effect and that admittedly governs the parties. With regard to the Government Revenue it has been found by both Courts and the finding is conclusive in second appeal that in the year 1877 the mortgagors themselves, that is, the defendants, applied to the *Taksildar* stating that they were no longer able to pay the revenue of this land and in consequence revenue was

collected from the plaintiffs. As to the argument that there was no contract originally for the payment of the Government revenue we think this is not correct. In every contract of usufructuary mortgage there is at least an implied contract for quiet possession and this implies a contract to pay the Government revenue. If the plaintiffs had not paid the Government revenue they would have been dispossessed from the land. The only other argument which it is necessary to consider is that the only remedy of the plaintiffs was in the execution department. The simple answer to this would be that the parties never contemplated the total destruction of the land by diluvion. If the land had remained the same and if dispossession had been caused by the defendants, there might have been some force in this argument, but as the facts are found, we think that the proper remedy of the plaintiffs was by a suit and that the suit has been rightly decided. We, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K.

*Appeal dismissed.***MADRAS HIGH COURT.**CIVIL REVISION PETITION NO. 128
OF 1922.

February 28, 1923.

Present:—Mr. Justice Krishnan.**BOLIMATI MURIGADU AND OTHERS—
PETITIONERS
versus****NALLA BAPADU AND OTHERS—
RESPONDENTS.***Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5 (d)—Pauper petition—Cause of action—Extraneous evidence, admissibility of.*

In an application for permission to sue in formal pauperis, in order to ascertain if the plaint discloses a cause of action under O. XXXIII, r. 5, of the Civil Procedure Code, it is not competent to the Court to go beyond the allegations in the plaint

(1) 19 Ind. Cas. 445; 11 A. L. J. 506.

(2) 43 Ind. Cas. 645; 40 A. L. J. 187; 16 A. L. J. 98.

GHISWA V. DEO NARAIN.

and on extraneous evidence to find whether the plaintiff is likely to succeed on the cause of action alleged.

Govindasami Pillai v. Municipal Council, Kumbakonam, 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Principal District Munsif, Rajahmundry, dated the 1st of September 1921, dismissing the Original Petition No. 5 of 1921 (Petition under O. XXXIII, r. 2, of the Civil Procedure Code).

Mr. T. Ramachandra Rao, for the Petitioners.

Mr. T. S. Raghunatha Rao, for the Respondents.

JUDGMENT.—The order of the District Munsif is clearly opposed to the ruling in *Govindasami Pillai v. Municipal Council, Kumbakonam* (1). The learned Munsif has found that the petitioners are paupers but has travelled beyond the four corners of the plaint and relied on evidence to hold that the petitioners have "no cause of action." The plaint certainly discloses a cause of action and it was not open to the Court to go beyond it and come to a finding which, in reality, is a finding that the petitioners are not likely to succeed on the cause of action alleged. The civil revision petition is allowed and the order of the lower Court is set aside and the petitioners are given leave to sue *in forma pauperis*. Costs will abide and follow the result of the suit.

V. N. V.

Petition accepted.

(1) 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 1659 OF 1921.

April 18, 1923.

Present:—Mr. Justice Daniels.

GHISWA—DEFENDANT—APPELLANT

versus

DEO NARAIN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 95, 167—Suit for declaration that defendant is sub-tenant of plaintiff—Civil Courts, jurisdiction of.

A suit for a declaration that the defendant is a sub-tenant of the plaintiff, is a suit which comes

under section 95 of the Agra Tenancy Act, and the Civil Court has no jurisdiction to try it. [p. 948, col. 2.]

Jagar Nath v. Ajudhya Singh, 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408 and *Kanhi Ram v. Durga Prasad*, 27 Ind. Cas. 913; 37 A. 223; 13 A. L. J. 278, distinguished.

Second appeal against the decree of the First Additional District Judge, Aligarh, dated the 28th June 1921.

Messrs. B. K. Mukerji and N. C. Vaish, for the Appellant.

Dr. S. N. Sen, for the Respondent.

JUDGMENT.—This appeal and cross-objection arise out of a suit brought in the Munsif's Court for a declaration. The plaintiff-respondent, Deo Narain, filed with his plaint two lie to, list A and list B. As regards the plots in list A he alleged that he and certain *pro forma* defendants were the sole occupancy tenants of, and were in possession of, these plots, and he asked for a declaration that the answering defendant, Ghiswa, the appellant in this Court, had no concern with or right in those plots. As regards the plots in list B of which Ghiswa was admittedly in possession, he asked for a declaration that Ghiswa was his sub-tenant. The Trial Court dismissed the suit as not cognizable by the Civil Court. As regards the list B plots the learned District Judge agreed with the Trial Court. As regards the other plots he held that the suit was not barred, and on the merits that the plaintiff was, and the defendant was not, the occupancy tenant of these plots. He accordingly decreed the suit as regards the list A plots. The defendant appeals in regard to the list A plots and the plaintiff files a cross-objection as regards the list B plots. The appellants learned Counsel has urged three objections:

First, he says, that the suit is in substance one for the division of a holding which is barred by section 32 of the Tenancy Act. This objection is based solely on a loose use of the word "holding" at one place in the District Judge's judgment. As a matter of fact, the lands are not one holding. On the contrary, as the plaint shows, they are distributed over nine different *mahals* held by different sets of proprietors.

The second plea is, that it was not open to the Court, as Counsel puts it, "to split

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up the suit," i.e., to hold that it was cognizable by the Civil Court as regards part of the subject-matter and not as regards the remainder. The reliefs claimed in regard to the list A and list B plots respectively being quite different there is no ground whatever why the Court should not hold that one part of the suit was cognizable by the Civil Court and not the other.

The third plea is also based on one sentence in the District Judge's judgment. The District Judge held that the whole of the documentary evidence was in favour of the plaintiff and that, except as regards the list B plots, the defendant Ghiswa had never been recorded as in possession in any capacity but he does not see why because the defendant "has apparently been for a long time practically in the position of an occupancy tenant as regards about 1/5th or 1/4th of the original holding to assume that he is a sharer to the extent of 1/3rd in the whole." The learned Counsel wishes me to interpret this as a finding that the appellant has been practically in the position of an occupancy tenant with regard to part of the list A plots. Reading the sentence with its context the meaning is clear. The reference is to the list B plots of which the Judge finds the defendant to be in possession and which constitute between 1/5th and 1/4th of the area of the list A plots. There is, therefore, no force in any of the pleas urged in support of the appeal.

The cross-objection is to the effect that the suit is one between rival claimants to an occupancy tenancy which, under the rulings of this Court in *Jagar Nath v. Ajadhya Singh* (1) and *Kanki Ram v. Durga Prasad* (2), is cognizable by a Civil Court. Neither of these suits is on all fours with the present case. The first was a suit for a declaration that the plaintiffs were occupancy tenants and that the defendants were trespassers. The second suit was a suit for a declaration that the plaintiff was the occupancy tenant of a holding from which the Revenue Court had ejected him

as a sub-tenant, and if necessary, for possession. I may note that doubt has been thrown on this latter case by the subsequent decision in *Baljit v. Mahtpat* (3) in which it was pointed out that no reference was made in the judgment to the provisions of section 167 of the Tenancy Act. Putting aside rulings and looking at the actual law the suit as regards the list B plots is a suit exactly of the nature which is contemplated by section 95 of the Tenancy Act, being specifically a suit for a declaration that the defendant is the sub-tenant of the plaintiff in respect of these plots. It has been argued that a restricted meaning should be given to the word, "landholder" in the section. Landholder, however, has been defined in clause (5) of section 4 of the Act as being the person to whom rent is payable, and in reference to a sub-tenant the landholder is the occupancy tenant from whom he holds. The same view is taken by Mr. Agarwala on page 308 of his Commentary on the Tenancy Act, 7th Edition. The result is that the appeal and the cross-objection both fail and both are hereby dismissed with costs including in this Court-fees on the higher scale.

M. A. A.

Appeal and Cross-objection dismissed.

(3) 49 Ind. Cas. 118; 17 A. L. J. 60; 41 A. 203.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 359 OF 1922.

March 2, 1923.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

Sri Rajah BOMMADEVASA SATYANARAYANA VARAPRASADA RAO
BAHADUR, ZAMINDAR GARU—

PETITIONER—APPELLANT

versus

Sri Rajah BOMMADEVARA VENKATA LAKSHMI NARASIMMA BAHADUR,
ZAMINDAR GARU—DEFENDANT—

RESPONDENT.

Guardians and Wards Act (VIII of 1890).

(1) 17 Ind. Cas. 376; 35 A. L. J. 10 A. L. J. 408.
(2) 27 Ind. Cas. 913; 37 A. 223; 33 A. L. J. 378.

SATYANARAYANA v. NARASIMMA.

s. 25—Custody of infant—Father and mother; rights of—Arrangement transferring custody of child, whether revocable.

A father is entitled to the custody of his child as against the mother even though the child is only four years old and is likely to be better looked after by the mother, unless it is shown that he is unfit to have the custody of the child. [p. 950, col. 1.]

Where there is nothing established against the father except that he and the mother have, during the past, been on bad terms and have been engaged in litigation, the father ought not to be deprived of the right to the custody of the child. [p. 950, col. 1.]

An arrangement by which a father abandons a child's custody to the mother is not irrevocable. [p. 949, col. 2.]

Mrs. Annie Besant v. Narayaniah, 24 Ind. Cas. 290; 38 M. 807 at p. 808; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1125; 41 I. A. 314 (P. C.), followed.

Appeal against the order of the District Court of Kistna, at Masulipatam, dated 22nd September 1922, in Original Petition No. 96 of 1922.

Messrs. E. L. Thornton, A. Krishnaswamy Aiyar and N. Rama Rao, for the Appellant.

Messrs. V. Ramadoss and V. Krishna Mohan, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Kistna dismissing a petition by the *zemindar* of South Vallur, headed as under the Guardians and Wards Act. It is not clear what was the particular provision of the Act the petitioner desired to proceed under, nor is it clear why the learned District Judge said the petitioner was proceeding under section 7 of that Act. The first prayer in the petition is that the petitioner or some other fit and proper person shall be appointed guardian of the infant and the second which is at present material is that the infant shall be removed from the custody of the respondent and placed in charge of a guardian to be appointed. It does not seem to have been recognised by those concerned that the relief which a father can appropriately claim is under section 7, or under section 25 not under section 19, which has also been referred to before us. The two first mentioned deal with the appointment of or declaration of a guardian, but the last applies only to persons other than the father, who, however, can apply only in case they show that the father is unfit for the guardianship.

We accordingly consider the petition directly with reference to the second prayer above referred to and section 25 of the Act. It may at once be said that we intend remanding the petition to the lower Court; and it may then be worth while for the petitioner to consider whether his prayers or averments need amendment in any way.

Turning to the lower Court's judgment, we regret that we are unable to understand on what ground exactly it dismissed the petition. There is, first, some reference to the relations between the petitioner and his wife, in whose custody the minor at present is and to the fact that under a compromise, Exhibit A, the petitioner acquiesced in the retention of the custody of the minor by the respondent. No doubt something has been said of this here on behalf of the respondent, the suggestion being that the arrangement was not revocable. A sufficient answer to that is a reference to the dictum of the Judicial Committee in *Mrs. Annie Besant v. Narayaniah* (1) that the authority delegated by a natural guardian to any other person will be revocable, subject to an exception which the lower Court has not considered and which may be held not to have been established in the present case. There is, therefore, nothing found by the lower Court or on record before us to show that the petitioner's abandonment of the minor to the respondent's custody is not revocable. It is suggested that it makes some difference that Exhibit A has been embodied in a decree. To speak strictly, however, it has not been shown us that the portion of Exhibit A now material was embodied in any decree. Exhibit A is headed as presented in a partition suit which was pending and it does not appear that it was or indeed could have been treated as the basis for an order in the guardianship petition, which also was pending. The learned Judge then states, "the sole question for consideration under section 7 of the Act is the welfare of the minor," and next says that he does not rely on certain photographs, which indeed have not

(1) 24 Ind. Cas. 290; 38 M. 807 at p. 808; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1125; 41 I. A. 314 (P. C.).

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been pressed on us here. He next refers to a statement in an affidavit of the petitioner in the other proceedings that "so long as his wife chooses to keep away from him he will act as he pleases." We are not clear as to the meaning of that or that it entails anything more than that he may marry a second wife, not that he will conduct himself in a manner disqualifying him for the custody of his child. That is followed by the mention of the failure of the petitioner to go into the box. We must presume that he had the chance of going into the box and that the respondent's Vakil had indicated his wish to cross-examine him, but that he did not offer himself for cross-examination, although it is fair to say that this is disputed here on the petitioner's behalf. It, however, goes a very little way towards supporting the petitioner's case. There is then a finding that there is nothing against the respondent's character. There is, lastly, the definite and admissible ground mentioned in the lower Court's order that the age of the minor is about four and the fact that he may properly be looked after by his mother for the present. We do not, however, think that this is sufficient to justify the District Judge in refusing to give the child to the custody of his father. Each case must, of course, stand or fall with reference to its particular circumstances. But when there is nothing established against the father, the petitioner, except that he and the respondent have during the past been on bad terms and have been engaged in litigation, that is not, in our opinion, sufficient.

That, however, was considered sufficient by the lower Court and it is, we recognise, possible that on that account the respondent did not produce anything in support of her allegations that the petitioner was unfit to have the custody of the child. In these circumstances, we think it right to set aside the order of the lower Court and remand the petition for re-hearing in the light of the foregoing, after the respondent has been given an opportunity to produce any evidence which she may desire to produce in support of her allegations, a similar opportunity being of course given to the petitioner.

Costs to date in this Court and in the lower Court will follow the result and will be provided for in the order to be passed.

V. N. V.

Order set aside.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 303 OF 1922.

May 14, 1923.

Present.—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

MUHAMMAD IFTIKHARULLAH—
JUDGMENT-DEBTOR—APPELLANT
versus

BANKE LAL—DECREE-HOLDER
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 10—Mortgage suit—Preliminary decree—Costs in appeal, whether recoverable personally—Practice.

In an appeal against a preliminary decree in a mortgage suit, it is open to the Appellate Court to direct that costs awarded against the unsuccessful appellant be recovered from him personally. But in the absence of such express direction the costs sanctioned by O. XXXIV, rr. 4 and 10, Civil Procedure Code, are added to the mortgage-money and are in the first instance recoverable from the mortgaged property after the decree is made final. [p. 951, col. 1.]

Damber Singh v. Kalyan Singh, 43 Ind. Cas. 557, 40 A. 109; 15 A. L. J. 914 and *Sadiq Husain Khan v. Ummatul Fatima Begum*, 48 Ind. Cas. 329, followed.

Amina Bibi v. Rama Shankar Misar, 50 Ind. Cas. 730; 17 A. L. J. 582; 41 A. 473, distinguished.

Execution first appeal from a decree of the Subordinate Judge, Moradabad, dated the 13th May 1922.

Dr. K. N. Katju and Mr. M. N. Raina, for the Appellant.

Mr. P. L. Banerji, for the Respondent.

JUDGMENT.—This appeal arises out of an application made by the decree-holder-respondent for the recovery of certain costs awarded to him by an appellate decree of this Court from the person of the judgment-debtors. It appears that the decree-holder obtained a preliminary decree for the sale of certain property against the present judgment-debtors and other

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persons which provided that, in the case of non-payment of the decretal money, including the costs awarded by the Trial Court, the mortgaged property was to be sold. From that decree some of the heirs of the original mortgagor appealed to this Court. Their appeal was unsuccessful, and was dismissed excepting so far that the time for the payment of the money was extended; and the decree-holder-respondent was awarded his costs as against them. The effect of the dismissal of the appeal with the modification mentioned above was that the decree of the Trial Court, as amended, merged into the decree of this Court, and until it was made final it could not be executed against the mortgaged property. The decree-holder sought in the present proceedings to recover the costs awarded to him by the decree of the Appellate Court, but O. XXXIV, r. 10, of the Code of Civil Procedure provides that in finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of the suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment. It is open to a Court of Appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction the costs are, as a matter of ordinary practice, sanctioned by O. XXXIV, rr. 2-4 and 10, of the Code of Civil Procedure, added to the mortgage money and are, in the first instance, recoverable from the mortgaged property after the decree is made final. That view has been recognised in the case of *Damber Singh v. Kalyan Singh* (1) and *Sadiq Husain Khan v. Ummatul Fatima Begum* (2). The Court below has relied on the decision in the case of *Amina Bibi v. Rama Shankar Misar* (3), but in that case the decree sought to be executed was a final decree in a mortgage-suit which provided for the

extension of the time for payment by the mortgagor for another six months from the date thereof and went on to direct the appellant to pay the respondents a certain sum of money. A final decree stands, however, on a different footing from a preliminary decree for sale. A preliminary decree is supposed to direct the taking of accounts of what would be due on the mortgage including the costs of the suit in the manner provided by O. XXXIV, rr. 2, 4 and 10 of the Code of Civil Procedure. A final decree is intended to give the result of the account as it would stand on the date of that decree, showing the money due on the mortgage including the costs recoverable from the mortgaged property, and if that final decree contains a separate direction for the payment of costs by a certain party to another, the situation becomes entirely different. In that particular case the costs in question were the costs of an unsuccessful appeal brought in the High Court by one only of several mortgagors against the final decree. In the present case no final decree has yet been prepared. The preliminary decree merely directed the taking of accounts and the payment of a certain sum of money including costs within a certain period, with a proviso that if the said amount was not so paid, the mortgaged property shall be liable to be sold. That decree merged in the appellate decree of this Court. The latter is the only decree capable of being made final, and the two decrees must be read together in order to determine the rights of the parties and the remedies at present available to them. We do not at any moment suggest that the right of the decree-holder to recover the costs from the person of the then successful appellant is altogether excluded. The remedy of the decree-holder at the present stage is to get a final decree prepared, showing the money due on the mortgage inclusive of the costs of the suit and the costs incurred subsequent to the preliminary decree for sale and when such a decree has been obtained he can execute the decree against the mortgaged property and then pursue such remedy as may be available to him after the mortgaged property has been sold for the recovery of the rest of the money due to him on account of the decree. In that view of the matter, this appeal must be allowed and the

(1) 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 914.

(2) 48 Ind. Cas. 329.

(3) 50 Ind. Cas. 730; 17 A. L. J. 582; 41 A. 473.

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order of the Court below set aside, the result being that the application of the decree-holder will stand dismissed with costs here and hitherto including in this Court fees on the higher scale.

M. A. A.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL, No. 52 OF 1921.

January 29, 1923.

Present—Mr. Justice Spencer and
Mr. Justice Krishnan.

MUTHUKUMARA MUDALIAR

—DEFENDANT No. 2—APPELLANT

versus

CHOCKALINGA MUDALIAR—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Statement admitting execution of mortgage-bond—Acknowledgment of liability.

A mere statement by a person that he executed a mortgage-bond for the balance of the sale price due under a sale-deed does not amount to an acknowledgment under section 19 of the Limitation Act of a liability subsisting at the time when the statement was made.

Kandasami Reddi v. Suppammal, 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M) 104; 32 M. L. T. 166, *Ittappan Kuthiravattat Nayer v. Manu Sastri*, 26 M. 34; 12 M. L. J. 101 and *Venkata v. Parthasaradhi*, 16 M. 220; 3 M. L. J. 35; 5 Ind. Dec. (N. S.) 860, followed.

Subramania Iyer v. Veerabadra Pillai, 70 Ind. Cas. 593; 14 L. W. 148; (1921) M. W. N. 475; 41 M. L. J. 217, doubted.

Second appeal against a decree of the District Court, Tanjore, in A. S. No. III of 1919, preferred against a decree of the Court of the District Munsif, Tiruturapundi, in O. S. No. 60 of 1917.

Messrs. K. Subramania Pillai and S. Mulhiah Mudaliar, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.—The statement which the Courts below have taken to be an acknowledgment of liability sufficient to save limitation, is the statement made by the present 2nd defendant, who was 3rd defendant

in Original Suit No. 28 of 1911, when examined as 2nd witness for plaintiff, when he said, "I am the 3rd defendant. I and the 2nd defendant purchased some land from the 1st defendant. For the balance of price due to her, Exhibit A was executed."

We are unable to accept the view that this was an acknowledgment of a liability subsisting at the date when the witness deposed.

The witness did not speak of the price as being still due to the 1st defendant at the time.

We hold, following *Kandasami Reddi v. Suppammal* (1), *Ittappan Kuthiravattat Nayer v. Manu Sastri* (2) and *Venkata v. Parthasaradhi* (3), that no implied acknowledgment of liability can be spelt out of the mere statement that the witness on some prior date executed a mortgage-bond.

The witness was 3rd defendant in Original Suit No. 28 of 1911 but did not defend that suit. At the time of giving evidence he had no necessity to mention anything about his liability.

For the respondent reliance has been placed on *Subramania Iyer v. Veerabadra Pillai* (4). In that case there were certain endorsements on the promissory-note in question and the defendant stated as a witness in a criminal case when the promissory-note was shown to him that he executed it and that the contents of it were correct.

We are inclined to doubt whether that case was correctly decided but it is unnecessary to say more as the words in which the supposed admissions were made are different from the words used in this case.

We allow the second appeal and set aside the direction that plaintiff may have a personal remedy against appellant, with costs in the lower Appellate Court and here.

V. N. V.

Appeal allowed.

(1) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M) 104; 32 M. L. T. 166.

(2) 26 M. 34; 12 M. L. J. 101.

(3) 16 M. 220; 3 M. L. J. 35; 5 Ind. Dec. (N. S.) 860.

(4) 70 Ind. Cas. 593; 14 L. W. 148; (1921) M. W. N. 475; 41 M. L. J. 217.

KALI DIN v. RAMAPAT.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1635 OF 1921
AND

SECOND CIVIL APPEAL NO. 62 OF 1922.

March 12, 1923.

Present:—Mr. Justice Lindsay and
Mr. Justice Daniels.

KALI DIN—DEFENDANT—APPELLANT.

versus

RAMAPAT AND ANOTHER—PLAINTIFFS.

—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202—Suit for cancellation of lease granted by Lambardar—Plea that lease was granted by consent of co-sharers—Procedure.

A co-sharer brought a suit in the Civil Court for the cancellation of a perpetual lease granted by the *Lambardar*, on the ground that it was beyond the powers of the *Lambardar* to grant it. The defence set up by the lessee was that the lease was executed by the *Lambardar* with the consent of all the co-sharers:

Held, (1) that the defence amounted in substance to a plea that the defendant was a tenant of the whole proprietary body including the plaintiff;

(2) that, under the circumstances of the case, the procedure laid down in section 202 of the *Agra Tenancy Act* was applicable; and the defendant should have been directed to file a suit in the Revenue Court within three months to establish the tenancy which he had set up.

Raghunath v. Ganesh, 54 Ind. Cas. 381; 18 A. L. J. 214; 2 U. P. L. R. (A) 79; 42 A. 222. and *Bhaunt v. Ram Dayal*, 64 Ind. Cas. 426; 19 A. L. J. 850, followed.

Second appeal from a decree of the Additional Subordinate Judge, Cawnpore, dated the 30th of May 1921.

Mr. K. C. Mital, for the Appellant.

JUDGMENT.—These are two connected appeals arising out of the same judgment. The plaintiff is a co-sharer in the village. The first defendant was the *Lambardar*. The first defendant granted a perpetual lease of 20 *bighas* of land to the second defendant Kali Din, who is the appellant before us. The plaintiff brought a suit in the Civil Court for the cancellation of this lease on the ground that it was beyond the powers of the *Lambardar* to execute. He also sued for the ejectment of the defendant from 5 *bighas* of land which he, the plaintiff, claimed as his *khudkasht*. The defendant pleaded that the lease was a good and valid lease. His contention was that not only was it within the power of the *Lambardar* but that it was executed with the consent

of all the co-sharers. This was in substance a plea that the defendant was the tenant of the whole proprietary body including the plaintiff. Under these circumstances, the Trial Court could have, under section 202 of the *Tenancy Act*, directed the defendant to file a suit in the Revenue Court within three months to establish the tenancy which he set up. It is true that no plea to this effect was taken in the written statement, the defendant contending instead that the whole suit should have been filed in the Revenue Court. This contention was found against him and the suit was decreed except in regard to the 5 *bighas* of land of which the plaintiff claimed actual possession. Both parties appealed and the lower Appellate Court dismissed the defendant's appeal and allowed that of the plaintiff and decreed the suit in full. From this decree the defendant, Kali Din, appeals. The sole ground pressed is that the Courts below should have acted under section 202 of the *Tenancy Act*. There are two rulings of this Court both of which are in his favour, *Raghunath v. Ganesh* (1) and *Bhaunt v. Ram Dayal* (2). We are reluctant to disturb the decree of the Court below for, apart from urging that his plea that the lease was executed with the consent of all the co-sharers, which the First Court decided against him, has not been decided by the Court below, the appellant has made no attempt to show us that the decision as to the validity of the lease was wrong on the merits. On the other hand, we find it impossible to distinguish the case from the two decisions already referred to. We, therefore, adopt the course which was adopted in those cases and, setting aside the decisions of both the Courts below, remand the case through the lower Appellate Court to the Court of first instance with directions to restore it to the file and to dispose of it in accordance with the procedure prescribed in section 202 of the *Tenancy Act*. Costs here and hitherto will abide the result.

Z. K.

Case remanded.

(1) 54 Ind. Cas. 381; 18 A. L. J. 214; 2 U. P. L. R. (A) 79; 42 A. 222.

(2) 64 Ind. Cas. 426; 19 A. L. J. 850.

PARTHASARATHY REDDIAR v. KANDASWAMI MUDALIAR.

MADRAS HIGH COURT.

ORIGINAL, SIDE APPEALS Nos. 118, 119
AND 120 OF 1921.

February 12, 1923.

Present:—Sir Walter S. Schwabe, Kt., Chief
Justice and Mr. Justice Coutts-Trotter.

PARTHASARATHY REDDIAR

—DEFENDANT No. 4—APPELLANT

versus

KANDASWAMI MUDALIAR AND
OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Widow—Adoption after death of
adult son—Consent of Sapindas—Estoppel—Wrong-
doer, whether can set up his own wrong—Person
claiming through wrong-doer, position of.*

An adoption by a Hindu widow subsequent
to the death of her unmarried adult son is legal
and valid if made with the consent of her deceased
husband or of his *sapindas*: [p. 954, col. 2.]

Tripuramba v. Venkataratnam, 72 Ind.
Cas. 278; 44 M. L. J. 349; 46 M. 423,
followed.

The *onus* of proving that in the case of an
adoption by a Hindu widow the consent of the
sapindas was procured by a bribe is strongly on the
person who alleges it and the mere fact of a pro-
mise of payment of money is not conclusive on
the question of the consent having been obtained
corruptly. [p. 954, col. 2.]

A party who claims under a wrong-doer cannot
be in a better position than the wrong-doer
himself. [p. 955, col. 1.]

A person who can only claim through
another is estopped from challenging an adoption
made by a widow with the consent of the latter
on the ground that his judgment, in giving
consent to the adoption, was vitiated by the
acceptance of a corrupt consideration. [p. 954,
col. 2.]

The principle contained in the maxim *nemo
allegans suam turpitudinem est audiendus*, that
no one alleging his own wrong is to be heard,
is applicable to this country. [p. 955, col. 1.]

Where it is necessary for a party who
wishes to establish a certain state of things
to set up his own wrong, he will not be allowed
to do so. [p. 955, col. 1.]

Doe v. Roberts, (1819) 2 B. & Ald. 368; 106
E. R. 401; 20 R. R. 477, *Prote v. Wiggins*,
(1836) 3 Bing. (N. S.) 230; 3 Scott. 601; 2 Hod-
ges 204; 6 L. J. (N. S.) C. P. 21; 132 E. R. 398; 43
R. R. 621, *Voddina Kamayya v. Gudisa Ma-
mayya*, 43 Ind. Cas. 352; 32 M. L. J. 484, *Sid-
lingappa v. Hirasa* 31 B. 405; 9 Bom. L. R. 542,
followed and applied.

Appeals against the judgment and decree
of Mr. Justice Phillips, passed in the
exercise of the Ordinary Original Civil
Jurisdiction of the High Court in O.
S. No. 212 of 1919.

Messrs. T. R. Ramachandra Aiyar &
Srinivasa Aiyar and A. Narasimhachari.
for the Appellants.

Messrs. K. Narasimha Ayyar and V. N.
Ramanatha Rao, for the Respondents.

JUDGMENT.

Schwabe, C. J.—In this case a widow
who had a son who attained the age of
18 and subsequently died unmarried,
adopted the appellant who was the son of
her daughter. The first question that
arises is, whether such an adoption with
the consent of her deceased husband or
with the consent of the *sapindas* is legal.
This question came before this Court a
short time ago in *Tripuramba v.*
Venkataratnam (1), and *Wallace, J.*;
and I decided that it was legal. I see
no reason for departing from that judgment.

The consent of the *sapindas*, one Kumara-
swami Mudali, whose consent was necessary,
it is alleged in this case, was obtained by a
promise given by the mother of the adopted
boy to pay him a sum of Rs. 200. The
onus of establishing that was strongly on
the respondents. I am not satisfied that he
was bribed at all, from which it follows, in
my view, that the *onus* was not discharged.

Another interesting point was raised,
namely, whether if the promise of payment
was made in connection with obtaining that
consent that fact is conclusive to prevent
the adoption being good. It would be very
strong evidence that the consent was
obtained corruptly, but it is not clear
on the authorities that the mere fact of the
promise of payment standing alone would
be conclusive. In this case the adoption
of this particular boy was obviously reason-
able. He was the grandson of the deceased
through a daughter. I think it is enough
to say in this case that the point does not
directly arise; but I would add that I
should want to be satisfied that there was
something more than a promise of payment
relied upon. The respondent in this
case is the adopted son of Kumaraswami
Mudali, whose consent, it is alleged, was
corruptly given and the question arises
whether the respondent who claims through
Kumaraswami Mudali is estopped from

(1) 72 Ind. Cas. 278; 44 M. L. J. 349; 46 M. 423.

PARTHASARATHY REDDIAR v. KANDASWAMI MUDALIAR.

denying the fact that his adoptive father did consent. The first point as to that is whether the mere fact that the adopted son has changed his status by entering into the new family is sufficient to bring that principle of estoppel into operation. On the view I take of the facts of this case, it is unnecessary now to express any opinion on that interesting and somewhat difficult point. But a further question of estoppel also arises. It is a principle of law adopted from the Roman Law that no one alleging his own wrong is to be heard. *Nemo allegans suam turpitudinem est audiendus*. That principle is applied in England and is to be found clearly stated in the case of *Doe v. Roberts* (2) and that that principle is applied in this country is clear from the recent decision of this Court by Wallis, C. J., and Coutts Trotter, J., in *Voddina Kamayya v. Gudisa Mamayya* (3) and it is also very clearly stated by Jenkins, C. J., in *Siddlingappa v. Hivasa* (4) and it comes to this :—that where it is necessary for a party who wishes to establish a certain state of things, in order to do so, to set up his own wrong doing, he will not be allowed to do so. In this matter, the respondent, who merely takes from the late wrong-doer Kumaraswami Mudali, can be in no better position than Kumaraswami Mudali himself and, applying that principle, it is quite impossible for him to set up that the consent that his adoptive father gave was obtained from him by a promise of corrupt payment. In the view I take of this part of the case, it is unnecessary for me to consider the question whether the subsequent release given by Kumaraswami of any rights he might have possessed was a valid release or not.

Appeal No. 120 of 1921 must be allowed and the suit dismissed with costs throughout. Appeals Nos. 118 and 119 will be allowed with costs here and below.

Courts-Trotter, J.—I am of the same opinion and only add a few words because we are differing from the learned Trial Judge among other things, on a question of

fact. The question is, whether there was evidence before the learned Judge on which he ought to have come to the conclusion that the reasonable inference from the facts was that Kumaraswami was influenced by corrupt motives to give his consent as a *sapinda* to the adoption. Looking at the facts as found, it appears to me that they cannot reasonably give rise to more than at best a suspicion, and having regard to the dates, namely, that the consent was in July 1909 and the alleged promise of payment was in the following October, it seems quite consistent with the facts to hold that Kumaraswami, having given his consent from perfectly proper motives, afterwards thought that he could make something out of it. Therefore, I agree with my Lord that, on the facts as we know them, the question of corruption in the exercise of the choice and discretion by Kumaraswami as to giving his consent as a *sapinda* does not arise.

There are certain points of great interest argued in this case, but I do not think that they are necessary for our decision and I do not propose to discuss them. I respectfully agree with the decision of my Lord and my brother Wallace, J., to which reference has been made.

The only other thing about which I wish to say a few words is, with regard to the question of estoppel. I do not think that the learned Trial Judge had a fair opportunity of dealing with that question, because he says in his judgment, at p. 24, "the question of estoppel raised by the 1st defendant which is the subject-matter of Issue No. 3 had not been pressed, and the issue must be found for the plaintiff."

I take that to mean not that the learned Judge decided that question, but that his attention was not fairly drawn to it so as to enable him to deal with it. That I take to be the doctrine of estoppel proper with which my Lord has dealt. But I do not see that there was even mention made to the learned Judge of another ground of defence which is perhaps the strongest that we have to deal with, namely, that based on the maxim *nemo allegans suam turpitudinem est audiendus*. That maxim belongs to Civil Law and is taken from the Institutes; it re-appears in the Common

(2) (1819) 2 B. & Ald. 368; 106 E. R. 401 20 R. R. 477.

(3) 43 Ind. Cas. 352; 32 M. L. J. 484.

(4) 31 B. 405; 9 Bom. L. R. 542.

DUKHI S. DHANNI MISIR.

Law in England for example in the two cases to which my Lord has referred to *Boe v. Roberts* (2) and *Prole v. Wiggins* (5). The question is whether in this Court that salutary principle of law is to be applied. There is authority both in this Court in the case to which my Lord has referred and in Bombay *Sidlingappa v. Hiras* (4) for applying such maxim and I am entirely in concurrence with the view that we should refuse to allow the respondent in this case, who can only claim through Kumaraswami, to set up the case that the person through whom he claims had his judgment vitiated by the acceptance of a corrupt consideration. I agree that these appeals must be allowed with costs.

V. N. V.

Appeals allowed.

Z. K. & N. H.

(5) (1836) 3 Bing. (N. S.) 230; 3 Scott 601; 2 Hodges 204; 6 L. J. (N. S.) C. P. 2; 132 E. R. 398; 43 R. R. 621.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 13 OF 1923.

March, 19, 1923.

Present—Mr. Justice Rafique.

DUKHI AND ANOTHER—PETITIONERS

versus

DHANNI MISIR—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35, cls. (i) (ii)—Wrongful removal of trees—Suit for compensation—Jurisdiction.

Cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Chapter XVII of the Penal Code and a claim for compensation for trees so cut is not maintainable in a Small Cause Court.

Civil revision from an order of the Judge, of the Court of Small Causes at Deoria, dated the 16th November 1922.

Mr. G. S. Apte, for the Applicants.

Mr. K. C. Mital, for the Opposite Party.

JUDGMENT.—This is an application in revision from a decree of the Small Cause Court Judge of Deoria. It appears that the plaintiff opposite party sued the applicants for the recovery of Rs. 50 on the allegation that they had unlawfully cut

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down the trees belonging to the plaintiff opposite party. The claim was resisted on various grounds and the title of the plaintiff opposite party was denied. It was further objected that the suit was not maintainable in the Court of the Judge of Small Causes. The learned Judge, however, disallowing all the pleas for the defence decreed the claim for Rs. 5. In revision it is urged that Art. 35, clauses (i), (ii) of the Schedule to the Small Cause Courts Act prohibits the entertainment of such a suit by a Judge of the Small Cause Court. The clause relied upon is as follows:—

“For an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code.”

The cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Chapter XVII of the Indian Penal Code. The claim was, therefore, not maintainable in the Small Cause Court.

I set aside the decree of the lower Court and direct that the plaint be returned to the plaintiff for presentation to the proper Court. No order as to costs.

N. H.

*Decree set aside.***MADRAS HIGH COURT.**

APPEAL AGAINST APPELLATE ORDER

No. 113 OF 1921

TREATED AS CIVIL REVISION PETITION

No. 200 OF 1923.

February 16, 1923.

Present—Mr. Justice Oldfield and

Mr. Justice Venkatasubba Rao.

MUTHUKARUPPA CHETTY

RESPONDENT—APPELLANT

versus

PANJA KAVUNDAN—PETITIONER

---RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 37 (b), 115—Execution of decree—Transfer of area of residence of judgment-debtor—Jurisdiction to execute decree—Appellate Court erroneously deciding lower Court had no jurisdiction—Revision.

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Where the area in which a judgment-debtor lives is transferred from the jurisdiction of the Court which passed the decree to that of another Court, the latter Court has jurisdiction to entertain an application for execution of the decree, and there is no necessity in such a case to obtain a transfer of the decree from the former Court to the latter Court.

Seeni Nadan v. Muthuswamy Pillai, 53 Ind. Cas. 213; 42 M. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63, followed.

Subbiah Nalcker v. Ramanathan Chettiar, 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251, referred to.

An erroneous order by an Appellate Court dismissing an execution application on the ground that it was made to a Court not having jurisdiction amounts to a refusal to exercise jurisdiction within the meaning of section 115 of the Civil Procedure Code, and is open to revision by the High Court.

Appeal against a decree of the Court of the Subordinate Judge, Salem, in A. S. No. 307 of 1920, preferred against the order of the Court of the District Munsif, Namakkal, dated the 7th October 1920 (S. C. No. 2676 of 1916, Principal District Munsif's Court, Salem).

Mr. K. Sankara Sastri, for the Appellant.

Mr. B. Sitarama Rao, for the Respondent.

JUDGMENT.—This is an appeal by a decree-holder against the decision of the lower Appellate Court passed at the instance of the judgment-debtor, here respondent; and setting aside the decision of the District Munsif of Namakkal that he had jurisdiction to execute the decree.

The decree was passed on the Small Cause Side and it is urged, first, that no second appeal lies. That objection must be sustained. But we have been asked to treat the appeal as an application in revision. We think that we are entitled to do so. It is contended that the lower Appellate Court did not decline jurisdiction or assume jurisdiction which it had not but simply made a mistake in a question of law relating to jurisdiction. That view is not in our opinion, correct. The lower Appellate Court held that the District Munsif has no jurisdiction to allow execution and it has dismissed the execution application on the ground that it was made to a Court not having jurisdiction. We think that, in doing so, it declined jurisdiction within the meaning of section 115.

On the merits, the question arises from the transfer of the area in which the judgment debtor lives, from the jurisdiction of the principal District Munsif of Salem, who passed the decree sought to be executed, to that of the District Munsif of Namakkal, in whose Court the application for execution has now been made. It is urged that only the former Court has ever had jurisdiction to execute the decree and that the decree-holder's proper course is to apply for a transfer of the decree to Namakkal. That contention is inconsistent with the decision in *Seeni Nadan v. Muthuswamy Pillai* (1). We are asked to distinguish that decision on the ground that it relates to the execution of a decree for sale of immoveable property. But we can find nothing in the language used in the judgments there to show that such a distinction was in the minds of the learned Judges or that they were considering the question except as it was referred to them, perfectly generally. It may be noted that the previous case in connection with which the reference was made, *Subbiah Nalcker v. Ramanathan Chettiar* (2) related to a money-decree; and if this distinction had been thought material, it is difficult to believe that nothing would have been said regarding it. We are not able, on principle, to see why it should be material and we do not think it necessary to add anything on the question of principle to the judgment of the Full Bench or in particular to the very clear statement of law contained in the judgment of Ayling, J.

The result is that the appeal against the appellate order is allowed with costs here and in the lower Appellate Court, the District Munsif's order including the portion relating to costs before him being restored. He will proceed with the execution according to law.

V. N. V.

Order set aside.

Z. K.

(1) 53 Ind. Cas. 213; 42 M. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63.
(2) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

JAGARNATH SINGH v. MOTI LAL:

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 159 OF 1922.

March 12, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

JAGARNATH SINGH—JUDGMENT—
DEBTOR—APPELLANT

versus

MOTI LAL AND OTHERS—DECREE-
HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 53—
Hindu Law—Joint family—Survivorship—
Nephew, whether liable for debts of uncle.*

Under the Hindu Law there is no obligation upon any co-parcener, except a son or a grandson who has acquired rights by survivorship, to pay the debts of a deceased co-parcener.

It is only a son or a lineal descendant who comes within the scope of section 53 of the Civil Procedure Code.

A nephew who has succeeded to the property of his uncle by survivorship, is not a "descendant" of his uncle in whose hands the property is liable for the debts of the deceased uncle within the meaning of section 53 of the Civil Procedure Code.

Chunnilal Harilal v. Bai Mani, 46 Ind. Cas. 745; 42 B. 504; 20 Bom. L. R. 660, relied on.

First appeal from an order of the Subordinate Judge of Jaunpur, dated the 28th June 1922.

Mr. K.K. Varma, for Mr. Kamuda Prasad, for the Appellant.

Mr. N.P. Upadhiya, for the Respondents.

JUDGMENT.—Moti Lal and others, plaintiffs, obtained a simple money-decree against Jatan Singh. He died, and the plaintiffs decree-holders applied to attach certain property in the possession of Jagannath Singh claiming that Jatan Singh was the uncle of Jagannath Singh and that they formed a joint Hindu family. Various objections were taken by Jagannath Singh under section 47 of the Civil Procedure Code. The Trial Court held that Jatan Singh was the uncle of Jagannath Singh but said that as the decree was clearly a personal decree and was not passed against Jatan as the *karta* of a joint family, there was no obligation on Jagannath Singh to pay Jatan Singh's debt, and that the property was not liable to attachment and sale. The decree-holders appealed and the learned Subordinate Judge held that, under section 53 of the Civil Procedure Code, the words "or their descendant" included a

nephew and, therefore, reversed the finding of the Trial Court and remanded the case for trial of the other issues.

Jagannath Singh comes here in appeal against the order of remand. The point turns on the interpretation to be put on section 53 of the Code of Civil Procedure. This section was introduced into the Code by Act V of 1908. It says that, for the purpose of section 50, property in the hands of a son or other descendant which is liable under the Hindu Law for the payment of debt of the deceased ancestor in respect of which a decree has been passed shall be deemed to be the property of the deceased which had come into the hands of the son or other descendant as his legal representative. It is noteworthy that the son or other descendant can only be charged if the property is liable under Hindu Law for the payment of debt of a deceased ancestor.

Sir Earnest Trevelyan in the second Edition of his Hindu Law, at page 323, sums up the law in the following words:

"Apart from the obligation of a son or grandson to pay the debts of his father or grandfather out of co-parcenary property, the Hindu Law, like other systems of Law, requires the person who succeeds to the property of another as heir or devisee to pay the legal debts of such other person, whatever may be the purpose of such debts to the extent of the assets received by him. There is no obligation upon any other co-parcener who has acquired rights by survivorship to pay the debts of the deceased co-parcener."

It seems, therefore, that under section 53 it is only the son or lineal descendant who comes within the scope of the section. We are fortified in this view by the decision of the case of *Chunnilal Harilal v. Bai Mani* (1). In this view the appeal succeeds and the order of remand must be set aside and the decree of the First Court restored with costs in all Courts including in this Court fees on the higher scale.

Z. K.

Appeal allowed.

(1) 46 Ind. Cas. 745; 42 B. 504; 20 Bom. L. R. 660.

RAHMAT BI v. BHURI BI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL, No. 232 OF 1922.
April 5, 1923.

Present.—Mr. Baker, J. C.

RAHMAT BI—PLAINTIFF—APPELLANT
versus

BHURI BI—DEFENDANT—RESPONDENT.

Muhammadan Law—Succession—Suit by heir against widow for share—Dower-debt, payment of—C. P. Land Revenue Act (II of 1917), s. 212—Raiyatwari lands whether heritable.

The liability of the heirs of a deceased Muhammadan to pay the dower of his widow is not personal, and an heir who sues the widow for possession of his share of the estate of the deceased is liable only to pay a proportionate part of the dower-debt. [p. 960, cols. 1 & 2.]

Muhammad Karim Ullah Khan v. Amani Begam, 17 A. 93; A. W. N. (1895) 16; 8 Ind. Dec. (N. S.) 385, *Hamira Bibi v. Zubaida Bibi*, 7 Ind. Cas. 497; 33 A. 182; 7 A. L. J. 1025, relied on.

Section 212 of the C. P. Land Revenue Act makes it clear that the right of a *raiya* to hold *raiya* land devolves as if it were land. [p. 959, col. 2; p. 960, col. 1.]

There is a presumption that when such land passes from father to son and from the son to his widow it passes by heirship. Where *raiya* land forms part of the estate of a deceased person it is liable to the claim of his heirs along with the rest of his property. [p. 960, col. 1.]

Gulabrao v. Sitaram, 8 C. P. L. R. 11, distinguished.

Under clause (3) of section 212 of the C. P. Land Revenue Act, *raiya* land is not liable to partition except with the consent of the Deputy Commissioner, but all heirs of a deceased *raiya* are entitled to share in the produce of the land, and any of them may, if so advised, apply to the Deputy Commissioner for partition. [p. 960, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 120 of 1922, dated the 10th January 1922.

Mr. M. Y. Shareef, for the Appellant.

Mr. Fida Hussain, for the Respondent.

JUDGMENT.—The plaintiff sued to recover her share in the estate of her deceased father and brother under the Muhammadan Law from defendant No. 1, her brother's widow, who was in possession. The Sub-Judge of Khandwa found that plaintiff was entitled to 323/720 in the property mentioned in the decree on payment of her proportionate shares of the dower (Rs. 1,000) of defendant No. 1 and of Rs. 385 the funeral expenses of Kamdar Khan, her brother, husband of defendant No. 1.

On appeal by defendant the District Judge of Nimar modified the decree of the First

Court by directing that the *Raiyatwari* Survey Numbers should be excluded from division and that plaintiff should pay Rs. 1,000 dower of defendant No. 1 and her share of the funeral expenses of Kamdar Khan. The plaintiff makes a second appeal against this decree on the grounds stated in the memorandum of appeal.

The amount of plaintiff's share as found by the First Court is admitted. The first point taken in second appeal is as to the exclusion of the *raiya* lands from partition. It is admitted that the *raiya* lands formed part of the estate of Amir Khan, the plaintiff's deceased father, and after him of Kamdar Khan, his son, the husband of defendant No. 1. The reasoning of the learned District Judge on this point will be found in parat graph 11 of his judgment. He holds that the lands are left by Amir Khan but they depend on a lease individually between the Government and the tenant. Even for Survey Numbers the law is that the right devolves as if it were land (section 212, C. P. Land Revenue Code). This is just the same as for occupancy tenant right. Hence there is no distinction to be drawn between items Nos. 1—4 'the occupancy tenancy lands' and items Nos. 5—9 'the *raiya* fields'. It appears from Exhibit D-1 that defendant No. 1 got the Survey Numbers transferred to her name on her husband's death. And when one member of a family obtains a lease it does not mean that all other members become tenants-in-common [*Gulabrao v. Sitaram* (1).] Therefore, so long as the *raiya* *patta* remains in the name of defendant No. 1 only, the plaintiff cannot claim a share. For these reasons the learned District Judge cluded the *raiya* numbers. I am of opinion that the lower Appellate Court has approached this part of the case from a wrong point of view. The question to be considered is whether the *raiya* lands form part of the estate of the deceased Amir Khan and Kamdar Khan. Undoubtedly they did, as the District Judge himself finds. If so, they would be liable to the claim of the heirs along with the rest of the property, unless specially excluded by law. Section 212 of the Land Revenue Code makes it clear

(1) 8 C. P. L. R. 11.

RAHMAT BI V. BHURI BI

that the right of a *raiya* to hold *raiya* land devolves as if it were land. The case quoted, *Gulabrao v. Sitaram* (1), is on a different point. It deals with one member of a joint Hindu family taking land on lease from a landlord. The present is not a case of the defendant No. 1 taking land on lease but of the devolution of the right to hold *raiya* land. There is a presumption that when such land passes from father to son, and from the son to the widow, it passes by heirship, and in the present case there is a distinct issue and finding on the point by the First Court which has not been dissented from by the lower Appellate Court. Issue No. 7 and the finding in paragraph 15 shows that the First Court held on the evidence of the Revenue Inspector that the defendants Nos. 1 to 3 got the items Nos. 5-9 as heirs of Kamadar Khan and they were not acquired by them. P. W. No. 5, the Revenue Inspector, says that in the case of *raiya* lands the heir's name is entered, if he is in possession. The fact that defendant No. 1 executed the usual *kabuliyat* to Government makes no difference. I am, therefore, of opinion that the *raiya* fields also form part of the estate which is liable to the claim of the heirs. Under clause (3) of section 212 of the Land Revenue Code, they are not liable to partition except with the consent of the Deputy Commissioner, but the plaintiff is entitled to her share in the produce, and she may, if so advised, apply to the Deputy Commissioner for partition.

Next, as to the dower. The amount is admitted and it is now admitted by the learned Counsel for appellant that defendant No. 1 is entitled to interest on her unpaid dower. It is here contended that the lower Appellate Court was wrong in ordering the plaintiff to pay the whole of the dower before taking her share of the estate. It is argued that the heirs take their shares after the dower is paid and their shares are thus proportionately reduced. If the plaintiff is made to pay the whole dower, the other heirs will get their shares undiminished. He relies on *Hamira Bibi v. Zubaida Bibi* (2) where it was held that the liability of the heirs of the husband not being personal, the heir who sues the widow for

possession of his share is only liable to pay the proportionate part of the dower-debt. The learned Pleader for the respondent has relied on certain observations in Amir Ali's *Muhammadden Law*, 4th Edition, Vol II, page 507. In *Muhammad Karim Ullah Khan v. Amani Begam* (3) which is one of the cases quoted in Amir Ali, it was held that the heir had failed to prove his right to partition without the payment of his proportionate share of the dower. In the present case the share of the plaintiff in the estate of Kamdar Khan (which alone is liable to the dower) is only 19/144, and it would be inequitable to make her pay the whole of the dower. I hold, therefore, that plaintiff should pay only her proportionate share of the dower, that is, 19/144 of Rs. 1,000, i.e. Rs. 131-15-1.

The only remaining point is as to the share of the funeral expenses of Kamdar Khan, amounting to Rs. 385 which plaintiff has been required to pay. It is contended by the learned Counsel for appellant that the defendant No. 1 has adduced no evidence that she paid this amount out of her own pocket, nor has she led evidence to show that she borrowed it. She has no means apart from the estate and it must, therefore, be assumed that she paid it out of the estate. The plaintiff, therefore, will take her share of the estate proportionately diminished by this payment, and it is inequitable that she should pay twice over. In this connection I may note that in paragraph 14 of the lower Court's judgment it is remarked that as any debts paid by Kamdar Khan must obviously have been paid out of the family property there is no call for further contribution as plaintiff's share is automatically reduced by the payments. In the absence of any evidence as to how Kamdar Khan's funeral expenses could have been paid except out of the estate, the same reasoning will apply.

The result is, that the appeal succeeds and the decree of the lower Appellate Court must be modified by including the *raiya* numbers in the property in which the plaintiff is entitled to get a share. Her claim to get 19/144 is subject to the payment of Rs. 131-15-1 as her proportionate share of the dower debt. The respondent will bear the costs of this appeal.

Z. K.

Appeal accepted.

MARIMUTHU, *In re*.**MADRAS HIGH COURT.**

CRIMINAL APPEAL No. 63 OF 1923.

AND

CRIMINAL REVISION CASE No. 858 OF 1922.

(TAKEN UP No. 50 OF 1922.)

February 15, 1923.

Present.—Just ce Sir William Ayling, Kt.,
and Mr. Justice Odgers.*In re* MARIMUTHU *alias* MARI—ACCUSED.*Penal Code (Act XL V of 1860), ss. 302, 304—
Death caused by violent kick—Intention—Offence.*

Accused taxed his wife with consorting and flirting with other men and she replied "what does it matter;" he, thereupon, struck her on the cheek and she fell down abusing him. The accused then gave a forcible kick on the prostrate body of the woman on her side which caused her immediate death:

Held, though the accused could be exonerated from the intention or knowledge requisite for an offence falling under section 302 of the Penal Code, the circumstances fully justified the inference that in kicking the deceased, accused knew he was likely to cause death so as to render him guilty of an offence under the latter part of section 304 of the Code. [p. 963, col. 1.]

Empress of India v. Lau Beg, 3 A. 776; A. W. N. (1881) 132; 6 Ind. Jur. 264; 2 Ind. Dec. (N. S.) 697, distinguished.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused on the charge under section 302, Indian Penal Code, by the Sessions Judge, Trichinopoly, in Sessions Case No. 38 of 1922, on his file and case taken up by the High Court after notice to the accused to show cause why he should not be convicted under section 304, Indian Penal Code.

Mr. P. Markandeyulu, for the Accused.
The Public Prosecutor, for the Crown.

JUDGMENT.

Ayling, J.—The accused in this case was tried before the Sessions Judge of Trichinopoly on charges under sections 302, 304, 323 and 325, Indian Penal Code, in connection with the death of his wife. The Sessions Judge convicted him for an offence under section 323 and sentenced him to one year's rigorous imprisonment but acquitted him on the other charges. Against this acquittal Government had appealed under section 417, Code of Criminal Procedure, and in the same connection the case was taken up in

revision under the orders of a learned Judge of this Court.

The case against accused, as disclosed in the prosecution evidence, is as follows:—Deceased, a young woman of 19, was on bad terms with her husband, accused, and had on several occasions returned to her parents' house complaining of his ill-treatment. She was last brought back from there within a week of her disappearance. On the 9th July, she was sent for to visit her sick mother and accused agreed to let her go but before starting for the latter's village went with her to a Muniyanar temple situated just outside a Reserve Forest. She wanted to worship there, and he wanted to cut a ploughshare in the adjacent reserve. They were seen together by two witnesses (P. Ws. Nos. 2 and 3) near the temple and just inside the Reserve Forest before sunset that evening. The woman was never seen again alive but a female skeleton was found some days later in the Reserve Forest, which was suspected to be that of the deceased. Accused was arrested on suspicion and produced all the woman's jewels including her *tali*.

He subsequently made a confessional statement (Exhibit J1 to J3) which he repeated in the Committing Magistrate's Court (Exhibit K) though he retracted it before the Sessions Judge. In this he stated that he and his wife had a quarrel in the Forest and that he first slapped and then kicked her and so unintentionally caused her death.

The Sessions Judge found the confession to have been freely and voluntarily made, and attached no importance to accused's allegations of ill-treatment or his retraction before the Sessions Court. He accepted it as a true version of what occurred and in this view of the facts held that no intention to kill or cause a grievous hurt could be attributed to accused and accordingly convicted him only of voluntarily causing simple hurt.

It will be seen from the above that, apart from the confessional statement, there is quite a strong case against accused for conviction under the more serious sections 302 and 304, Indian Penal Code. The statement is incriminatory, in so far as it shows that accused caused

MARIMUTHU, *In re*.

his wife's death, but it is exculpatory so far as it tends to palliate accused's action by reference to the manner and circumstances attendant and the intention to be ascribed to accused. It is in the latter aspect that it has most practical importance.

The medical evidence throws no light on the cause of death. None of the bones of the skeleton were found to be fractured and although the skull was separated from the trunk, this may well have been the work of wild animals. The Sessions Judge has deduced from this that accused could not have used his axe in killing his wife and having further regard to the absence of any very deadly ill-feeling has accepted in its entirety the version of the occurrence put forward by accused in Exhibits J1 to J3, and K.

I cannot help feeling considerable doubt as to whether these statements contain the whole truth, and whether accused has not at any rate considerably minimised the violence he used to cause his wife's death. A slap on the cheek and a kick (or even kicks) on the side are not likely to have caused the immediate death of a healthy young woman of 19. However, in all the circumstances of the case and particularly as the matter came before us by way of revision and appeal against acquittal, I am loth to say that the Sessions Judge was not justified in accepting the accused's version of what occurred. I shall, therefore, proceed on the assumption that it is correct, and only consider whether, accepting it, accused should have been convicted of a more serious offence than causing simple hurt. This is the story in accused's own words as given in Exhibit I: "I got angry and beat my wife on her cheek with my hand. She fell down saying 'be ruined, be damned.' Saying 'has it come to this with you because I keep you in the house as a Muhammadan woman and supply you with all necessaries in the house.' I gave a kick forcibly. It struck on the side of my wife. I stopped for a while and observed. There was no breathing or talking."

Now, the "slap" on the cheek could have done little harm, though it would seem to have been forcible enough to knock her down; but the kick (or kicks) on the side would seem to have caused practically instant death. There is nothing to suggest that she was suffering from any disease, and I think we may fairly infer that he must have

kicked the woman with tremendous force to produce such an effect and that a man who so kicks a prostrate woman on the side must be credited with the knowledge that he is likely thereby to cause her death even if he be exonerated from the more definite intention or knowledge required by section 302, Indian Penal Code. It is beside the point to say, as the Sessions Judge does, "that ill-feelings between accused and his wife were certainly not such as to make the accused wish for the death of his wife." In cold blood, accused probably entertained no such desire. But he says that just before this he had taxed her with consorting, or at any rate, flirting with other men and she had in effect replied "what does it matter?" ("on account of their coming and going what is lost?") He then struck her on the cheek and she fell down absuving him. In such circumstances he may well have felt considerable anger, and it is wrong to argue that he could not have meant to kill his wife because he had no sufficient motive to do so.

The learned Vakil who argued the case for the accused before us has relied on the judgment of Straight, J., in *Empress of India v. Idu Beg* (1) to show that at the worst accused can only be convicted of causing grievous hurt (section 325, Indian Penal Code) and not of murder or culpable homicide. I do not think it supports any such conclusion, the learned Judge in that case was at great pains to explain the scope of section 304A, Indian Penal Code, and in particular to show that it did not cover "cases of direct violence-wilfully inflicted." It is only in the latter part of his judgment that he deals with the question of what intent, or knowledge should be ascribed to the accused on the facts of the particular case before him. And he says, "I should certainly not have distrusted the order of the Judge had he convicted of culpable homicide not amounting to murder on the ground that there must have been knowledge that death would be a likely result. At the same time, I am willing to accept his conclusion that there was no such knowledge, though further than this

(1) 3 A. 776; A. W. N. (1881) 132; 6 Ind. Jur., 264; 2 Ind. Dec. (N. S.) 697.

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I cannot adopt his view." In other words, he accepted, though apparently not without some doubt, the lower Court's finding that the accused in that case did not know that death was a likely consequence of his act. Such a decision can hardly in this respect be any guide to another Court dealing with another case.

For myself, I think that in the present case a conviction for causing grievous hurt would be illogical as well as inadequate to the facts. The only category of section 320, Indian Penal Code, which could possibly be applied is the eighth "any hurt which endangers life," and I do not think this phrase was intended to apply to a case in which life was not merely "endangered" but actually taken away. But, however this may be, the circumstances seem to me to fully justify the inference that in kicking deceased, accused knew that he was likely to cause death and I hold him guilty of an offence under section 304, Indian Penal Code, (latter portion). His subsequent conduct in stripping his dead wife of her jewels and even cloth and leaving her naked body in the jungle are incompatible with any very light sentence and I would, therefore, impose a sentence of five years' rigorous imprisonment.

Odgers, J.—I agree that, under the circumstances, we should accept the finding of the Sessions Judge that the confession of the accused is a true statement of the facts which occurred. According to this, the accused and his wife had a quarrel and he taxed her with intimacy with other men. He got angry, slapped his wife with such force that she fell down. She cursed him in so doing and he "gave a kick forcibly on her side." She died immediately. There is no evidence or even plea of the existence of a disease. The question is what, on these facts, is the intention to be imputed to the accused? Section 299 defines (last clause) culpable homicide as causing death with the knowledge that he is likely to cause death.

The only kind of grievous hurt (section 320) which could by any possibility be applicable to this case is the eighth, *viz.*, any hurt which endangers life.

Here the accused "kicked forcibly." The confession says only one kick, but there may well have been more, at any rate, the violence of the single kick must have been very

severe. In *Empress of India v. Idu Beg* (1), which was brought to our notice and strongly relied on for the accused, the blow was a single one and the learned Judge (Straight, J.) said he would not have disturbed the order of the District Judge had he found the accused guilty of culpable homicide not amounting to murder on the ground that there must have been knowledge that death would be likely result. That was a case of section 304—and all it actually decided was that cases of direct violence wilfully inflicted do not fall within that section. In the present case the kick not only endangered life but on accused's own showing caused immediate death and it appears to me that it was administered with such violence that the accused must be taken to have known that it was likely to cause death, there being no evidence of any other contributory cause.

I, therefore, agree with the judgment of my learned brother and with the sentence proposed by him.

V. N. V.

Z. K.

Accused convicted.

PATNA HIGH COURT.

DEATH REFERENCE NO. 4 OF 1918.
CRIMINAL APPEALS NOS. 63 AND 65
OF 1918.

April 25, 1918.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Thornhill.

MADAN GURU AND ANOTHER—ACCUSED
—APPELLANTS
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1893), s. 164—*Statements by accused before trial, record of—Magistrate, power of—Evidence Act* (I of 1872), ss. 9, 11, 21, 133—*Statements by accused before trial, admissibility of—Accomplice, statement of—Corroboration.*

There is nothing in section 164 or any other sections of the Criminal Procedure Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is

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placed on his trial. Such a statement, if proved to be voluntary, is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. [p. 969, col. 2.]

Queen-Empress v. Bhairab Chunder Chuckerbutty, 2 C. W. N. 702 and *Queen-Empress v. Viran*, 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553, dissented from.

Empress v. Kangal Mali, 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 713, cited.

Sections 9 and 11, read with section 21, of the Evidence Act amply justify a Court in admitting into evidence all previous statements made by an accused which have a bearing upon the question of his guilt and whether the previous statement is made to a Police Officer, to a Judicial Officer, or to a third party is immaterial, if the statement is relevant to the fact in issue, namely, the accused's guilt. [p. 969, col. 2.]

Queen-Empress v. Bhairab Chunder Chuckerbutty, 2 C. W. N. 702, explained.

Under section 133 of the Evidence Act the evidence of an accomplice by itself would be sufficient for the purpose of a conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise that presumption is an error of law. [p. 970, col. 2.]

Phillip Jacobs, 1 Cr. App. R. 215, noticed.

Reference made, under section 374 of the Criminal Procedure Code, by the Sessions Judge of Sambalpur.

Messrs. *Gour Chandra Pal* and *Gajendra Prasad Das*, for the Appellants.

Mr. *Sultan Ahmad*, for the Crown.

JUDGMENT.

Mullick, J.—The appellant, Madan Guru, has been convicted under section 302 of the Indian Penal Code of murder by causing the death of a young woman named Anuchaya on the night of the 8th of December 1917, and has been sentenced to death. The case now comes before us on a reference made by the Sessions Judge of Sambalpur for confirmation of the sentence. The appellant, Basudeo, who has preferred Appeal No. 65 of 1918, was a servant of Madan Guru and has been convicted also of the same offence and sentenced to transportation for life. It appears that three other persons, namely, Ganda Gour (also a servant of Madan Guru), a man named Sankri Keot and his wife Kheri Keotni were also placed upon their trial before the Committing Magistrate jointly with the two appellants before us. Of these the two last named, Sankri and his wife, were discharged by the Magistrate on the ground

that there was no sufficient evidence against them, and in the Court of Session they were the principal witnesses for the Crown. As to Ganda he was committed for trial to the Court of Session together with the two appellants but he has been acquitted by the learned Sessions Judge agreeing with the two assessors. With regard to the two appellants, one of the assessors was for acquitting both; while the other, although not very clear in the opening part of his opinion, finally came to the conclusion that the evidence was sufficient. The learned Sessions Judge, agreeing with the last named assessor and disagreeing with the first named, has convicted the two appellants and has sentenced them as stated above.

Now, before the events of the night of the alleged murder are recited, it is necessary to note that the deceased Anuchaya was living in the village of Lapanga in the same homestead with her father Babuna, her brother Sitaram, and her brother's wife Sita Kultani. She occupied a hut of her own, separate from that of the others. Some three years previously she was divorced by her husband, who is now living in another house in the same village. Although ostensibly supporting herself by the sale of dried fish, she had been since then Madan's mistress. Madan was in the habit of visiting her and sometimes spending the whole night in her house; while she also was in the habit of going over to Madan's house, in the company of Basudeo.

Now it is alleged, and in my opinion proved, that sometime in the afternoon of the 8th December last, the accused Basudeo came to the house of Babuna and asked the deceased to go with him to Madan's house. The evidence of Sita Kultani, the sister-in-law of the deceased, leaves no room for doubt that Madan had been in the habit of sending for the deceased, that he had frequently made presents to her and that some of the deceased's ornaments were at that time in Madan's custody. Sita states that she saw Basudeo departing with the deceased on the afternoon of that Saturday. She is corroborated by Babuna and by a very disinterested witness named Nidhi Satpati, a Postal Peon, who happened to go to the house of the deceased on that day for the

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purpose of buying vegetables from the deceased. This Postman deposes that the deceased appeared to be in a hurry and said that she could not attend to him because a man had come to take her to Gurupali, which is the village in which Madan resides. The evidence of Sita Kultani has been very strongly attacked by the learned Vakil, who appears on behalf of the appellant, Madan, before us and it has been repeatedly asserted that she is a maliciously false witness, who has been tutored by the Police for the purpose of implicating Madan in this very serious charge. We agree with the learned Sessions Judge that this witness, in spite of contradictions here and there, has on the whole given a straightforward story and that she saw the deceased depart with Basudeo on afternoon of Saturday the 8th of December. With regard to Nidhi Satpathi no reason has been assigned for disbelieving him and the evidence shows that he came forward so early as the 11th of December to tell the Sub-Inspector who was investigating into the case that he had seen Basudeo departing with the deceased on the previous Saturday. Then there is the evidence of a boy named Khedu Gond, who tells us that he saw the deceased with Basudeo on the road between Lapanga and Gurupali. A similar statement is made by a witness named Chabila Keot, and, in my opinion, there can be no doubt that he and Khedu are actuated by no malice towards the appellants and that though not examined by the Police till the 16th of December, they have spoken the truth at the trial.

The scene next shifts to the village of Gurupali, three miles from the home of the deceased. If we do not believe Sankri Keot and his wife Kheri Keotni, there is no direct evidence as to where the deceased was during the night of the 8th. If, on the other hand, we believe them then their evidence shows that she was at the house of Madan on the night of the 8th of December; that she was thence accompanied by Madan, Basudeo, Ganda, Sankri, and Kheri as far as a streamlet named Gangajal Jore, which is about half way between the house of Madan and her own house, and that there she was killed by the two appellants with a *tangi*, which is an instrument resembling an axe. Apparently the absence of the deceased did

not in any material degree excite the suspicion or the anxieties of her relatives and no action appears to have been taken on the 9th of December. But on Monday the 10th of December Babuna discovered a number of bones and some ornaments and clothing belonging to his daughter in the bed of Gangajal Jore and he then appeared at 2 P.M. before the Sub-Inspector, Bhakta Hari, who was the officer in charge of Katarbaga Police Station, and happened, it is alleged, to be staying in the village Gurupali for the purpose of doing his rounds. Babuna lodged an information stating that he had been early in the morning to Basudeo and that Basudeo had told him to enquire of Madan what had become of the deceased; that he had asked Madan also and that Madan had replied that the deceased had probably gone home by a round about way. Although no direct charge of complicity in the death of the deceased was laid in this information either against Basudeo or Madan, its general trend is to hint that they had a hand in the disappearance of the girl. The Sub-Inspector thereupon arrived at the place where the remains were lying and commenced his investigation.

The Sub-Inspector, who was, at the time when the information was recorded, staying in the house of Madan and who has been charged freely with improperly favouring him does not appear to have taken any action against Madan or Basudeo on 10th or the 11th. It appears, however, that on the 12th at about midday, Basudeo and Ganda, who were not under any Police restraint, made a very important statement to the Sub-Inspector. We have no details of that statement on the record. As it was a statement which was in no sense a confession, I think, the learned Sessions Judge ought to have got that statement proved by the Sub-Inspector and made it a part of the evidence in the case. The omission to do so was, in our opinion, serious. But this much we do know that Basudeo and Ganda implicated Sankri and his wife and that upon the strength of their statement these two persons were arrested at 6-30 P. M. and despatched to Sambalpur, the Head-Quarters of the District, the following morning, that they reached Sambalpur that day and that on

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the 14th of December, their statements, purporting to be statements under section 164 of the Code of Criminal Procedure, were recorded by Deputy Magistrate Maulvi Wasiq Ali. Meanwhile, the Sub-Inspector (it is not known whether he was still staying at the house of Madan or not), was carrying on his enquiry and on the 14th of December in consequence of further statements made about 2 P. M. by Basudeo and Ganda he arrested Madan, Basudeo and Ganda on the charge of murder. It has been suggested by the learned Sessions Judge that the Sub-Inspector's action was quickened by the knowledge that the Deputy Superintendent of Police being dissatisfied with the progress made in the investigation, was himself proceeding to Lapanga. As a matter of fact, the Deputy Superintendent did arrive some time on the night of the 14th of December and brought with him one or more Sub-Inspectors to assist in the investigation. On the 15th of December Sankri and his wife were brought back in custody from Sambalpur to the place of occurrence where they were confronted with Madan, Basudeo and Ganda who were still in Police custody; and in consequence of certain statements made by Sankri a purse containing Rs. 7-2-6 was recovered by the Police from the young son of Sankri. The matter of this purse has an important bearing in the case because it is alleged that on the 12th of December, immediately after her arrest, the wife of Sankri gave up the purse to the Sub-Inspector, Bakhta Hari, stating that the accused, Madan, had given her Rs. 8 as hush money immediately after the murder of Anuchaya and that she had spent annas 13 pies 6 out of the Rs. 8 and that the balance was in that purse. I will refer later to the Sub-Inspector's conduct in reference to this matter but at this stage it is only necessary to say that it is the case of the prosecution that the Sub-Inspector has either negligently or intentionally omitted to record in his diary this very important statement by Kheri. On the 15th, 16th, and 17th some witnesses were examined and on the last mentioned date the five accused, namely, Madan, his two servants (Basudeo and Ganda) Sankri and his wife were despatched to Sambalpur. On arrival there, Basudeo

and Ganda both made statements before the Deputy Magistrate, Maulvi Wasiq Ali, which were recorded under section 164 of the Criminal Procedure Code. Madan refused to make any statement, with regard to his connection with the alleged crime.

At this stage it will be convenient to consider the submission which has been so forcibly made before us by the learned Vakil appearing on behalf of the appellant, Madan, that it has not been established that any murder took place. Now the evidence upon this point is this: The medical evidence in the case shows that the skull and other bones found in the Gangajal Jore by the Police are the remains of a human being the sex whereof it is impossible to determine. The ornaments found strewn about the place have been identified as those which Anuchaya had been wearing. They are ordinary ornaments, such as are in common use and do not bear any special marks of identification but, nevertheless, the witness Sita being a person living in the same house with the deceased would be in a position to identify them. The evidence given by her establishes that these are ornaments similar to those which Anuchaya was wearing when she left the house in the afternoon of the 8th of December. Then a silk sari and a wrapper was also found at the place. Evidence has been given by two *dhobis*, a man and a woman, which shows that this sari was that of the deceased and that the wrapper was one which was used by the deceased and by various members of the deceased's family. There is also the evidence of a tailor who deposed that he once cut this wrapper and sewed up the ends. It is contended that the whole of this evidence as to the identification of the sari and the wrapper is false. It is true that the sari and the wrapper bore no identification marks but it cannot be said that the persons who had washed them were not in a position to identify them nor that the tailor who had cut the wrapper was incapable of identifying it when called upon to do so. The medical evidence also shows that human blood was found upon both these pieces of cloth. The case for the prosecution is that the body of the deceased was left in the bed of the stream from the night of the 8th till the morning of the 10th December and that wild birds and animals having preyed upon

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the remains, there was nothing left from which the features of the deceased could be identified. Having regard to the conditions which prevail in this country it is impossible to reject this theory. There is, further, direct evidence to show that on the 9th of December the body of the deceased was found in a state capable of identification by at least three witnesses. The first of these is the boy Khedu to whom reference has already been made. He states that he saw the body of Anuchaya lying at the place with the throat cut and that he fetched his master Ainthia and showed him the corpse. There is also the witness Sankri Padhan, who states that while going to market on the 9th in the afternoon he saw the body being eaten by vultures. It is remarkable that none of these witnesses who profess to have recognised Anuchaya, gave any information that day to the members of her family. It appears that Khedu was examined by the Police on the 16th, Ainthia was also examined on the same date while Sankri was examined on the 17th and the only explanation offered by these witnesses for not giving immediate information was that they were overcome with fear that they might be implicated in the case. Having regard to the conditions prevailing in the tract from which this case comes and to the general ignorance of the class of persons to which these witnesses belong, the explanation does not seem to me to be at all an improbable one. With reference to the witness Khedu there is a further fact which requires to be considered. He states that he met Sitaram, the brother of the deceased, on the morning of Monday the 10th, and that he told Sitaram that he had seen the body on the previous day. Now Sitaram was examined by the Police on the 11th and he made no mention of the fact that Khedu had told him that he had seen the body on the 9th. It was not till the 15th of December that Sitaram told the Police that Khedu had seen the body on the 9th. This is undoubtedly a point against the prosecution but having regard to the weight of evidence to the contrary, I think it is established that Khedu and the other two witnesses are speaking the truth.

In these circumstances, the only conclusion which can be drawn from the facts

is that the deceased met her death by violence.

The next question is: who caused her death? Suspicion naturally fell upon Basudeo. When first questioned by Babuna he declined to give any information of the girl's whereabouts. It is suggested that the deceased might have gone on her business, which was that of selling fish and met her death at the hands of some person or persons unknown. In this connection our attention has been drawn to an inconsistency between the information lodged by Babuna and the evidence given by him at the trial. In the information he stated that the deceased left with a basket of fish, whereas at the trial he has made rigorous attempts to deny that he made any such statement at all. Now the reason for this denial is quite apparent. He is afraid of making any admission which will favour the theory that the murder was committed by some unknown person. Whether the basket was a mere pretext or whether she did intend to do some selling that day there is no evidence to show, but that she did go with Basudeo is, in my opinion, conclusively established.

The onus, therefore, lies heavily on Basudeo to account for her subsequent movements. His denial that he went to the girl's house at all raises an inference of guilt though not by any means a conclusive one but the importance of her being last seen in his company is that it furnishes corroboration of the evidence of the two accomplices Sankri and Kheri. But before I proceed to deal with their evidence, it is necessary to refer to one part of the case about which there is considerable controversy. Both of them state that they went on the 8th of December to Madan's house at his request for the purpose of discovering ways and means of procuring an abortion upon the deceased. The case for the prosecution is that the deceased was three months' pregnant and that the accused, Madan, was responsible for her condition. On behalf of the defence there is a complete denial of the pregnancy although the intimacy is admitted. It is argued that the whole story about Sankri and his wife having gone to the house of Madan on that night is a concoction from beginning to end. Now the two witnesses who give direct evidence as to the condition

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of pregnancy are Sita, the sister-in-law of the deceased, and a woman named Tara. With regard to Tara the learned Sessions Judge, we think rightly, has preferred to class her as a somewhat doubtful witness. She states that she was in the habit of accompanying the deceased to the house of Madan and that one night, while the deceased and Madan were sleeping in one of the apartments while she (the witness) was in another apartment she overheard a conversation between Madan and the deceased in which the deceased threatened Madan with exposure on the day of his daughter's wedding. We think it is doubtful whether this witness could have overheard the whole conversation under the conditions which she relates and as the learned Sessions Judge has, after observing her demeanour in the witness-box, declined to accept her as a witness of truth, we think we must also form the same estimate of her testimony. But with regard to Sita, there can be no doubt that she was in a position to notice the symptoms which she describes. Her evidence, therefore, also corroborates the story told by the accomplices as to the object of their visit to the house of Madan on the night of the 8th. It has been pointed out to us that neither in her statement as recorded by the Police nor in her statement before the Committing Magistrate was any mention made by her of the symptoms which she now describes. The omission on the part of the Sub-Inspector may be due to neglect or, as is suggested by the prosecution, to a desire to shield Madan, and from the circumstances that he made the same kind of omission in regard to Sankri's wife raises strong suspicions against his honesty. As to the statement before the Committing Magistrate which is very brief it is not known whether the witness was ever questioned upon this point. If she had been and if she had then denied the fact of pregnancy, there may have been good ground for suspecting the evidence of the accomplices upon this question, but in the absence of any direct evidence to show that the statement made by Sita in the Sessions Court is false, I think her account of the symptoms observed in the deceased must be accepted as correct.

There is one other point in this connection which has been brought to our notice to-day

by the learned Vakil for the appellant, Madan. The learned Vakil points out that in the *surat hal* report drawn up on the 10th of December there is mention of a *kaupina* cloth which has been translated in the report as "undercloth" and which is said to have been found near the remains in the Ganga-jal Jore. It is suggested that a *kaupina* cloth is generally worn by women during the period of menstruation and that the finding of such a cloth completely demolishes the theory as to the deceased's condition. Now, whether a *kaupina* is a cloth such as is suggested by the learned Vakil for the appellant or not has not been established by any evidence. My own impression, on reading the report was that it was a kind of under-skirt worn usually by women under their outer *sari* but even if it be such a cloth as is now suggested it is, in my opinion, not inconsistent with the theory of pregnancy; for it is a well-known fact that even during that condition menstruation sometimes continues for several months.

The accomplices having been corroborated so far, let us proceed to test the rest of their evidence. It has been contended by the learned Vakil who appears for the appellant, Madan, that the statements of Sankri and his wife before Maulvi Wasiq Ali on the 14th of December 1917 are wholly inadmissible in evidence. The learned Sessions Judge has made no reference to these statements and I think that he was wrong in omitting to do so. If they had previously made any inconsistent statements then surely the accused were entitled to the benefit of the doubt arising from such inconsistencies. It appears that the learned Deputy Magistrate caused the exact words of Sankri and his wife to be recorded in Uriya by a clerk acquainted with that language while he himself recorded a note in English. We have before us a translation of the vernacular statement and we find that at that early stage Sankri stated before the Deputy Magistrate that he and his wife had been taken to the house of Madan by Basudeo and that he was asked by Madan's mother to procure an abortion, that he replied that he could not perform the *puja* because he was not in a condition to do so on that day and that he would perform it 4 or 5 days later. It is necessary to note here that according to the evidence Sankri is believed to be an

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exorciser of evil spirits and that he and his wife are the priest and priestess of the temple of Kali close to the scene of occurrence. The statement proceeds to recite that at Madan's request they accompanied Madan, Basudeo, Ganda and Anuchaya, who was brought out of a hut called the *Chanri* house, as far as the Gangajal Jore, that when they had reached the bank of the streamlet, Madan and Anuchaya went on ahead while the other four remained behind, that shortly afterwards Madan called out to Ganda and Basudeo, that Ganda and Basudeo then went forward; that Basudeo handed a *tangi* to Madan, that Madan struck Anuchaya with the *tangi*, that thereupon Basudeo also struck her and that in answer to Anuchaya's entreaties for mercy, Madan replied that she would not escape death. Kheri's statement, though a much shorter one, is to the same effect. There is, however, one curious point in it which required to be noticed. She asserts that Anuchaya cried out and begged for mercy exclaiming that she would not stay in Madan's house. In explanation of this it is suggested by the prosecution that Anuchaya had threatened to stay in Madan's house against his will in order to shame him and to force him to make some provision for her.

The learned Vakil for the appellant, relying upon the case of *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1), contends that both these statements recorded by Maulvi Wasiq Ali are without jurisdiction and are not, therefore, admissible either to corroborate or contradict Sankri and his wife. Now it is true that one of the learned Judges in the case just cited, namely, Mr. Justice Banerjee, clearly expressed the opinion that a Magistrate acting under section 164 of the Code of Criminal Procedure has only jurisdiction to record the statements of witnesses and the *confessions* of accused persons and that if an accused person makes a statement which falls short of a confession there is no jurisdiction to record that statement and if recorded it is inadmissible as evidence at any subsequent stage of the case. The learned Judge is of opinion that the sections of the Indian Evidence Act are controlled by sections 164, 342 and 364 of the Code of

Criminal Procedure and he relies upon a decision of the Madras High Court in *Queen-Empress v. Viran* (2). The other learned Judge who formed the Bench did not, however, go so far, but on the facts of that particular case preferred to hold that the statement was inadmissible on the ground that it had not been shown that it was made voluntarily. With the greatest respect, I venture to differ from the view of the former learned Judge. In my opinion there is nothing in section 164 or any other sections of the Criminal Procedure Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement, if proved to be voluntary, is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. It has been held in *Emperor v. Kangal Mall* (3) that statements made before the Police at any stage before the examination of the accused in Court for the purpose of explaining the evidence recorded against him are admissible for the purpose of adjudicating upon his guilt, and, that being so, I entirely fail to see why statements to a Magistrate under conditions which are much more reliable than those under which statements before the Police are recorded should not also be admissible. Sections 9 and 11, read with section 21, of the Evidence Act, in my opinion, amply justify a Court in admitting into evidence all previous statements made by the accused which have a bearing upon the question of his guilt and whether the previous statement is made to a Police Officer to a Judicial Officer, or to a third party is immaterial if the statement is relevant to the fact in issue, namely, the accused's guilt. It is true that the rule of their Lordships' decision in *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1) has been followed in other cases in regard to statements made in the course of what are known as verification proceedings in the presence of the police, but whatever might be said with regard to the value of those statements, I do not think that these cases lay down any

(2) 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553.

(3) 26 Ind. Cas. 161, 41 C. 601; 15 Cr. L. J. 713.

(1) 2 C. W. N. 702.

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general proposition of law, that it is not competent to the prosecution to prove as against an accused statements made by him at a stage previous to his examination in Court. Holding, therefore, that the statements made by the two accomplices in this case before the Deputy Magistrate under section 164 are admissible, the question is whether or not they corroborate the statements made in the Court of Session. There does not seem to be any material discrepancy and they are, in my opinion, acceptable as corroborating, under section 157 of the Evidence Act, their testimony in the Sessions Court. Then, as to the statements made by these witnesses on the 19th December before the Committing Magistrate, there is no material variation except as to the respective parts played by Madan, Basudeo and Ganda in inflicting the injuries upon the deceased. In the view I take of the complicity of Madan his two servants and Sankri and his wife in the murder, the actual part played by each in the attack is a matter of comparatively minor significance, but if anything is to be gathered from the variations as to the part played by each in the attack, it is that there was an inclination to protect Madan and Ganda at the later stages of the case and to ascribe the fatal blow to Basudeo. Holding that these variations are of minor importance I am satisfied that the evidence of Sankri and his wife has been materially corroborated.

Now the learned Counsel who appears for the Crown and who has argued the case with great fairness has attempted to suggest that Sankri and Khori were not accomplices in the legal sense of the word, and that though they may have been present it has not been shown that they were privy to the conspiracy to murder. It is impossible, having regard to the ordinary course of human affairs, to accept the suggestion that although they arrived in the middle of the night at the house of Madan, and although they were asked to engage in a nefarious operation upon the deceased, and although they consented to go with the deceased and Madan and his two servants to the bed of the stream, they had no intention of joining in the attack which put an end to her life. In my opinion they were fully cognizant of the purpose

for which they were taking the deceased, and having regard to all the circumstances I have no doubt that they were party to a conspiracy for the purpose of causing the death of the deceased. No doubt, under section 133 of the Indian Evidence Act, their evidence by itself would be sufficient for the purpose of a conviction but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law, but the degree of weight to be attached to the presumption is a matter to be judged on the facts of each case and it is for the Court to say upon the evidence adduced before it whether that presumption has been adequately rebutted. The learned Counsel for the prosecution has drawn our notice to the case of *Phillip Jacobs* (4). In that case the accused were charged with dishonestly retaining stolen property and the only corroboration was a denial on his part of his intimacy with the actual burglar. The Court held that the denial itself was sufficient corroboration. Now, in this case what is the position? I have already said that it has been established that Basudeo went to the house of the deceased and brought her away saying that she was required at Gurupali. Basudeo has not explained where he took the deceased. It is established that Basudeo is the servant of Madan; and that he sleeps in the house of Madan at night, that there is no reason for suspecting him of any intimacy with the deceased, that Madan, on the other hand, had been the paramour of the deceased for three years, that he was in the habit of sending Basudeo to fetch her, and that Basudeo had on previous occasions fetched her. Is it not a reasonable inference to draw, in these circumstances, that on this day too she was fetched by Basudeo not for his own purposes but for Madan's purposes? Then we have the events which took place in the early part of the evening. The evidence of Sarthak Gond shows that he, early in the evening, went with Ganda to fetch Sankri to Madan's house and that Sankri at first refused to come. Then there

(4) 1 Cr. App. R. 215.

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is the evidence of Palan Kulta, another servant, and the boy Lochan, also a servant of Madan, who was sleeping in the house that night and who states that Sarthak came to the room in which Basudeo was sleeping and asked Basudeo to go to his master. There is also the evidence of these witnesses to the effect that later on they saw Madan leave the house with Basudeo and Ganda and that Basudeo did not return till a very late hour of night. I see no reason for disbelieving these witnesses. The learned Sessions Judge and one of the assessors have seen these witnesses and believed them and I see no reason for doubting the correctness of their finding. Finally, there is the evidence of Sankri's little boy Kangalu Keot who states that Madan, Basudeo and Ganda came and took his father and mother with them that night. It has been suggested that it is very unlikely that these two accomplices would have left the young boy in the house alone. Then it is suggested that it is extremely unlikely that if Madan was desirous of procuring an abortion upon the deceased his mother who comes of a respectable family would have interviewed Sankri and his wife and discussed the matter with them. In my opinion, the direct evidence in this case is such that it is impossible to reject it on the ground of its improbability.

Therefore, in my opinion, taking the evidence as a whole, there is material corroboration of the statements of the accomplices and the guilt of the accused, Madan, is established beyond doubt. For the same reason the guilt of Basudeo is established with equal certainty.

One other matter remains to be considered and that is the question of motive. It is clear that Basudeo had no direct motive in killing the deceased. He joined the conspiracy merely at the instigation of his master. With regard to Madan it has been contended that he was fond of the deceased who was a young woman of 24 or 25 years of age; that he is a comparatively wealthy man, that his father had done creditable service under Government and was a Rai Sahib, and that a man of his position could have afforded to keep Anuchaya as his concubine. It is impossible in every case to find the motive for the crime,

but it has been suggested that Madan may have considered it more convenient to get rid of Anuchaya as she was likely to become troublesome and we can only say that such a theory is not inconsistent with the evidence which has been laid before us. There is also a suggestion that the attack and the killing took the form of a sacrifice to the goddess Kali. There is no evidence to support this suggestion except a statement made by Basudeo, but the presence of the priest and priestess of the temple and the undoubted visit of Madan to the temple immediately after the visit for the purpose of invoking the assistance of the goddess does suggest that there may have been a religious element in the crime. The priest and the priestess had no particular motive in joining the conspiracy and this part of the case must, I fear, be left in obscurity. There is, however, one feature in the statement made by them which is as curious and unintelligible as it is extraordinary. They state that before the attack the remaining members of the party hung back while Madan and the deceased went forward in the direction of some bushes and Madan had sexual intercourse with the deceased. It is not a late invention. We find it in Sankri's statement on the 14th of December before the Deputy Magistrate and since that date all subsequent statements, whether made by Sankri or Kheri or Basudeo, or Ganda make mention of this fact. What the relevancy of this act is to the crime I am unable to say.

Finally, there is one other point which requires to be noticed, namely, the finding of the purse containing Rs. 7-2-6. The Sub-Inspector did not record the fact that Sankri's wife had stated on the 12th December, that the money had been given to her by Madan. The evidence of Jubraj and Sidheswar Tripathy establishes that this statement was in fact made by Kheri and Kheri's deposition in Court is that this money represents the balance of the Rs. 8 which were given to her as hush money. Madan has declined to make any statement as to this. A written statement was filed on his behalf which is quite valueless and ought not to have been received, and in which he gives no explanation of the various circumstances established against him. Although it was not obligatory up-

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on him to make a statement, he ought, if innocent, to have been in a position to explain these circumstances.

In these circumstances, the conviction for murder with regard to him, as also with regard to Basudeo must be upheld.

As regards the question of sentence, where five persons join together in a conspiracy to kill another the actual part taken by each in the furtherance of the common object of that conspiracy is immaterial, but, nevertheless, I think that there are circumstances in this case which make it unnecessary that we should confirm the sentence of death passed upon Madan. It is difficult to say from whose brain came the instigation to murder. It may have been the priest and the priestess who suggested it as it is in evidence that it was the 9th day of the moon on which day sacrifices are made to the goddess Kali; or it may be, though this is only conjecture, that the mother of the accused, Madan, was responsible; or it may be that the accused, Madan, himself was responsible; but in view of this uncertainty I think that it would be more prudent to set aside the sentence of death passed upon Madan and substitute therefor the sentence of transportation for life.

It is accordingly ordered that the conviction of the appellant, Madan, be, and is hereby, confirmed. The sentence of death passed upon him is set aside and in lieu thereof he is sentenced to transportation for life.

The conviction and the sentence of transportation for life passed upon the appellant, Basudeo, are confirmed and his appeal is dismissed.

In conclusion, we have to express our appreciation of the fair and able manner in which this case has been argued before us both by the learned Vakil for the appellant and by the learned Counsel for the Crown and of the assistance they have rendered to us in the discharge of our difficult task.

Thornhill, J.—I concur.

M. D. J. & N. H.

*Appeal dismissed;
Sentence varied.*

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 366-B OF 1921.

April 10, 1922.

Present:—Mr. Justice Maung Kin.

KALOO KHAN—PETITIONER

versus

M. A. RAHIM, SECRETARY, MYAUNGMYA

MUNICIPAL COMMITTEE

—RESPONDENT.

Burma Municipal Act (III of 1898), ss. 92 (4), 180—Walls, whether building—Walls built without sanction—Committee, right of, to demolish.

Walls built to enable the occupier of a house to use the enclosed area as part of his habitation are buildings within the meaning of the Burma Municipal Act, and the erection of such walls without the sanction of a Committee, would justify the Committee in directing their demolition. [p. 974, col. 1.]

Criminal revision against the conviction under section 180, Municipal Act.

Mr. S. S. Halder, for the Petitioner.

Mr. Maung Gye & Co., for the Respondent.

JUDGMENT.—The Municipal Committee of Myaungmya issued a notice in writing under section 92 (4), Burma Municipal Act, calling upon the accused to dismantle an unauthorized brick walling 34½ feet by 24½ feet at the back of the house, being contrary to the plan approved by the Municipal Committee. The accused duly received the notice but refused to obey it. The Municipal Committee, therefore, charged him with having committed an offence under section 180 of the Burma Municipal Act, and the Magistrate fined him Rs. 10.

The defence was that the notice in question was illegal and *ultra vires* because the walling which the accused was called upon to dismantle is not a building within the meaning of the Burma Municipal Act and the bye-laws thereunder.

The walling consists of two walls one at right angles to the other and these were at the back of the house, the plan for which was approved. The house faces north, and of the two walls one is a continuation of the eastern wall of the house, and the other is at right angles to the southern end of it and to the eastern wall which belongs to the next adjoining house on the west. So that the two walls in question and the third wall just referred to make a sort of backyard to the house. The western wall measured

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from inside is 9 feet 3 inches and goes up to the eaves of the kitchen which is part of the house. The height of the same measured from outside is 10 feet 3 inches, the height of the eastern wall which is not one of the walls in question, and the southern wall measured from inside is 8 feet each and from outside 9 feet each. From the description given in the additional evidence, it appears to me that the roof of the kitchen is not a continuation of the roof of the main house, and the wall between the eastern wall in question in this case which juts out beyond that kitchen to the south and the main house is somewhat lower, because the measurements of that intervening wall are 8 feet and 9 feet from inside and outside, respectively. The question then is: Do the two walls built as explained above constitute a building within the meaning of the Burma Municipal Act.

There is no definition of the word "building" either in the Act or the bye-laws thereunder but I think the question must be decided with reference to the mischief aimed at by the Act.

In *Lavy v. London County Council* (1) the question was whether a wall was a building, structure or erection within the meaning of section 75 of the Metropolis Management Act, 1862. It was held that it would depend upon the height of the wall and the purpose for which it was built. The house in question in that case had a forecourt. On the site nearest to the street the forecourt was bounded by a dwarf wall between 2 and 3 feet high with iron railings on it. The owner of the house pulled it down and built on its site a wall 11 feet high which was intended to be used as a screen on which to exhibit advertisements and also to serve as a boundary to the forecourt. The most important fact was that the new wall extended beyond the general line of building in the street and was erected without the consent of the London County Council. It was held that the dwarf wall is not a "building" within the meaning of the said section of the said Act, but that the substituted wall was a "building" within the section. The object of the section is to prevent a structure

from being built beyond the general line of buildings without the consent of the London County Council. Lindley, L. J., said, "In one sense every wall, everything erected, is a 'building,' structure or erection: but that section must be construed reasonably and with reference to the object for which it is passed. That is apparent from the case of *Ellis v. Plumstead Board of Works* (2)... where it was said, and I have no doubt correctly said, that if a man merely puts up a fence to mark off his boundary and preserve his rights as the owner, although in one sense it may be a building, structure, or erection, it is not necessarily a building, structure, or erection which falls within the mischief aimed at by the Act and avoided by section 75. We must look at this case, and not at the effect of other cases. In this case we must ask ourselves, as men of the world, whether such a new wall as this is not a 'building,' structure or erection, within the mischief of section 75." The learned Judge then proceeded to say that it was merely an attempt to throw dust in the eyes of the Court to say that the wall in question was only a boundary wall. Lopes, L. J., said, "When we have to determine that question, it seems to me to be all important to bear in mind what the object of these provisions is. The object of these provisions is this—to maintain in new streets a uniform line of frontage. It cannot I presume be said for one moment that any walls, whether high or low, are not 'buildings,' structures or erections. They obviously are such, but there are walls and walls. There is a wall of a certain height—2 or 3 feet high—which would not in any way, I take it, disturb the uniformity of a street; then there are walls of a greater height—12 or 14 feet, or even more—which would absolutely destroy the uniformity of that frontage, and absolutely defeat the purposes of these provisions. The question in every case is a question of fact,.... whether the wall in question is such a wall as to be a building, structure or erection within the meaning of this Act—within the mischief of this Act.... It is a question of degree, and I think that is very well stated by Lord Coleridge in the case of *Ellis v. Plumstead Board of Works* (2) where he says:

(1) (1895) 2 Q. B. 577; 64 L. J. M. C. 262; 14 R. 634; 73 L. T. 106; 43 W. R. 677; 59 J. F. 630.

(2) (1893) 68 L. T. 291; 5 R. 237; 41 W. R. 496; 57 J. F. 359.

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"I think, however, that the particular thing shown to us in the photographs and plans in this case is such an erection as the section applies to. In saying that, I am not prepared to go the length of saying that every possible 'building, structure, or erection' which a man might put up for the purpose merely of ascertaining and bounding his own property from the public road would necessarily come within the section." Rigby, L. J., said, "Ordinary boundary walls may be outside section 75, and I think in practice they have been treated as being so: it is a question of degree in every case."

From the observations of the learned Judges above quoted it will appear that it will serve no useful purpose in referring to any dictionary at all. We must ascertain what is the mischief the Burma Municipal Act aimed at removing whether the Act does avoid such mischief, and then say whether the walls in question built in the way described above, must be held to be within the meaning of "building" under the Act. I do not think that these walls can be regarded merely as boundary walls. I think they are built so as to enable the occupier of the main house to use the enclosed area as part of his habitation. As merely boundary walls, it is not necessary to have walls of the height in question. The eastern wall in question is a continuation of the eastern wall of the main house, and the southern wall connects the southern end of the eastern wall of the adjoining property. I think we must use our common sense, and I do not think that, having regard to the provisions of the Burma Municipal Act and the bye-laws thereunder in regard to habitation, any man would say that these walls were mere fence or boundary walls. If they were mere fences or boundary walls the accused could not be punished for having them erected. In my opinion the walls in question are "buildings" within the meaning of the Burma Municipal Act and that the Municipal Committee were justified in directing the accused to dismantle them.

The conviction of the accused by the Magistrate must be upheld.

W. C. A.

*Application dismissed.***BOMBAY HIGH COURT.**CRIMINAL APPLICATION FOR REVISION
No. 87 OF 1923.

April 5, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
JOITA BECHAR—APPLICANT

versus

PARSHOTTAM SANKALCHAND—
OPPOSITE PARTY.*Criminal Procedure Code (Act V of 1898), s. 439—Acquittal—Revision.*

Per Macleod, C. J.—If the Local Government do not exercise their right of asking the High Court to admit an appeal from an order of acquittal passed by a Sessions Judge sitting with assessors, it is difficult to imagine any circumstances which would justify the High Court in interfering with the order in revision at the instance of the complainant. [p. 975, col. 1.]

Ahmedabad Municipality v. Maganlal, 9 Bom. L. R. 156; 5 Cr. L. J. 171; referred to.

Per Crump, J.—After a regular trial in the Sessions Court, it would be only in the most exceptional cases that the High Court would be justified in interfering, under section 439 of the Criminal Procedure Code, with an order of acquittal, when there is no appeal by the Local Government under section 417 of the Code. [p. 975, col. 1.]

Criminal application for revision against an order of acquittal passed by the Second Additional Sessions Judge, Ahmedabad, in Sessions Case No. 13 of 1923.

Mr. A. G. Desai, for the Applicant.

JUDGMENT.

Macleod, C. J.—The four accused were charged before the Additional Sessions Judge of Ahmedabad, viz., the third with an offence under section 494, Indian Penal Code, and the other three accused with abetting that offence. The Sessions Judge agreeing with the assessors acquitted all the accused.

This is an application by the complainant to the High Court to interfere under its revisional powers. We have been referred to a decision in *Ahmedabad Municipality v. Maganlal* (1) in which Mr. Justice Batty said:—

"Although this Court does not ordinarily interfere with orders of acquittal in revision, yet it cannot be expected that it would hesitate to do so, where the acquittal is based not upon an appreciation of doubtful evidence, but upon a manifest error in law appearing on the face of the judgment."

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The order of acquittal in that case was passed by a First Class Honorary Magistrate, and it constitutes a material difference that the present case was tried by a Sessions Judge sitting with assessors. Speaking for myself, if in such a case Government do not exercise their right of asking us to admit an appeal from the order of acquittal, I find it difficult to imagine any circumstances which would justify this Court in interfering in revision at the instance of the complainant.

Crump, J.—I agree. This is not a case in which we ought to interfere in the exercise of our powers in revision. It would, perhaps, in my opinion, be difficult to lay down any general rule, but it is, I think, at all events, safe to say that after a regular trial in the Sessions Court, it would be only in the most exceptional cases that this Court would be justified in interfering under section 439 when there is no appeal by the Local Government under section 417, Criminal Procedure Code.

Z. K.

*Application rejected.***RADHEY v. EMPEROR.**

Reference made under section 438 of the Criminal Procedure Code by the Sessions Judge, Bassein, in his Criminal Revision No. 325 of 1922 on 30th October 1922.

REFERENCE.—The Sub-Divisional Magistrate of Kyonpyaw has ordered the accused, Mg. Pan Zyaw, to enter into a bond with sureties for his good behaviour under section 118 of the Code of Criminal Procedure and has, at the same time, passed an order of restriction against the accused under section 7 of Burma Habitual Offenders Restriction Act. This double order is clearly illegal under proviso (a) of section 7 of the Habitual Offenders Restriction Act. The proceedings are, therefore, submitted to the Chief Court with a recommendation that the order of restriction be set aside.

ORDER.—As the learned Sessions Judge points out, the double order under section 118, Criminal Procedure Code, and section 7 of the Habitual Offenders Restriction Act is illegal. See section 7 (a) of the latter Act. Section 3 of the Act authorises joint proceedings in the enquiry but double order is forbidden. I, therefore, set aside the order of restriction passed under section 7 of the Act. The Sub-Divisional Magistrate is requested to cancel the order and to inform those concerned.

W. C. A.

*Order set aside.***LOWER BURMA CHIEF COURT.**

CRIMINAL REVISION PETITION No. 653 OF 1922.

November 7, 1922.

Present:—Mr. Justice Macgregor.**PAN ZYAW—APPLICANT***versus***EMPEROR—RESPONDENT.**

Criminal Procedure Code (Act V of 1898), s. 118—Burma Habitual Offenders Restriction Act (II of 1919), s. 7—Surety-bond plus restriction order, legality of.

A Magistrate has no jurisdiction to direct an accused person to furnish securities for good behaviour under section 118 of the Criminal Procedure Code and at the same time to pass an order under section 7 of the Burma Habitual Offenders Restriction Act, restricting the movement of the accused.

ALLAHABAD HIGH COURT

CRIMINAL REVISION PETITION No. 85 OF 1923.

March 7, 1923.

Present:—Mr. Justice Ryves.**RADHEY AND OTHERS—APPLICANTS***versus***EMPEROR—OPPOSITE PARTY.**

Penal Code (Act XLV of 1860), s. 99—Right of private defence, extent of.

When exercising the right of private defence, it is difficult to expect the person to weigh with

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golden scales" what maximum amount of force is necessary to keep within that right.

Criminal revision from an order of the Additional Sessions Judge, Allahabad, dated the 11th of December 1922.

Mr. L. M. Roy, for the Applicants.

The Assistant Government-Advocate, for the Crown.

JUDGMENT.—In this case five persons were convicted by the Trial Court under section 323 of the Indian Penal Code and sentenced to pay fine.

They appealed. The learned Sessions Judge found categorically that these five persons had been attacked and that they had a right of private defence of property and were perfectly entitled to take the cattle which were trespassing on and damaging their field to the pound, and that they were entitled, if resisted, to use sufficient force to prevent the rescue of the cattle. The Appellate Court goes on to find that, inasmuch as "twelve injuries were inflicted upon Bindra, I do not think that it would be right to hold that the accused kept within their right." The Appellate Court has not found which accused exceeded the right of private defence, but having regard to his finding that "Bindra was an obstinate fellow" it probably required all the blows which he received and which cause only simple hurt to enable the accused to effect their purpose. At any rate, when once the Court has found that a right of private defence exists it is very difficult to expect the accused to weigh "with golden scales" what maximum amount of force is necessary to keep within that right.

In my opinion, on his own finding, the learned Judge should have allowed the appeal.

I, therefore, allow this application, set aside the conviction and acquit the applicants. The fines, if paid, will be refunded.

M. A. A.

Application allowed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 46 OF 1912.

July 13, 1922.

Present.—Mr. Justice Maung Kin.

GURA—PETITIONER

versus

THE DISTRICT JUDGE, AKYAB—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476, proceeding under—Notice, whether necessary.

In a proceeding under section 476 of the Criminal Procedure Code, it is not invariably necessary that the person to be proceeded against should receive notice to show cause against the proposed action against him.

Mr. J. E. Lambert, for the Petitioner.

ORDER.—The applicant's affidavit has been reported by the Township Judge to be false in certain particulars.

It was filed in support of his appeal.

I do not think that it was necessary to issue notice to the applicant to show cause against the proposed action against him. Such notice is not invariably necessary. It depends upon the circumstances of the particular case whether it is necessary or not. Action was taken under section 476 of the Code of Criminal Procedure, which does not provide for notice to the respondent of the intention of the Court to take action against him. The circumstances of the case do not seem to me to be such as require the issue of such a notice.

If the Township Judge is believed, the applicant's affidavit will be held to be false.

There seems to be no reason for interfering with the District Judge's order.

The application is dismissed.

W. C. A. & N. H.

Application dismissed.

KANEEZ FATIMA BEGUM v. RAM NANDAN DHAR DUBE.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL NO. 1105 OF 1922.

February 8, 1923.

Present.—Mr. Justice Ryves and Mr. Justice Daniels.

Musammât KANEEZ FATIMA BEGUM

—JUDGMENT-DEBTOR—APPELLANT

versus

RAM NANDA DHAR DUBE AND OTHERS

—DECREE-HOLDERS—RESPONDENTS.

Muhammadian Law—Widow—Dower-debt—Inherited property—Creditor of husband, rights of—Suit by widow for dower-debt—Subsequent suit by creditor of husband—Widow, whether can claim remaining portion of dower—Civil Procedure Code (Act V of 1908), O. II, r. 2.

Under the Muhammadan Law a dower-debt is not a secured debt but a simple debt ranking equally with other debts due from the estate of the husband. [p. 978, col. 1.]

The widow's lien for dower, under the Muhammadan Law, is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him by proceeding against the share of the estate which the widow has inherited. [p. 978, col. 1.]

A Muhammadan widow sued the other heirs of her husband to recover her dower-debt, but she deducted from her claim a sum proportionate to the share which she had inherited from her husband as his heir. Subsequently, a creditor of the husband who had obtained a decree against his estate sought to sell in execution of the decree the share which the widow had inherited from her husband. The widow objected that she had a charge on that share to the extent of the amount of the dower which she had excluded from her claim against the other heirs in the previous suit:

• *Held*, (1) that the dower-debt was not a secured debt and could not, therefore, operate as a charge; [p. 978, col. 1.]

(2) that the widow's claim to the portion of the dower-debt which she did not include in her suit against the other heirs was barred by the provision contained in O. II, r. 2 of the Civil Procedure Code. [p. 978, col. 1.]

Inayat Ali v. Jattun Bibi, 32 Ind. Cas. 362; 18 O. C. 263; 2 O. L. J. 579, relied on.

Execution Second Appeal from a decree of the District Judge, Gorakhpur, dated the 18th April 1922.

Mr. Haribans Sahai, for the Appellant.

Mr. Sankar Sarai, for the Respondents.

JUDGMENT.—This is an appeal in execution-proceedings. The respondent, Ram Nandan Dhar Dube, held a simple money-decree against the assets of Muhammad Ghulam Muhi-ud-din Ashraf Bakshi Khan who is said to have died in 1903. In execution of that decree a share of 1-anna 7-pies and a fraction in *Mauza* Bhupgarh, alleged to have been inherited by Musammât Kaneez Fatima Begum, the widow of the deceased, was attached and sold. Musammât Kaneez Fatima had a claim for dower against the estate of the deceased. It is now common ground that the share which she inherited in this village from her husband was $7\frac{1}{2}$ pies only, and on her objection the sale has been set aside except as regards this $7\frac{1}{2}$ pies as to which it has been maintained. The remainder of the share owned by the deceased in this village passed to the other heirs of the deceased. Musammât Kaneez Fatima Begum instituted a suit to recover her dower-debt and, in execution of the decree which she obtained, the whole share of the deceased in the village except the share in her possession was brought to sale and purchased by her in the year 1918. She took objection to the sale held under the respondent's decree on the ground that she inherited only $7\frac{1}{2}$ -pies share in this village, and that out of this share she had made a gift in the year 1908 of $2\frac{1}{2}$ pies to one Musammât Amna Bai. Her case was that only 5-pies share was liable to sale under the respondents' decree and that even this share was subject to a charge of Rs. 27,000 in respect of the unpaid portion of her dower-debt. In a suit for dower which she filed she had not claimed the entire dower-debt but had deducted a sum proportionate to the share which she had inherited and it is in respect of this sum that she now claims a charge.

The Courts below have held that only the $7\frac{1}{2}$ -pies share which she inherited can be brought to sale but have disallowed her claim to a charge and to the deduction of $2\frac{1}{2}$ -pies share on account of the gift. In this appeal she again presses the two objections which have been rejected by the Courts below. As regards the $2\frac{1}{2}$ -pies share which she gave away it has been found that on the same day she received from the donee a life-interest

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in a much larger share, viz., a share of 9 pies, in this very village, therefore, the share of $7\frac{1}{2}$ pies which she inherited had not really been diminished in any way and the entire share is liable to be sold. We can find no valid answer to this reasoning and none has been shown to us.

The claim to a charge is also untenable. It is well established that a dower-debt is not a secured debt but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him. It is argued in the alternative that even as a simple creditor she is entitled to realise the amount of dower still due to her from the portion of the estate in her hands as heir equally with the respondent. The plea was not taken in the grounds of appeal and it is untenable. In the first place, the dower fell due on her husband's death in 1903 and as a simple debt has long since been time-barred. In the second place, as she elected to sue for only a portion of the dower-debt, O. II, r. 2 of the Civil Procedure Code would prevent her claiming any amount which she had chosen to forego. A similar contention was put forward in a case before the Judicial Commissioner of Oudh reported as *Inayat Ali v. Jaitun Bibi* (1) and was rejected. It is only as a secured creditor that she could claim to treat the amount for which she did not sue as being a charge on the share in her hands by inheritance, and the authorities are clear, and indeed it is not disputed, that a widow is not a secured creditor in respect of her claim for dower.

The appeal, therefore, fails. As the amount in respect of which the sale has been upheld is not sufficient to satisfy the respondent's claim, the learned District Judge has directed that the respondent shall be at liberty to

realise the remainder of his decree from the objector's share in other villages which he has already attached. The appellant wishes it made clear and we declare by our decree that the District Judge's order will not prevent the appellant from putting forward any legitimate objection she may have to the sale of the estate of those shares. Subject to this, the appeal is dismissed with costs including fees on the higher scale.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 211 OF 1921.

February 16, 1923.

Present:—Sir. Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

GOVIND CHINTAMAN BHAT—

PLAINTIFF—APPELLANT

versus

KACHUBHAI GULABCHAND—

DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 57, 59, 60—Loan and deposit, distinction between—Burden of proof.

A plaintiff relying upon Art. 60 of Schedule C to the Limitation Act must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money "a deposit" and not "a loan." That might arise from a direct agreement or might be implied from the circumstances in which the money came to the hands of the borrower. [p. 979, col. 2.]

Ordinarily, when one person hands over money to another on the understanding that it is not a gift, but has to be repaid when de asked, that would be considered in law "a loan"; and if the lender seeks to prove that the money so handed over was a "deposit," the onus would lie upon him to prove that there were additional circumstances which turned the "loan" into a "deposit." [p. 979, col. 2.]

Munche ji Bomanji Panthaki v. Dorab i Jehangir Randiva, 19 B. 775; 10 Ind. Dec. (N. S.) 520 and *Subramanian Chettiar v. Kadiresan Chettiar*, 32 Ind. Cas. 965; 39 M. 1081; 3 L. W. 168; 30 M. L. J. 245; 19 M. L. T. 129; (1916) 1 M. W. N. 86, referred to.

First Appeal from the decision of the First Class Subordinate Judge, Poona, in Suit No. 665 of 1919.

(1) 32 Ind. Cas. 362; 18 O. C. 263; 2 O. L. J. 579.

GOVIND CHINTAMAN BHAT v. KACHUBHAI GULABCHAND.

Messrs. H. C. Coyajee (with him Y. V. Bhandarkar); for the Appellant.

Mr. K. N. Koyajee, for Respondent No. 1.

Mr. V. D. Limaye, for Respondents Nos. 2 and 3.

JUDGMENT.—On September 16, 1900, Rs. 10,000 passed from the firm of Chhaganlal-Vakhatchand to the firm of Kachubhai-Gulabchand; and in the accounts of Chhaganlal-Vakhatchand it is shown that Rs. 10,000 were credited to Kachubhai. Interest at three per cent. was credited up to the 3rd of *Asv* of the *Samvat* year 1957, and the total of principal and interest was carried on into the account of the year 1958, and it would appear that the account continued, interest at three per cent. being added at the end of each year, till 1908. Nothing further happened until in November 1918 in execution of a decree against Nagindas, the only son of the original depositor Chhaganlal-Vakhatchand, the debt due by the firm of Kachubhai-Gulabchand was put up for sale and brought by one Krishnaji Bhat for Rs. 120. In October 1919, Krishnaji assigned his right to the debt to one Narain Krishna for Rs. 1,000 and the present plaintiff bought it from Narain Krishna for Rs. 1,100 on November 4, 1919. On November 7, he gave notice to Kachubhai-Gulabchand to pay the amount. Certain other defendants besides the shop of Kachubhai-Gulabchand were added on the ground that they were *bhaubands* of Kachubhai-Gulabchand. But there does not appear any reason why these defendants should have been added as parties.

The first defendant alleged in his written statement that he had borrowed Rs. 10,000 at three per cent. from the alleged depositor that it was not a deposit and that the alleged claim was time-barred. He also alleged payment.

The Trial Judge dismissed the plaintiff's suit on the ground that the suit was for money lent, therefore, time began to run from the date of the loan.

It has been urged before us in appeal that the suit was one for money deposited on an agreement that it should be payable on demand, and, therefore, the suit came within Art. 60 of the Second Schedule of the In-

dian Limitation Act, and time began to run against the plaintiff from November 7, 1919, when the demand was made. No oral evidence was adduced at the trial, nor has it been suggested before us that there was any evidence available as to the circumstances in which the money was first handed over to the first defendant's firm in 1900. There is, therefore, a good deal of difficulty in ascertaining whether the suit comes within Art. 60. It is not clear what the Legislature meant by the word "deposited" in Art. 60 but there must be some difference between "money lent," and "money deposited," and one can only assume that a plaintiff relying upon Art. 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money "a deposit", and not "a loan". It has been suggested that the difference in "a loan" and "a deposit" is, that the borrower who takes money on deposit stands in a fiduciary relationship to the lender. That might either arise from a direct agreement, or might be implied from the circumstances in which the money came to the hands of the borrower. Ordinarily, when A hands over money to B on the understanding that it is not a gift but has to be repaid when demanded, that would be considered in law "a loan" and when the plaintiff seeks to prove that the money so handed over was "a deposit", the onus would lie upon him to prove that there were additional circumstances which turned the "loan" into a "deposit".

The case of *Muncherji Bomanji Panthaki v. Dorabji Jehangir Randiva* (1) has been relied upon by the appellant. The learned Chief Justice said (page 776):—

"This case raises the question as to the distinction between a loan and a deposit which has frequently come before this Court, and which is generally difficult to decide. Ordinarily, money paid into a banking account is regarded as a loan. . . It is pretty clear that the sum of Rs. 650, which was the foundation of the account between the defendant and Vrbaij, was really paid to him by her as belonging to her son. The child was only a year old, and it is difficult to believe that the defendant did not know that this money paid over to him in the child's name was the

(1) 19 B. 775; 10 Ind. Dec. (N. S.) 520.

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child's property and paid over to him (the defendant) as a deposit. When a mother pays her son's money into his grandfather's firm, as was done in this case, the intention must be that it is to be kept as a deposit for her son and to be ultimately given to him when he demands it, unless indeed in the meantime it has already been applied in some way or other for his use and profit."

Mr. Justice Tyabji said:—

"There are several circumstances which show that the ... transaction was of a fiduciary character."

That case, however, must stand on its own facts and can be of little use in solving the problem whether any general principles can be laid down to enable the Courts to distinguish between "a loan" and "a deposit."

In *Subramanian Chettiar v. Kadiresan Chettiar* (2) it was held that money left in the hands of a trader who was not a banker would be a deposit in circumstances such as would make it money of a customer where the deposit is a banker.

But it seems to us that any reference now to the relationship between a banker and a customer would be of little assistance in answering the question we have to decide. Previous to the amendment of Art. 60 by adding the words "including money of a customer in the hands of his banker so payable," it would have been considered that money paid in the ordinary course by a customer to his bank was not money deposited, and it is only by virtue of that amendment that a customer's money in the hands of a banker is now treated as a deposit. But that amendment only defines a particular instance as coming within the class of deposits. It cannot be suggested that there is anything uncommon between a loan taken by a trader for the purposes of his business, and money taken by the bank from its customers to be held either on deposit or on current account. If, whenever money is left in the hands of a trader, who is not a banker, it is to be considered that there is a deposit of such money, then it is difficult to see what distinction there is between "a loan" and "a deposit".

It seems to us, so far as this case is concerned, that the plaintiff would have to show that when these Rs. 10,000 were paid to the first defendant's firm, some arrangement was made by which the first defendant's firm agreed to hold it as a deposit instead of as a loan. It will be seen that there is no distinction in the Act between money lent and money deposited with regard to the agreement to repay. So that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved and it is not possible to define exactly what that something further must be. It has sometimes been suggested that facts must be proved which create a sort of fiduciary relationship between the lender and the borrower, but we are not prepared to say that is always necessary. However, in this case we cannot see that the plaintiff has proved anything to distinguish the debt which was incurred by the first defendant's firm in 1900 as a debt for money deposited and not for money lent. As the onus clearly lay upon him to satisfy the Court that there was that distinction, and he did not discharge it, then he is bound to fail, as the suit then comes within Art. 59 or 57, and is clearly barred. The appeal, therefore, must be dismissed.

In the Trial Court the first defendant had been ordered to pay plaintiff's costs, although the suit was dismissed. The first defendant has appealed against that order (F. A. No. 218 of 1921). The learned Judge seems to have been impressed by the fact that, although the first defendant had notice under the Civil Procedure Code when the claim was attached and sold by the Court, he did not appear and plead time-bar and satisfaction, and did not reply to the plaintiff's notice. We do not know that the first defendant was under any obligation to appear when he had received notice that the claim had been attached. He was entitled to stand upon his rights and wait until he was sued to plead that the suit brought against him was time-barred. But certainly he should have replied to the notice and it is also against him that he pleaded payment. That would be a ground for depriving him of his costs, even although he succeeded in getting the plaintiff's suit dismissed.

(2) 32 Ind. Cas 965; 39 M. 1081; 3 L. W. 168; 30 M. L. J. 245; 19 M. L. T. 129; (1916) 1. M. W. N. 86.

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But that is no ground for making him pay the costs of the unsuccessful plaintiff. So the orders will be that First Appeal No. 211 of 1921 is dismissed with costs. Two sets of costs; and First Appeal No. 218 of 1921 is allowed with costs in favour of defendant No. 1.

Z. K.

*Appeal dismissed.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 1502 OF 1921.

March 9, 1923.

Present.—Mr. Justice Lindsay.

DHARAMAN—DEFENDANT—APPELLANT

versus

SUKHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 25, 29—Occupancy tenant—Sub-lease unregistered, for more than one year, validity of—Rent, whether can be recovered.

All agreements which are contrary to the law are void and unenforceable and no party to such agreements can obtain any relief from the Courts in respect of any portion of the agreements.

An occupancy tenant cannot recover rent from a sub-lessee holding under a sub-lease made in contravention of the terms of section 23 of the Agra Tenancy Act.

Section 29 of the Agra Tenancy Act does not say that where there has been a sub-letting in contravention of the terms of the Act, the sub-lease is valid and enforceable. All it says is that when there has been such a sub-letting and where the interest of the tenant becomes extinguished before the period of the sub-lease has expired, the landlord has a right or option to treat the sub-lessee as his principal tenant, and may enforce against him any of the covenants which he entered into with the tenant at the time the sub-lease was made.

Second appeal against the decree of the First Additional District Judge, Aligarh, dated the 25th of August 1921.

Mr. Panna Lal, for the Appellant.

Mr. B. K. Mukherji, for the Respondents.

JUDGMENT.—In my opinion the judgment of the lower Appellate Court in this case is wrong and must be set aside.

The suit was brought by the plaintiffs to recover rent for the years 1325 and 1326

from the defendant on the ground that he had been cultivating 10 *bighas* 5 *biswas* land during that period at an annual rent of Rs. 88.

The plaintiffs are admittedly occupancy tenants and the claim was, therefore, brought against the defendant in his capacity as a sub-tenant.

The Assistant Collector dismissed the claim on the ground that no sub-letting had been proved.

The learned District Judge has found that, as a matter of fact, the defendant cultivated these lands during both the years in suit and that the rent had not been paid either wholly or in part.

So far as this part of the case is concerned, these findings are findings of fact and cannot be disputed.

A point of law, however, was raised before the learned District Judge to the effect that, inasmuch as the defendant had been shown to occupy the land for two successive years the sub-letting by the plaintiffs was in violation of the law as laid down in section 25 of the Agra Tenancy Act. It was pleaded, therefore, that inasmuch as the sub-lease was void under the terms of that section the plaintiffs could not get any relief from the Courts. The learned Judge, however, repelled this argument referring to the provisions of section 29 which, according to his interpretation, indicated that although a sub-lease might be at variance with the law as laid down in section 25, it was nevertheless enforceable.

I do not think the learned Judge has read section 29 of the Act correctly. That section does not say that where there has been a sub-letting in contravention of the terms of the Act, the sub-lease is valid and enforceable. All it says is that when there has been such a sub-letting and where the interest of the tenant becomes extinguished before the period of the sub-lease has expired the landlord has a right or option to treat the sub-lessee as his principal tenant and may enforce against him any of the covenants which he entered into with the tenant at the time the sub-lease was made.

The law in my opinion is perfectly clear. All agreements which are contrary to the law are void and unenforceable and no party to such an agreement can obtain any relief from the Courts. It follows, therefore,

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that here we have a case of a sub-lease made in contravention of the terms of the Act inasmuch as there was no registered instrument, and, that being so, the plaintiffs are not entitled to recover. The fact that the landlord has not chosen to enforce his option to eject the plaintiffs for having made a sub-lease in contravention of the terms of the Act cannot, as between the parties to the sub-lease itself, make that valid which is otherwise void under the law.

It has been argued before me that in any case the defendant ought to be made liable for the first year, i.e., 1325 Fasli, on the ground that a sub-lease for one year does not require registration. I am not disposed to accede to this argument. It is found clearly that the arrangement of the sub-tenancy was an arrangement made in defiance of the terms of section 25 and I do not think the plaintiffs can fall back upon the plea that although the agreement for a sub-lease is in its entirety void nevertheless some portion of it is good so as to entitle the plaintiffs to claim one year's rent. The proper view is that the whole contract is void and the plaintiffs cannot recover. The result is that I allow this appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellant is entitled to his costs both here and in the Court below, and in this Court costs will include fees on the higher scale.

Z. K.

*Appeal allowed.***MADRAS HIGH COURT.**CIVIL REVISION PETITION No. 783
OF 1921.

February 23, 1923.

Present—Mr. Justice Odgers.

VISWANATHA ASARI—PETITIONER—

PLAINTIFF

Versus

SAMI ASARI alias MAGHASAYA ASARI

—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII,

rr. 2, 3—Dismissal of suit in presence of plaintiff's Pleadings—Order, nature of—Remedy—Appeal—Revision.

Where on the day of hearing of a suit the plaintiff is represented by a Pleadings who asks for an adjournment which is refused, the Court cannot dismiss the suit for default under O. XVII, r. 2, of the Civil Procedure Code but must proceed to dispose of it on the merits under r. 3 of that Order.

Obiter—The remedy of the aggrieved party in such a case is by way of appeal against the decree and not by way of revision against an order refusing restoration of the suit.

Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon, 26 M. 267, *Vaiguntthammal v. Valliammal Ammal*, 41 Ind. Cas. 719; 41 M. 256; 6 L. W. 337; (1917) M. W. N. 743, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Sub-Judge, Chinglepet, in M. P. No. 5 of 1921 in S. C. S. No. 543 of 1920.

Messrs. S. Rangaswamy Aiyengar and S. Subhan Mania Aiyar, for the Petitioner.

Mr. D. W. Neelamegha Charlar, for the Respondent.

JUDGMENT.—In this case it is contended that the order of the Sub-Judge is wrong in that it disposed of the suit on the merits whereas, as the plaintiff was absent, he ought to have proceeded under O. XVII, r. 2, of the Civil Procedure Code, in dismissing the case for default instead of under O. XVII, r. 3. As against this, it appears that the plaintiff was not absent but was represented by the Pleadings who asked for an adjournment which was refused. *Patinhare Tarkatt Rama Mannadi v. Vellur Krishnan Menon* (1) is authority for the proposition that in such a case the suit cannot be dismissed for default but a judgment must be written and the case disposed of. No authority is cited to the contrary. It is further contended that no revision lies, as this is not an *ex parte* decree, but the remedy of the petitioner is to proceed by way of appeal from the decree against him. The petition cannot, therefore, be brought against the order refusing restoration of the suit on the ground that the suit was dismissed for want of evidence and was not dismissed *ex parte*.

(1) 26 M. 267.

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As I must hold that the plaintiff was present by his Pleader in this case, *Vaiguntathammal v. Valliammal Ammal* (2) is the authority for holding that O. XVII, r. 3, is applicable and the learned Subordinate Judge was right in the order he made. I am inclined to think that the other point taken for the respondent on the authority of *Gundan v. Rama Chetti* (3) is also sound but in view of my finding on the other point, it is not necessary to say anything more with regard to that.

Assuming a revision petition will lie, I hold the order of the Subordinate Judge was correct and there is no ground to interfere with it.

This civil revision petition is dismissed with costs.

V. N. V.

Petition dismissed.

N. H.

(2) 41 Ind. Cas. 719; 41 M. 256; 6 L. W. 337 (1917) M. W. N. 743.

(3) 33 Ind. Cas. 660; 3 L. W. 524.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1807 OF 1921.

April 26, 1923.

Present:—Mr. Justice Daniels.

Musammat HAJIRA KHATUN—DEFENDANT—APPELLANT
versus

Musammat AMINA KHATUN—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 112—Legitimacy, rule of—Rule, applicability of, to Muhammadans.

The rule as to legitimacy contained in section 112 of the Evidence Act is a rule of procedure and not of substantive law, and as such is applicable to Muhammadans. [p. 984, col. 1.]

Muhammad Allahdad Khan v. Muhammad Ismail Khan, 10 A. 289; 6 Ind. Dec. (N. S.) 193, referred to.

Mazhar Ali v. Budh Singh, 7 A. 297; A. W. N. (1884) 333; 4 Ind. Dec. (N. S.) 422 (F. B.) and *Mairaj Fatima v. Abdul Waheed*, 63 Ind. Cas. 286; 43 A. 673; 19 A. L. J. 713, relied on.

Second appeal against the decree of the District Judge, Budaun, dated the 29th July 1921.

Mr. Harmandan Prasad, for the Appellant.

Mr. Iqbal Ahmad, for the Respondent.

JUDGMENT.—The question in this appeal is, whether the defendant *Musammat Hajiran Khatun* is the legitimate daughter of *Iftikhar-ud-Din*. *Iftikhar-ud-Din* had two wives, *Musammat Rukaiyut-un-nissa* and *Musammat Hasan Jan alias Bivi Jan*. The plaintiff is the daughter of the former, the defendant of the latter. *Iftikhar-ud-Din* has at different times quarrelled with and divorced both his wives. At one time, he denied the paternity of the defendant, at another time he acknowledged her.

It is admitted by both parties that the defendant was born on 19th September 1912. It was the case of the plaintiff that Bibi Jan was divorced in the year 1911 before the defendant was born or even conceived. The learned District Judge has rejected this case and has found as a fact that *Musammat Bibi Jan* was not divorced until after the birth of the defendant; apparently in December 1912. His finding, therefore, is, that the defendant was born during the continuance of a valid marriage between her mother and *Iftikhar-ud-Din*. He has also found that *Iftikhar-ud-Din* visited the defendant's mother at a time when conception could have taken place. It, therefore, follows that if the case is governed by section 112 of the Evidence Act there was a conclusive presumption in favour of the defendant's legitimacy and the suit should have been dismissed. The learned District Judge has ignored the provisions of this section and has gone on to discuss the case on the letters and declarations of *Iftikhar-ud-Din* about this time. He notices various letters and post-cards of *Iftikhar-ud-Din* returned during the months preceding the defendant's birth and he notes that though *Iftikhar-ud-Din* was on bad terms with his wife and was complaining of her temper, etc., in none of them did he disclaim the paternity of the child who was about to be born. He holds, however, that *Iftikhar-ud-Din's* conduct in divorcing his wife so soon after the birth of the defendant was an indication that he believed himself not to be the father and on this ground he has decreed the suit. The reasoning of the District Judge is difficult to understand, and in any case he has entirely ignored the conclusive presumption which he was bound

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under section 112 of the Evidence Act to draw from the facts which he had found.

It has been argued, however, on behalf of the respondent that section 112 of the Evidence Act does not govern the case and reference has been made to a doubt expressed in Sir Roland Wilson's Anglo-Muhammadan Law, 5th Edition, paragraph 83, page 161, as to whether section 112 is not really a rule of substantive law rather than a rule of evidence and, therefore, inapplicable to Muhammadans so far as it conflicts with the presumption of Muhammadan Law. The presumption raised by Muhammadan Law is that a child born within two years of the termination of a lawful marriage is legitimate, but the point relied on by the respondent is that this is a rebuttable presumption and that the District Judge must be taken to have found as a fact that the presumption has been rebutted. The remarks of Sir Roland Wilson on the subject are based originally on certain observations of Mr. Justice Mahmood in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1). Mahmood, J., did not express any definite opinion on the subject but he observed that it may some day be a question of great difficulty to determine how far the provisions of the section are to be taken as trenching upon Muhammadan Law. There is no direct authority on the point, but a similar controversy has been raised as to the presumption contained in section 108 of the Evidence Act and it was held by a Full Bench of the High Court in *Mazhar Ali v. Budh Singh* (2), that this was a provision of the Law of Evidence and was applicable to Muhammadans. The same view has been taken in *Mairaj Fatima v. Abdul Waheed* (3).

On the face of it, there appears no justification for the doubt suggested in Sir Roland Wilson's Commentary. The Evidence Act applies to all classes and to all judicial proceedings before any Court. The rule contained in section 112 is in fact a rule of exclusion of evidence. Its position

in Part III of the Evidence Act, which deals with the production and effect of evidence, shows that it was intended to be so regarded. It is a rule that on certain facts being established no evidence to contradict the conclusion of legitimate descent shall be admitted except evidence of non-access. On the necessary facts being proved in a judicial proceeding such as the present suit the Court was bound to apply section 112 of the Evidence Act and to draw a conclusion in favour of the defendant's legitimacy. Sir Roland Wilson would apparently treat it as a provision containing an artificial definition of legitimate descent as including all persons born during the continuance of lawful wedlock or within a certain time after its termination. Even from this point of view the difficulty arises that the supposed rule is not absolute. Evidence, though evidence of one particular kind only, is admissible to disprove paternity. As to Sir Roland Wilson's concluding remark that the enactments which provide that in matters of status Muhammadans shall be governed by Muhammadan Law are later in date than the Evidence Act, it is sufficient to say that if it had been intended in these enactments to repeal a provision of the Evidence Act as applicable to Muhammadans this would have been done directly and not left to be inferred by a remote and precarious inference. I may note further that two learned Muhammadan Commentators, Mr. Mulla and Mr. Justice Tyabji, have differed from the view suggested by Sir Roland Wilson. The latter, in the second Edition of his Principles of Muhammadan Law, page 267, expresses the opinion that the section was probably drafted without giving a thought to the context in which it should have been set if it is to displace the Muhammadan Law on the point but goes on to say, that the oversight can hardly be a ground for disregarding its provisions. I agree with the view taken by these writers that section 112 of the Evidence Act applies. The result is that the appeal must succeed and I accordingly allow it with costs in all Courts including in this Court fees on the higher scale.

M. A. A.

Appeal allowed.

(1) 10 A. 289; 6 Ind. Dec. (N. S.) 193.

(2) 7 A. 297; A. W. N. (1884) 333; 4 Ind. Dec. (N. S.) 422 (F. B.).

(3) 63 Ind. Cas. 286; 43 A. 673 19 A. L. J. 713.

CHHAMMU LAL, v. BHAJAN LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 636 OF 1921.

May 28, 1923.

Present:—Mr. Justice Ryves and
Mr. Justice Daniels.

CHHAMMU LAL, AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BHAJAN LAL, AND OTHERS—PLAINTIFFS
—RESPONDENTS.*Transfer of Property Act (IV of 1882), s. 72—
Repairs by mortgagee—Improvements to suit
particular tenant.*

Putting iron bars into a window of a house usufructuarily mortgaged, in order to suit a particular tenant, for doing which the mortgagee has received increased rent, is not repairs within the meaning of section 72 of the Transfer of Property Act; and no compensation can be claimed for the same at the time of redemption.

Rupan Singh v. Champa Lal, 26 Ind. Cas. 521; 37 A. 81 at p. 86; 13 A. L. J. 14, followed.

Second appeal against a decree of the District Judge, Farrukhabad, dated the 22nd January 1921.

Mr. Durga Prasad, for the Appellants.

Dr. K. N. Katju, Messrs. G. Agarwala
and Vishnu Nath, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a usufructuary mortgage of some shops executed in 1843 by the predecessors in title of the plaintiffs. The plaintiffs claim that the principal and interest had been more than paid up by the usufruct. Various defences were raised in the suit, but it is now only necessary to consider two points. The Trial Court held that the plaintiffs must pay Rs. 1,099-0-9 plus interest at 9 per cent. per annum to the defendants for necessary repairs made by them in the premises they held under the terms of the mortgage-deed. It further held that Chhammu Lal and Ram Narain who had obtained possession of two of the shops had made certain improvements in their shops which had cost them about Rs. 109 each, and directed the plaintiffs to pay this amount to Chhammu Lal and Ram Narain with interest at 9 per cent. per annum. On appeal the lower Appellate Court held that the defendants were not entitled to interest on the sum of Rs. 1,099 spent by them in repairs, on the ground that they had already received increased rent in consequence of these repairs which was

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equivalent to interest. It seems to us that this really is a finding of fact.

On the second point it held that there was no evidence to show that Ram Narain had made any improvements at all, and, therefore, nothing was due to him; and as regards Chhammu Lal it found, that what he had done was to put in some iron bars into a window in order to suit a particular tenant, and that he had received increased rent accordingly. In any case, it seems to us that improvements of this kind do not fall within section 72 of the Transfer of Property Act; and in this respect we agree with the concluding remarks in the case reported in *Rupan Singh v. Champa Lal* (1). The result is that the appeal fails and is dismissed with costs including fees in this Court on the higher scale.

M. A. A.

Appeal dismissed.

(1) 26 Ind. Cas. 521; 37 A. 81 at p. 86; 13 A. L. J. 14.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 158 OF
1923.

March 1, 1923.

Present:—Mr. Justice Krishnan.

Daroga MUHAMMAD GHOUSE SAHIB

—PETITIONER

versus

Shaik MOHIDEEN SAHIB—

RESPONDENT.

Presidency Small Cause Courts Act (XV of 1882), s. 48—Civil Procedure Code (Act V of 1908), O. XXI, r. 98—Execution of ejectment decree—Removal of obstruction—Small Cause Court, power of.

Under section 48 of the Presidency Small Cause Courts Act, a Small Cause Court has jurisdiction in execution of a decree in ejectment, to act under O. XXI, r. 98 of the Civil Procedure Code and remove any improper obstruction to the carrying out of its own order.

Baggiammal v. Appadurai Gramany, 6 Ind. Cas. 722; 7 M. L. T. 385, followed.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order of the Court of Small Causes, Madras, dated the 11th January 1923, in

K. I. RAILWAY COMPANY V. KISHIN LAL.

Miscellaneous Petition No. 211 of 1922 in Ejectment Suit No. 210 of 1922.

Messrs. *Muhammad Ibrahim Sahib* and *G. Ramakrishna Iyer*, for the Petitioner.
Messrs. *K. Narasimha Iyer*, *A. Raghunatha Rao* and *P. V. Subramanyam*, for the Respondent.

JUDGMENT.—It is argued that the Presidency Small Cause Court had no jurisdiction to remove the obstruction by the petitioner. I am unable to accept this argument. It is clear section 48 of the Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under Chapter VII and the language of it is wide enough to include a power to act under O. XXI, r. 98, Civil Procedure Code. A similar view was taken in the case reported as *Baggiammal v. Appadurai Gramany* (1). To hold otherwise would lead to the extraordinary result that, though the Small Cause Court can pass an order in ejectment against a tenant, its order could be defeated by the tenant giving over possession to a third party a day previous to the date fixed for ejectment. The Small Cause Court has power to remove any improper obstruction to the carrying out of its own order.

It was next contended that this was not a proper case to direct removal of obstruction as petitioner claims a title to the property. He has, according to his own case, no title at present but only a right to enforce specific performance of a contract which, it may be mentioned, the respondent denies, and he has taken possession from Karim, the respondent's tenant, against whom the order in ejectment was made. The order of the lower Court removing obstruction was clearly right in the circumstances.

The civil revision petition is dismissed with costs.

V. N. V. *Petition dismissed.*
(1) 6 Ind. Cas. 722; 7 M. L. T. 385.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 23 OF 1923.

April 13, 1923.

Present:—Mr. Justice Daniels.

EAST INDIAN RAILWAY COMPANY
—DEFENDANT—APPLICANT

versus

FIRM KISHIN LAL TIRKHAMAL—
PLAINTIFF—OPPOSITE PARTY.

Railway Company—Risk Note Form B—Suit for damages for short delivery—'Loss,' meaning of—Burden of proving loss—"Robbery" and "theft," meaning of.

In a suit for damages for non-delivery of goods against a Railway Company where the plaintiff has not alleged loss of the consignment, it is for the Railway Company to prove the loss before seeking protection under the Risk Note, Form B; and it is only after it has proved this that the plaintiff can be required to prove that the loss was due to a cause for which the Railway Company was liable. [p. 987, col. 1.]

Ghelabhai Pansi v. East Indian Railway Company, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525 and *Secretary of State for India in Council v. Firm Jiwan and Abdullah*, 71 Ind. Cas. 609; 21 A. L. J. 220, relied on.

East Indian Railway Co. v. Nathmall, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321 and *Smith, Limited v. Great Western Railway Co.*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, distinguished.

The word 'loss' in Risk Note, Form B, means loss to the Railway Company and not loss to the plaintiff. [p. 987, col. 2.]

Secretary of State for India in Council v. Firm Jiwan and Abdullah, 71 Ind. Cas. 609; 21 A. L. J. 220, followed.

Hill, Sawyres & Co. v. Secretary of State, 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297, dissented from.

The terms, "robbery" and "theft" in Risk Note, Form B, have the same meaning in the case of theft from a running train. [p. 987, col. 1.]

Great Indian Peninsular Railway Co. v. Bhola Nath-Debi Das, 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79, relied on.

Civil revision from an order of the Judge of the Court of Small Causes, Ghaziabad, dated the 9th December 1922.

Mr. L. P. Zutshi, for the Applicant.

Mr. N. C. Valsh, for the Opposite Party.

JUDGMENT.—This revision raises a question of the liability of a Railway Company in respect of goods consigned under Risk Note B. In this Form of Risk Note the consignor, in view of reduced rate of freight, agrees to hold the Railway "harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment

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from any cause whatever except for the loss of a complete consignment or of one or more complete packages . . . due either to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants . . . (with a further proviso) that wilful neglect shall not be held to include fire, robbery from a running train or any other unforeseen event or accident."

One hundred and twenty-six bags of sugar were consigned to the plaintiff under a Risk Note in this form. On taking delivery the number was found to be short by three bags. The plaintiff alleges that, in consequence of this short delivery, the plaintiffs have suffered loss to the amount claimed. In defence, the Railway Company set up the Risk Note and they further alleged that in this case the loss of the bags was due to theft from a running train. It has been held that, in this connection, the terms "robbery" and "theft" are equivalent [*Great Indian Peninsular Railway Co. v. Bhola Nath-Debi Das* (1)]. The case was tried in the Small Cause Court. The view by the learned Judge of the Court below was that as the plaintiff did not allege in his plaint that the goods were lost but merely that he had not received them, it lay on the defendants to prove loss of the goods, and it was only after they had proved this that the plaintiff could be required to prove that the loss was due to a cause for which the Railway Company would be liable. In support of this view the learned Judge relies on the case of *Ghelabhai Punsi v. East Indian Railway Company* (2), though the learned Judge prefers to cite the case from some volume of private reports. The same view was taken by Lindsay, J. in *Secretary of State for India in Council v. Firm Jivan & Abdullah* (3), in a case in which a consignment of food had rotted owing to delay in transit and the plaintiff had suffered loss in consequence. The delay was found to be due to the wilful neglect of the Railway Company. The goods were consigned under Risk Note B, as in the present case. The

Risk Note gave the Railway absolute protection in respect of damage to the goods. It did not protect them against loss if the loss was due to the wilful neglect of their servants. The learned Judge held that, "loss" meant loss by the Railway Company and not loss to the plaintiff. On this view the plaintiff is entitled to a decree in the present case. In that case the plaintiffs were suing for something which was *prima facie* within the protection afforded by the Risk Note, namely, damage to the goods. Therefore, in the absence of proof of loss the suit failed. Here the plaintiffs are suing for something which was *prima facie* within the protection afforded by the Risk Note, namely, damage to the goods. Therefore, in the absence of proof of loss the suit failed. Here the plaintiffs are suing for something which is *prima facie* outside the protection afforded by the Note, namely, breach of the contract to deliver. In the absence of evidence of loss the plaintiff is entitled to succeed. No doubt, a different view has been taken by the Punjab High Court in *Hill, Sawyers & Co. v. Secretary of State* (4), but the Subordinate Judge was bound to follow the rulings of this Court.

Reliance is placed by the respondent on *East Indian Railway Co. v. Nathmall* (5) and *Smith, Limited v. Great Western Railway Co.* (6). In both these cases the loss of the goods was admitted by the plaintiffs. In the former case the goods were missing on the arrival of the train at its destination. In the English case it is specifically stated in the last paragraph of Lord Wrenbury's judgment that the plaintiff alleged the loss of the goods. The argument turned on whether wilful negligence could be assumed from the mere fact of non-delivery. Moreover, the protection given to the Railway was in wider terms and included delay or detention.

For the above reasons I am unable to accept this revision, which I accordingly dismiss with costs.

M. A. A. Application dismissed.

(1) 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79.

(2) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

(3) 71 Ind. Cas. 609; 21 A. L. J. 220.

(4) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297 (F. B.).

(5) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.

(6) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

KALA V. MAM CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 3078 OF 1922.

April 19, 1923.

Present.—Mr. Justice Martineau and
Mr. Justice Moti Sagar.

KALA AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

MAM CHAND AND OTHERS—DEFENDANTS
—RESPONDENTS.

Custom—Ancestral property—Alienation—Sonless proprietor of Rohtak Tahsil, District Rohtak.
A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land.

Giant v. Teh Chand, 64 Ind. Cas. 549; 11 P. L. R. 1922; (1922) A. I. R. (L) 69; 4 L. 111 and *Uggar Sain v. Telu*, 71 Ind. Cas. 829; (1923) A. I. R. (L) 193; 4 L. 113, followed.

Budal v. Kirpa, 23 Ind. Cas. 211; 76 P. R. 1914; 148 P. L. R. 1914; 131 P. W. R. 1914, dis-sented from.

Beg v. Allah Ditta, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), referred to.

Second appeal from a decree of the District Judge, Delhi, dated the 15th March 1922, reversing that of the Munsif, First Class, Rohtak, dated the 7th July 1921.

Mr. Shamair Chand, for the Appellants.

Mr. Bhajan Lal, for the Respondents.

JUDGMENT.—The land in suit, which was the ancestral property of Hira, a Gujar of the Rohtak Tahsil, was sold by him to defendants Nos. 1 and 2. Some of his collaterals sue for possession of the land, contending that the sale is invalid for want of necessity. The lower Appellate Court has dismissed the suit, holding that Hira had an unrestricted power of alienation, and the only question in this second appeal is whether that decision is correct.

The late Mr. Clifford, Divisional Judge of Delhi, in a number of cases took the view that in the Rohtak District a proprietor had wide powers of alienation and that the onus of proving that his power of alienating ancestral property was restricted lay on the person alleging it. This view was followed in the Chief Court in several cases to which the learned District Judge has referred. The entry in the *Riwaj-i-am* of 1879 was to the effect that reversioners could not object to alienations and in the current *Riwaj-i-am* complied

by Mr. Joseph it was definitely stated that a sonless proprietor has full power to alienate his property even without necessity. The appellants rely on *Budal v. Kirpa* (1) in which it was held by a Division Bench that it was not proved that by custom an agricultural proprietor of the Rohtak District can dispose at pleasure of his ancestral land. But the previous rulings to the contrary were not considered in that case, and the decision has not been followed in more recent judgments, namely, *Giant v. Teh Chand* (2), and *Uggar Sain v. Telu* (3). In *Uggar Sain v. Telu* (3) Campbell, J., pointed out that *Budal v. Kirpa* (1) dealt with land in another Tahsil, and also that in that case the *riwaj-i-am* was not before the Court, and he observed that that judgment must be read subject to what was laid down regarding the *riwaj-i-am* by the Privy Council in *Beg v. Allah Ditta* (4). He decided, therefore, that a sonless proprietor of the Rohtak Tahsil of the Rohtak District had unrestricted powers of alienation in respect of ancestral land. An appeal from his decree under the Letters Patent was dismissed, the Division Bench agreeing with his conclusions. This finally sets the matter at rest, and we accordingly agree with the decision of the lower Appellate Court and dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(1) 23 Ind. Cas. 211; 76 P. R. 1914; 148 P. L. R. 1914; 131 P. W. R. 1914.

(2) 64 Ind. Cas. 549; 11 P. L. R. 1922; (1922) A. I. R. (L) 69; 4 L. 111.

(3) 71 Ind. Cas. 829; (1923) A. I. R. (L) 193; 4 L. 113.

(4) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

BOODHA v. SUKHRAM SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1396 OF 1921.

February 22, 1923.

Present.—Mr. Justice Gokal Prasad.

Haji Shaikh BOODHA—DEFENDANT—

APPELLANT.

versus

Babu SUKHRAM SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Old document—Executant's signature through scribe—Authority to scribe—Presumption.

In the case of a document more than 30 years old produced from proper custody, the legal presumption is that it was executed by the person who purports to execute it; but if it is signed by the scribe on behalf of the executant, there is no presumption that the scribe had authority from the executant to sign.

Gokul Singh v. Saheb Singh, 38 Ind. Cas. 162; 15 A. I. J. 121 and *Lokman Das v. Ganga Sahai*, 60 Ind. Cas. 96, followed.

Yar Ali v. Hashmat Bibi, A. W. N. (1897) 90, distinguished.

Second appeal from a decree of the District Judge, Ghazipur, dated the 17th September 1921.

Messrs. Iqbal Ahmad and Mukhtar Ahmad, for the Appellant.

Dr. M. L. Agarwala, for the Respondents.

JUDGMENT.—This second appeal arises under the following circumstances. The plaintiffs brought the present suit for possession of two plots of land on removal of certain construction made by the defendant on these plots. The plaintiffs' allegation was that they were the *zemindars* and the defendant was the *raiyyat* and as such had no right to construct on the two plots in dispute. The defendant contended that he was the owner of the plots by virtue of two sale-deeds executed about 60 years ago by the predecessors-in-title of the plaintiffs in favour of the predecessor-in-title of the defendant. The two sale-deeds relied upon by the defendant were filed, they were of the years 1841 and 1843. The Munsif mainly relied on these two sale-deeds although the plaintiffs objected to them on the ground that they did not bear the signatures of the vendors although one of them was literate. The Munsif, however, found on the evidence in favour of the defendant and dismissed the claim. On appeal by the plaintiffs the lower Appellate Court found that the plaintiffs were

the owners and has decreed the suit. It has given no effect to the sale-deeds referred to above on the ground that although the sale-deeds were more than 50 years old and the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents for the executants had authority from the executants to do so. I hold this view which is in consonance with the view taken by this Court in the cases of *Gokul Singh v. Saheb Singh* (1) and *Lokman Das v. Ganga Sahai* (2) is correct. The present appeal has been filed because the learned Judge of the lower Appellate Court has loosely used the words "are not admissible in evidence" when talking of these sale-deeds. He has not rejected them from the evidence but they still form part of the record. As I have said above, all that the learned Judge could have meant and did mean was that the sale-deeds relied upon by the defendant were of no avail to him because there was no presumption that the vendors really executed them as they admittedly do not bear the signatures of the vendors and there was no evidence that the vendors authorised the scribe to execute these deeds. Reliance is placed on the case of *Yar Ali v. Hashmat Bibi* (3). That case is of no help to the defendant-appellant inasmuch as in the present case these documents were not admitted without objection. I hold that the lower Appellate Court was justified in ignoring these documents as evidence of the defendant's title. The finding that the plaintiffs are the owners of the plots in dispute is a finding of fact. I, therefore, dismiss this appeal with costs.

M. A. A. *Appeal dismissed.*

(1) 38 Ind. Cas. 162; 15 A. I. J. 121.

(2) 60 Ind. Cas. 96.

(3) A. W. N. (1897) 90.

RAM ADHAR SINGH v. RAM MANOHAR SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 585 OF 1922.

May 7, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Dicks.

RAM ADHAR SINGH AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Babu RAM MANOHAR SINGH AND
ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Gift of estate to next reversioner—Acceleration—Provision for widow's maintenance.

A gift of the entire estate by a Hindu widow in possession, in favour of the next reversioner, which operates as an acceleration of the estate to the latter, is not vitiated by its containing a provision for the maintenance of the widow. [p. 991, col. 1.]

Rangasami Gounden v. Nachiappa Gounden, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.) and *Angamuthu Chetti v. Varatharajulu Chetti*, 53 Ind. Cas. 386; 42 M. 854; 37 M. L. J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 11 L. W. 11 (F. B.), followed.

Bhagwat Koer v. Dhanukdari Prashad Singh, 53 Ind. Cas. 347; 46 I. A. 259; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.) and *Sureshwar Misser v. Maheshwari Misra*, 57 Ind. Cas. 325; 47 I. A. 233; 48 C. 100; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 25 C. W. N. 194 (P. C.), relied on.

Second appeal from a decree of the District Judge, Benares, dated the 26th of January 1922.

Mr. Mushtaq Ahmad, for Mr. Iqbal Ahmad, for the Appellants.

Dr. S. N. Sen and Mr. Harnandan Prasad, for the Respondents.

JUDGMENT.—The point for decision in this appeal is, whether a gift of an estate by a widow in possession in favour of the next reversioner, which operates as an acceleration of the estate to the latter, is vitiated by its containing a provision for the maintenance of the widow. In this case *Musammatt Sumera Kunwar* was in possession of the estate of her husband, Ramweshar Singh, as a Hindu widow. On the 22nd April 1909 she made a gift of the entire estate to the sole surviving daughter, *Musammatt Ramkali Kunwar*. *Musammatt Ramkali* obtained possession,

and after her death, the estate has been taken possession of by her two sons, the respondents. The original plaintiff, *Jai Mangal Singh*, now represented by his sons was the son of another daughter of *Rameshar Singh* who was dead at the time of the gift to *Musammatt Ramkali*. The succession having opened on the death of the latter, he claims his one-third share in the property as reversioner jointly with the defendants. His claim was decreed by the Trial Court which found that the deed in favour of *Musammatt Ramkali* operated as an acceleration and that, on her death the plaintiffs and the defendants were jointly entitled. The deed was attacked in both the Courts below on three grounds,

(1) That *Musammatt Parbati Kunwar* was alive at the time of the gift.

(2) That the entire property was not included in the deed of gift.

(3) That the deed contained a provision for the maintenance of *Musammatt Sumera*.

The Trial Judge rejected all three objections.

The learned District Judge agreed with him on the first two points, but held that the provision for maintenance vitiated the deed and that *Musammatt Sumera* being still alive, the succession would only open on her death. It may be noted here that it has never been contended that the provision for maintenance was in any way excessive. The argument is that the mere fact of a provision for maintenance being made operates to prevent there being a surrender of the entire estate and *ipso facto* invalidates the deed.

The matter appears to us to be settled by two recent decisions of the Privy Council. The principle that an acceleration to be valid must be of the entire estate was laid down by their Lordships of the Privy Council in *Rangasami Gounden v. Nachiappa Gounden* (1). The lower Court, following a decision of the Bombay High Court, has held that any provision for maintenance is inconsistent with this principle. The Privy Council has, however,

(1) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

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itself laid down that this is not the case. In *Bhagwat Koer v. Dhanukdari Prashad Singh* (2) an agreement by the widow renouncing the estate and accepting maintenance for her life was held to operate as a valid surrender and to come within the rule laid down in *Rangasami's case* (1). The same view was taken in the case of *Sureshwar Misser v. Maheshrami Misra* (3), where the widow surrendered the estate to the next reversioner, but the reversioner at the same time conveyed a small portion of it back to the widow as a provision for her maintenance. The former decision was relied on by the Madras High Court in the Full Bench ruling in *Angamuthu Chetti v. Varatharajulu Chetti* (4) in which they also have held that a reasonable provision for the widow's maintenance does not affect the validity of surrender by her husband's death to the nearest reversioner. Even apart from authority, this is, we think, a reasonable view to take. The widow, so long as she is alive, is entitled to be fed and clothed and some provision for her support must be made by the persons in possession of the estate. The matter appears to us to be concluded by the Privy Council rulings to which we have already referred. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Trial Court with costs throughout including in this Court fees on the higher scale.

M. A. A.

Appeal allowed.

(2) 53 Ind. Cas. 347; 46 I. A. 259; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 103 (P. C.).

(3) 57 Ind. Cas. 325; 47 I. A. 233; 48 C. 100; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 25 C. W. N. 194 (P. C.).

(4) 53 Ind. Cas. 386; 42 M. 854; 37 M. L. J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 11 L. W. 11 (F. B.).

MADRAS HIGH COURT.

CIVIL APPEAL NO. 301 OF 1921.

October 5, 1922.

Present:—Mr. Justice Spencer and

Mr. Justice Devadas.

Sri GADICHERLA VENKAT NARASIMHA RAO GARU—DEFENDANT—

APPELLANT

versus

NYAPATHY SUBBA RAO PANTULU

GARU AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Scheme suit—Trustee, non-existence of, effect of—Person in possession, whether proper party—Construction of document—Will—Bequest for spread of Sanskrit language, validity of—Bequest for spread of Hindu religion, validity of—Alternative objects, bequest for—One object void—Whole gift, whether bad—Hindu Law—Adoption by widow in pursuance of authority to adopt in Will—Adopted son, whether entitled to repudiate dispositions of ancestral property in same Will.

Where there is a trust created by a Will for public purposes of a charitable or religious nature, a suit will lie under section 92 of the Code of Civil Procedure for settling a scheme if the direction of the Court is deemed necessary for the administration of such trust, whether or not there is a *de facto* or *de jure* trustee in existence on the date of suit. The heir at law in possession of the property has an interest in it and is a proper party to such a suit. [p. 993, col. 1.]

Nett Rama Jogiah v. Venkatachalu, 26 M. 450 and *Budh Singh Dudhuria v. Niradbaran Roy*, 2 C. L. J. 431, followed.

Ashraf Ali v. Mahammad Nurajjama, 49 Ind. Cas. 355; 23 C. W. N. 115, *Annavaarapu Nacharamma v. Malladi Venkatapayya*, 70 Ind. Cas. 903; 31 M. L. T. 63; 16 L. W. 922 and *Official Assignee v. Abdul Hussein*, 28 Ind. Cas. 116, distinguished.

A bequest for the spread of the Hindu religion is void for uncertainty. [p. 994, col. 2.]

Scott v. Brownrigg, (1881) 9 L. R. Ir. 246, *Dunne v. Byrne*, (1912) A. C. 407; 81 L. J. P. C. 202; 106 L. T. 394; 56 S. J. 324; 28 T. L. R. 257, *Chandi Charan Mitra v. Haribola Das*, 51 Ind. Cas. 215; 46 C. 951; 29 C. L. J. 366; 23 C. W. N. 645, followed.

A bequest for the spread of the Sanskrit language is a valid charitable bequest. [p. 995, col. 1.]

Whicker v. Hume, (1858) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N.S.) 933; 11 E.R. 50; 31 L. T. (O. S.) 319; 6 W. N. 813; 115 R.R. 70 and *Attorney-General v. Flood*, (1816), Hay & J. App. xxi; Hayes 61r, followed.

In the case of a bequest for alternative objects, where the trustees have been given an absolute discretion to spend the whole fund on one or other object or on both, if one of the objects is void for uncertainty, the whole

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gift is bad, for the testator having left the application of the fund. entirely to the trustees, it would be open to that body to apply the whole amount to the uncertain object, leaving nothing for the other. [p. 995, col. 2.]

In re Macduff, Macduff v. Macduff, (1896) 2 Ch. 451; 65 L. J. Ch. 700; 74 L. T. 706; 45 W. R. 154. *Houston v. Burns*, (1918) App. Cas. 337; 87 L. J. P. C. 99; 118 L. T. 462; 34 T. L. R. 219. *Blair v. Duncan*, (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 157; 18 T. L. R. 194 and *Leavers v. Clayton*, (1878) 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89; 26 W. R. 907, relied on.

A person who has been adopted by a widow on the authority of her husband contained in a Will is not entitled to repudiate the other dispositions of property in the same Will. [p. 995, col. 2; p. 996, col. 1.]

Ganapathi Ayyan v. Savithri Ammal, 21 M. 10; 7 Ind. Dec. (N. S.) 364, followed.

Bhyri Appamma v. Byri Chinnammi, 58 Ind. Cas. 511; 12 L. W. 17 and *Balkrishna Motiram Gujar v. Shri Uttar Narayandev*, 50 Ind. Cas. 912; 43 B. 542; 21 Bom. L. R. 225, distinguished.

Per *Spencer, J.*—Where a testator's meaning is so vague that the execution of his purpose would practically amount to making a new Will for him, the Court will not recognise the trust as one capable of execution. [p. 993, col. 1.]

Muthukrishna Naicken v. Ramchandra Naicken, 47 Ind. Cas. 611; 37 M. L. J. 489. *Blair v. Duncan*, (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 157; 18 T. L. R. 193 and *Grimon d. v. Grimon d.*, (1905) A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477; 21 T. L. R. 323, followed.

In construing a Will, it is open to the Courts to take into account the sympathies of the testator with certain objects and his connection with certain institutions. [p. 994, col. 1.]

Clode v. Andrews, (1907) 97 L. T. 130 and *Attorney-General v. Stepney*, (1804) 32 E. R. 751; 10 Ves. 22; 7 R. R. 325, followed.

Per *Devadoss, J.*—A Court will uphold a bequest if its purpose is definite though the objects of the charity are not definite. [p. 1008, col. 2.]

Gordhan Das v. Chunni Lal, 30 A. 111 at p. 114; 5 A. L. J. 23; A. W. N. (1908) 34, relied on.

Appeal against a decree of the Court of the Additional Subordinate Judge, Rajahmundry, in O. S. No. 31 of 1920, (O. S. No. 25 of 1919 of the District Court, Godavari).

Messrs. P. R. Ganapathi Aiyar and A. Venkatachalam, for the Appellants.

Messrs. D. Appa Rao, G. Lakshmanna and N. Rama Rao, for the Respondents.

This appeal, and the Memorandum of Objections filed by respondents Nos. 1 and 2, coming on for hearing on the 8th, 11th, 12th, 13th, 14th and 15th September 1922, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Spencer, J.—This suit was instituted by three plaintiffs styling themselves members and trustees of the Godavari Hindu Samaj, with the sanction of the Advocate-General under section 92 of the Civil Procedure Code, for the purpose of getting a scheme framed by the Court for carrying out the trust contained in clauses 11 and 12 of the Will of the late Rajah Gadicherla Seethayya of Rajahmundry who executed it on April 4th and died on April 15th 1909. By the same Will the testator gave authority to his widow to adopt a son which she did on June 4th, 1911, by adopting the present appellant.

Clauses 11 and 12 of the Will run as follows:—

"11. A sum of Rs. 400 should be spent every year out of my estate, either for the spread (*Abhivriti*) of the Sanskrit language, or for the spread of the Hindu religion, or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samaj may deem fit."

"12. Further, it is my desire that the Vedas relating to my *Sakha* (branch) should be encouraged. And for that purpose it is my desire that chiefly a general Sanskrit or Vedic or Oriental Library should be established at Rajahmundry in my name. The executors must make the arrangements necessary therefor."

The Will names three executors, one of whom is the first plaintiff. They all declined office and the appellant who came of age on November 1st, 1917, has taken over the estate from the hands of his adoptive mother.

The first objection argued at the hearing of the appeal related to the maintainability of the suit. It was urged that the defendant, not being a trustee either by appointment or *de son tort*, could not be sued under section 92 merely because he was in

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possession of the estate, that for every suit under that section there must necessarily be a trustee [see observations in *Ashraf Ali v. Mahammad Nurajjama* (1)] but here there was none, and that the proper course for the plaintiffs to adopt was to bring a suit for administration in order to get the terms of the Will carried out. I do not consider that any of these are fatal objections to the present suit.

If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme "where the direction of the Court is deemed necessary for the administration of such trust" [*vide Neti Rama Jogiah v. Venkatacharlu* (2)] and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest, and is a proper party to such a suit. Mr. Ganapathy Aiyar then cited *Annava-rapu Nacharamma Malladi v. Venkatapayya* (3) and *Official Assignee v. Abdul Hussein* (4) in support of his argument that the present suit was premature as there was no definite fund for the trustee to administer and that the trust was thus incomplete. But the circumstances of those cases appear to be distinguishable. In the latter there was no fund ear-marked to be impressed with the trust, and in the former there was no appropriation of assets and the trust fund was yet to be ascertained. Here the Will definitely assigns a sum of Rs. 400 to trust purposes to be spent every year out of the testator's estate and makes it a charge on the estate. Whatever may be thought of clause 12, there is a definite fund set apart for the purposes mentioned in clause 11. As noticed by the learned Subordinate Judge, when there is a Will in existence section 6 of the Indian Trusts Act makes it unnecessary that there should be a transfer of the trust property to the trustees. The suit is, in my opinion, maintainable.

I pass now to a consideration of the more serious question whether the trust is void owing to uncertainty as to its objects.

(1) 49 Ind. Cas. 355; 23 C. W. N. 115.

(2) 26 M. 450.

(3) 70 Ind. Cas. 903; 31 M. L. T. 631 15 L. W. 922.

(4) 28 Ind. Cas. 116.

If it is possible to ascertain with any degree of certainty the intentions of the testator, the Court will give effect to them. If, however, the trust fails on account of uncertainty of the objects, the trustee cannot repudiate it but holds it for the benefit of the testator's heir as a resulting trust [*vide Briggs v. Penny* (5)]. If the testator's meaning is so extremely vague that the execution of his purposes practically amounts to some one else making a Will for him, then the Court will not lend its assistance or recognise the trust as one capable of execution. See *Blair v. Duncan* (6) and *Grimond v. Grimond* (7). This is the principle followed by Seshagiri Aiyar, J., in *Muthukrishna Naicken v. Ramachandra Naicken* (8) though the learned Judge does not refer to those English cases. He says at page 497* "The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new Will for him." The objects of the trust as disclosed by clause 11 of the Will, namely, the spread of the Sanskrit language or the spread of Hindu religion appear to be partly for the benefit of one branch of human knowledge, viz., the Sanskrit language and partly religious. In this country religious objects are not necessarily charitable objects, and learning is not quite synonymous with education. But it is unnecessary to embark on a disquisition upon the question whether a religious purpose is also a charitable purpose, which formed the main consideration in *Baker v. Sutton* (9), in *Townsend v. Carus* (10) and in *In re White, White v. White* (11) as section 92, Civil Procedure Code, speaks of "any express or constructive trust created for public purposes of a

(5) (1851) 3 Mac. & G. 546; 21 L. J. Ch. 265; 16 Jur. 93; 87 R. R. 192; 42 E. R. 371.

(6) (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 157; 18 T. L. R. 194.

(7) (1905) A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477; 21 T. L. R. 323.

(8) 47 Ind. Cas. 611; 37 M. L. J. 489.

(9) (1836) 48 E. R. 292; 1 Keen 224; 5 L. J. (N. S.) Ch. 264; 44 R. R. 65.

(10) (1844) 67 E. R. 378; 3 Hare 257; 13 L. J. Ch. 169; 8 Jur. 104; 64 R. R. 284.

(11) (1893) 2 Ch. 41; 62 L. J. Ch. 342; 2 R. 380; 68 L. T. 187; 41 W. R. 683.

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charitable or religious nature." It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose.

In order to understand the real intentions of the testator I am willing to read clause 12 of his Will along with clause 11 and not to treat clause 12 by itself as creating a precatory trust.

I think we should also take notice of the reference in clause 11 to the Rajahmundry Hindu Samaj as an aid to discovering what the testator meant. It was also material to take into consideration, as the learned Subordinate Judge has done in paragraph 10 of his judgment, the evidence of P. W. No. 1 that the testator was a member of the Rajahmundry Hindu Samaj almost from its inception and was keenly interested in the working of this society. In *Clode v. Andrews* (12) use was made of the knowledge that a certain Dr. Maclean was engaged for many years in the work of Christian Missions to interpret a reference to Missionary objects connected with his name in a Will, and in *Attorney-General v. Stepney* (13) the known objects of the Welch Circulating Charity Schools were referred to in order to understand the meaning of a Will which had as its object the improvement of Christian knowledge coupled with a mention of those schools. But I am unable to agree with the Subordinate Judge that the objects of the Hindu Samaj set out in clause 2 of their Rules, exhibited as Exhibit C, are almost exactly the same as the purposes indicated by the testator in his Will. The teaching of Sanskrit is not one of the professed objects of the Association. A library is mentioned as one of the means of carrying out its objects but it is not clear what kind of library is intended. On this point the Will which speaks of a general Sanskrit, Vedic or Oriental Library is more specific. Again, the Association aims at the diffusion of the principles of Hinduism, the study of Hindu civilization and the advancement of the Hindu Community. The testator desired to see the spread of the Hindu religion with

special attention to the Vedas relating to his branch (*Sakha*), he being a Yagnavalkya Brahmin. If the testator had absolute confidence in the Managing Committee of the Hindu Samaj, he might have made an outright bequest in their favour and left the spending of the money entirely in their hands without directing his executors to make arrangements to have the trust conducted according to the discretion of the trustees of the Hindu Samaj. In *Grimond v. Grimond* (7) Lord Moncreiff, whose judgment was adopted by the House of Lords, observes, that the trustee's own religious views do not affect the question when the trustees have been left with unlimited discretion as to what religious institutions are to be selected for being benefited. So here, if one of the objects of the trust is the spread of Hinduism generally, then, in my opinion, the object is too wide and indefinite to be carried into effect. The scheme framed in the lower Court provides for the submission to the Court by the trustees of a programme for the utilization of the annual grant of Rs. 400 and for the Court sanctioning the same with such modifications as may be found necessary. How is any Christian, Hindu or Muhammadan Judge to decide whether the proposal so submitted will advance the Hindu religion in the manner contemplated by the testator? If, on the other hand, we hold that the scheme should be directed to the best means for inculcating the peculiar sectarian doctrines of the testator's own branch of the Hindu faith, then it may reasonably be doubted whether this purpose is such a public one as section 92 of the Code was intended to cover. The learned Subordinate Judge, who was in favour of upholding the trust as a good one, has been driven after considering clause 12 to the conclusion in paragraph 19 of his judgment that the object is not clear enough and he has been obliged to treat this clause as merely recommendatory. To my mind, the trust is even more vague and indefinite, if clause 12 is omitted from consideration. The words "for the spread of the Hindu religion" are no more definite than the words "for Missionary purposes" which were held in *Scott v. Brownrigg* (14) to be too vague and uncer-

(12) (1907) 97 L. T. 130.

(13) (1804) 32 E. R. 751; 10 Ves. 22; 7 R. R. 325.

(14) (1881) 9 L. R. Ir. 246.

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tain to create an executable trust, or than the words "most conducive to the good of religion in this diocese" in *Dunne v. Byrne* (15). It is not enough that in those cases there could be no doubt that the settler was thinking of the Christian religion when he spoke of Missionary or religious purposes, or that in the present case the Hindu religion is designated by name. God is worshipped in many forms by Hindus. A general endowment for the worship of God without specifying the deity for whose benefit the endowment is to take effect is void for uncertainty. *Vide Chandi Charan Mitra v. Haribola Das* (16).

On the other hand, I am inclined to regard the promotion of the knowledge of the Sanskrit language as a valid charitable bequest. In *Whicker v. Hume* (17) a fund given to be applied by trustees according to their discretion "for the advancement and propagation of education and learning all over the world" was held to be not too vague; and in *Attorney-General v. Flood* (18) a gift for promoting education in the Irish language was upheld. See also Halsbury's Laws of England, Volume 4, Art. 174. Here the word "spread" denotes that the testator was thinking of education. The Sanskrit language could only be spread by teaching persons hitherto ignorant of it. It would not be spread by rewarding those who are already learned.

If the object is definite enough the Court will find suitable modes for carrying out the wishes of the testator. See *Gordhan Das v. Chunni Lal* (19). Of course, it is necessary that if a Sanskrit Library is to be founded it should be one open to the public (unlike the Hindu Samaj's Library which is limited to Hindus who pay a certain subscription and are grouped in two classes); if Sanskrit Schools are to be formed they must be schools which can be freely attended by the public. Otherwise this will not be a trust for public

puposes falling under section 92, Civil Procedure Code.

The trust for the spread of Hinduism being too vague, and that for the spread of the Sanskrit language being valid, we must next take note of the fact that the trustees of the Hindu Samaj have been given an absolute discretion to spend the whole sum of Rs. 400 on one or the other object, or on both. In such a case where one object is void for uncertainty the whole gift is void, since, owing to the use of the disjunctive "or," there is no indication as to what proportion is to be devoted to the charitable purpose of advancing education: *vide In re Macduff, Macduff v. Macduff* (20), *Blair v. Duncan* (6), *Houston v. Burns* (7) and *Theobald's Law of Wills* (7th Edition) page 369. So in the present case the testator having left the application of the fund entirely to the discretion of the trustees of the Rajahmundry Hindu Samaj, it would be open to that body to apply the whole amount to the vague purpose of spreading the Hindu religion, leaving nothing for the encouragement of Sanskrit learning.

But on the principle of the above English cases the whole bequest thus is bad and unexecutable. The trustees under the Will in such a case cannot exercise their discretion and allot the whole to charity. [*In re Jarman's Estate, Leavers v. Clayton* (22)].

I am, therefore, of opinion on the 2nd and 3rd issues that no enforceable trust is created in clause 11 or 12 of the Will, and I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

A third point which is the subject of the 5th issue has been raised, namely, whether the adopted son who takes by survivorship can repudiate dispositions of a portion of the ancestral property made by his adoptive father without its being proved that his natural father was aware of the contents of the Will at the time of the adoption. Mr. Ganapthy Aiyer quotes *Balkrishna Motiram Gujar v. Shri Uttar Narayan Dev* (23) in

(15) (1912) A. C. 407; 81 L. J. P. C. 202; 106 L. T. 394; 56 S. J. 324; 28 T. L. R. 257.

(16) 51 Ind. Cas. 215; 46 C. 951; 29 C. L. J. 366; 23 C. W. N. 645.

(17) (1858) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 11 E. R. 50; 31 L. T. (O. S.) 319; 6 W. R. 813; 115 R. R. 70.

(18) (1816) Hay & J. App. xxi; Hayes 611.

(19) 39 A. 111 at p. 114; 5 A. L. J. 23; A. W. N. (1908) 34.

(20) (1896) 2 Ch. 451; 65 L. J. Ch. 700; 74 L. T. 706; 45 W. R. 154.

(21) (1918) App. Cas. 337; 87 L. J. P. C. 99; 118 L. T. 462; 34 T. L. R. 219.

(22) (1878) 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89; 26 W. R. 907.

(23) 50 Ind. Cas. 912; 43 B. 542; 21 Bom. L. R. 225.

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support of his arguments that he can. In the present case the testator was childless when he made his Will and was free to make an absolute gift. Following *Ganapath Ayyan v. Savithri Aymal* (24), I feel clear that the adopted son cannot, while approbating the provisions of the Will under which his adoption was made, reprobate other provisions of the same Will. It is unnecessary, in view of my finding on Issues Nos. 2 and 3, to pursue this point further. It has also become unnecessary to discuss the objections and the cross-objections to the scheme framed by the Court. The decree of the lower Court is set aside and the suit is dismissed with costs. The Memorandum of Objections is dismissed.

Devadoss, J.—I have had the advantage of perusing the judgment prepared by my learned brother and I agree with his conclusions on the points argued before us. Inasmuch as this appeal was argued at great length very ably on both sides and as the points involved are of considerable importance, I wish to add, in my own words, the reasons for agreeing with my learned brother.

The plaintiffs are the members and trustees of the Godavari Hindu Samajam, commonly known as the Hindu Samajam, located at Rajahmundry; and they have brought this suit for the settlement of a scheme for carrying out the intentions and directions contained in clauses 11 and 12 of the Will of Sri Gadicherla Chinna Seethayya Garu, who died on the 15th April 1909 possessed of Zemindari villages and other properties yielding an annual income of Rs. 4,000. The defendant is the adopted son of the said Seethayya Garu. The Additional Subordinate Judge of Rajahmundry has granted a decree in plaintiffs' favour and the defendant has preferred this appeal.

The main contentions raised on behalf of the appellant are (1) the suit is not maintainable under section 92 of the Civil Procedure Code inasmuch as there is no trustee in charge of the alleged trust estate; (2) the terms of the Will are so vague that the bequest must fail on account of

uncertainty; and (3) the defendant being the adopted son of the testator is entitled to repudiate the bequest made by the Will as he succeeded to the whole of the testator's property by right of survivorship.

The first contention, that there is no trustee in charge of the trust estate and, therefore, a suit under section 92 is incompetent, is an untenable one. Section 92 was enacted for the purpose of safeguarding public trusts of a charitable or religious nature. The section says: "In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust,....two or more persons having an interest in the trust....can sue after fulfilling certain formalities." It is quite plain that the section is applicable to cases where the direction of a Court is deemed necessary for the administration of any trust, and it is nowhere said that the suit could only be against trustees *de facto* or *de jure*. When the Court is put in possession of facts from which it can infer that there is a public trust of a charitable or religious nature and that for its proper administration the direction of the Court is necessary, the Court has jurisdiction to frame a scheme for the proper administration of the trust. The appellant relies on a number of cases in which it was held that section 92 did not apply to suits against trespassers. A trespasser claims adversely to the trust and in order to evict him or to claim damages from him no scheme is necessary and the intervention of the Court under section 92 is uncalled for. It is the duty in such cases of a trustee or trustees to seek the proper remedy against the trespasser or against the person holding the property adversely to the trust.

In *Gholam Mowlah v. Ali Hafiz* (25) the suit was against the purchaser of the trust property. The Court held that, the defendant being an alienee of the trust property, section 92 had no application.

In *Arunachella Chetti v. Muthu Chettiar* (26) the suit was by a trustee against a

(24) 21 (M) 10; 7 Ind. Dec. (N. S.) 364.

(25) 47 Ind. Cas. 111; 28 C. L. J. 4.

(26) 17 Ind. Cas. 586; 23 M. L. J. 347.

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trespasser. The suit was decided under the Civil Procedure Code of 1877 in July 1880. It was held that section 539 had no application to the case.

In *Budree Das Mukim v. Chooni Lal* (27) Woodroffe, J., held that suits brought not to establish a public right but to remedy a particular infringement of an individual right were not within the section and that, as against strangers, such as alienees from the trustee and mere trespassers holding adversely to the trust, that section did not apply.

In *Bapuji Jagannath v. Govindlal Kasandass* (28) it was held that section 92 had no application where the remedy asked for was not for the infringement of a public right but for a private right. In that case one executor sued another executor for accounts and for an injunction against further management. The Court held that the suit was not bad for want of sanction under section 92, Civil Procedure Code.

In *Subbayya v. Krishna* (29) the Full Bench held that a trustee could be removed though section 539 did not expressly give the power of the Court.

In *Ashraf Ali v. Mahammad Nurajjama* (1) the Court held that to a suit against the lessee in which the trustee was a party section 92 had no application as no scheme was asked for, the suit being for a declaration that the lease was invalid and that possession should be handed over to the plaintiffs.

Strong reliance was placed by the appellant on a decision of the Madras High Court reported as *Annavaarapu Nacharamma Malladi v. Venkatapayya* (3). There the late Chief Justice and Kumaraswami Sastri, J., held that a suit under section 92, Civil Procedure Code, for enforcing the terms of a Will which contained provisions for the administration of public trusts was not maintainable. On a careful reading of the judgment I think the decision does not support the appellant's contention. All that was decided in that case was that it was not compe-

tent for persons to invoke the provisions of section 92 for the purpose of administering the estate of a deceased person with a view to compel the executors to give effect to charitable bequests. What was found on the evidence in that case was that there was no fund from which the charity could be maintained. The learned Judges held that, in the absence of a specific finding that a trust had been created, a suit of that nature would not lie. But the facts of this case are different. Here the amount to be spent on the charity is charged on the whole estate. The estate is worth Rs. 4,000 a year and the amount of the charitable bequest is only Rs. 400 a year. Funds for the trust have been provided by pointing out the source of the funds and by making the whole of the property bear the charge for the trust. Where it is quite clear that a trust has been properly constituted by Will, it is not necessary that there should first be an administration suit before the trust could be the subject of a suit under section 92. In the *Mofassil*, administration suits are almost unknown, and, if it is considered that an administration suit is essential preliminary to a suit under section 92, the question would arise as to who should bring the administration suit. The heirs of the testator may be quite unwilling to bring the administration suit and anybody who would ordinarily be entitled to bring an administration suit might be found unwilling to do so. I do not think that the case supports any wide proposition as is contended for by the appellant. Where it is doubtful whether there would be funds for the purpose of satisfying the bequest for charity, there it might be necessary to have an administration suit in order to fix the amount that might be available for charitable purposes after meeting the legitimate demands of creditors and specific legatees.

The contention that there must be trustees in charge of the funds in order to entitle persons to sue under section 92 is an obvious fallacy. One can conceive of cases where all the trustees die or refuse to act. It is in such cases the interference of the Court would be deemed most necessary and beneficial and it is to prevent charities lapsing for want of proper management that sec-

(27) 33 C. 789; 10 C. W. N. 581.

(28) 34 Ind. Cas. 167; 40 B. 439; 18 Bom. L. R. 335.

(29) 14 M. 186; 1 M. L. J. 95; 5 Ind. Dec. (N. S.) 132.

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tion 92, Civil Procedure Code, was enacted on the lines of Lord Romilly's Act.

In *Neti Rama Jogiah v. Venkatacharlu* (2) the suit was brought under section 539 of the Civil Procedure Code for a declaration that the defendants were not *Dharmakarthas* of certain temples, and to have trustees appointed for the due administration of those temples. The learned Judges observe at page 452 as follows:—"The substantial question, therefore, for determination in the case is whether the defendants are the lawful trustees of the temple as claimed by them. If they are so, there is an end of the suit, but, if they are not, then there is a vacancy in the office of one or both of the trusteeships, and the plaintiffs, as persons interested in the institution, prayed for an order of Court directing the appointment of new trustees for the due administration of trusts of the temple. In our opinion such a suit is comprised in the words of the section, namely, that 'when-ever the direction of the Court is deemed necessary for the administration of such trust,' and the suit, therefore, falls under section 539 (a) of the Civil Procedure Code. In support of this view we may refer to the opinion of the Judicial Committee of the Privy Council in *Bishen Chand v. Nadir Hossein* (30), in which Sir Barnes Peacock in delivering the judgment of the Committee stated, 'If there had been any objection that he (i.e., the plaintiff) was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed and a new trustee appointed by the Court under the Code of 1877. As pointed reference is made to the Code of 1877 in which for the first time section 539 was introduced, there having been no section corresponding to it in the Code of 1859, it is quite clear that the provision referred to by the Privy Council is section 539." In cases where there are no trustees or where all the trustees choose to claim adversely to the trust, the interference of the Court is necessary for the protection of the trust.

In *Raghubar Didi v. Kesho Ramanuj Das* (31) the four defendants between them by an endowment created a trust in respect of the temple of Janaki Ballabji and of the idol contained therein, which endowment consisted of 5 *biswas* of land, the income of which was to be devoted to the expenses of the temple. The plaintiff alleged that, since November 1894, the donors changed their minds and had stopped the payment for expenses. Straight, J., observes at page 22: "Now it is not necessary, if I read that section aright, that there should have been any breach of trust; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned Judges of the Calcutta High Court in *Latifunnissa Bibi v. Nazirun Bibi* (32). Therefore, this may be fairly regarded as a suit, to put it in its narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction of the Collector or such officer as the local Government might appoint was necessary, for the purpose of empowering the plaintiff to bring such a suit."

That the defendant need not be a trustee, nor need he admit the existence of a trust in order to enable the plaintiffs to sue under section 92, is made clear by the judgment of the Calcutta High Court in *Budh Singh Dudhuria v. Niradbaran Roy* (33). Mookerjee, J., observes at page 437: "The case is no authority for the proposition that the Court is ousted of the jurisdiction it possesses under section 539, Civil Procedure Code, by the bare denial on the part of the defendant of the existence of the trust alleged by the plaintiffs. If the view urged by the appellants were well-founded, every case of a public charity might be excluded from the jurisdiction of the Court by reason of the most groundless allegation on the part of the defendant that there is no public trust. But, it is an elementary principle that when the jurisdiction of a Court to take cognizance of a suit instituted before it, is disputed,

(30) 15 L. A. 1 at p. 10; 15 C. 329; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 803 (P. C.).

(31) 11 A. 18; A. W. N. (1888) 276; 13 Ind. Jur. 148; 6 Ind. Dec. (N. S.) 439 (P. C.).

(32) 11 C. 33; 5 Ind. Dec. (N. S.) 779.

(33) 2 C. L. J. 45.

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the Court must adjudicate upon the question.** I must hold accordingly that if in a suit instituted under section 539, Civil Procedure Code, the defendant disputes the jurisdiction of the Court to make any decree under that section on the ground that the trust alleged by the plaintiffs does not exist, the Court is not ousted of its jurisdiction but must determine the question upon the evidence."

The same principle was laid down in *Jafarkhan v. Daudshah* (34). Batchelor, J., who delivered the judgment of the Court observes at page 53*: "We think that no difficulty is caused by the use of the words 'any alleged breach of any trust' occurring in section 539, for we do not read those words as equivalent to any alleged breach of any admitted trust. The construction which we put upon the section in this respect has, so far as we are aware, been consistently followed in these Courts and the case of *Chintaman Bajaji Dev v. Dhondo Ganesh Dev* (35) is an illustration of that. Reference being made to page 616 of the report, it will be seen that the defendants there pleaded that the *Savasthan* was not a public, religious or charitable institution and that they were not the trustees but owners of the property in that suit."

It is quite apparent from these decisions that the jurisdiction of the Court is not ousted by the defendant pleading that he is not a trustee or that there is no trust for which a scheme could be framed. In this case the defendant claims to repudiate the provisions of the Will as the adopted son of the testator. His interests are, no doubt, adverse to that of the plaintiffs, who want to maintain that there is a trust. But in the case of a suit under section 92, it is not necessary that there should be any active contest as to any breach of trust by a trustee. If the circumstances are such that the intervention of the Court is deemed necessary for the purpose of framing a scheme for any trust which is proved to exist, the Court has jurisdiction to frame a scheme. No doubt, the defendant in this suit could not

be made to pay amounts due or to surrender the property, if any, belonging to the trust, he being a stranger to the trust. On the framing of a scheme and on the appointment of trustees, he should be proceeded against by the trustees for such reliefs as they may deem fit. In that sense, no doubt, the suit against the defendant is unsustainable, but the suit is perfectly competent for the purpose of enabling the Court to frame a scheme in respect of the charitable bequest contained in the Will, provided the bequest fulfills other conditions.

The second point is one of more difficulty. The contention that the bequest is void for uncertainty should be considered in the light of the provisions of the Will relating to the bequest. Paragraph 11 of the Will runs thus:—

"A sum of Rs. 400 should be spent every year out of my estate, either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit." The next clause runs thus: "Further, it is my desire that the Vedas relating to my *Sakha* should be encouraged; and for that purpose, it is my desire chiefly a general Sanskrit or Vedic or Oriental Library should be established at Rajahmundry in my name. The executors must make the arrangements necessary therefor." Clause 12 does not present much difficulty. It is what I may call a precatory trust. There is no definiteness about the trust. The amount to be spent for establishing the Sanskrit or Vedic or Oriental Library is not mentioned and the direction to found a general Sanskrit or Vedic or Oriental Library is very vague. What sort of Sanskrit books should be in the Library or what sort of Vedic books should be collected or what sort of Oriental Library it should be, there is no indication in the Will. I do not think it is necessary to consider this matter further. I hold that, in the first place, it is precatory and, in the second place, that it is so vague that it cannot be given effect to. Clause 11 contains a bequest of a sum of Rs. 400 to be spent annually for the

(34) 9 Ind. Cas. 358; 13 Bom. L. R. 49.

(35) 15 B. 612; 8 Ind. Dec. (N. S.) 413.

*Page of 13 Bom. L. R.—[Ed.]

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spread of the Sanskrit language or the spread of Hindu religion or for both, and the executors should make the arrangements necessary therefor and should conduct as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit. Here, again, the testator's directions are so vague that it will not be possible for any Court of Law to decide what is necessary for the spread of the Sanskrit language or for the spread of the Hindu religion and the executors are asked to make 'such arrangements as the trustees of the Rajahmundry Hindu Samajam might deem fit.' The trustees of the Samajam may change and the objects of the Samajam are as vague and as comprehensive as they can be. The objects of the Samajam are the diffusion of the principles of Hinduism, the study of Hindu civilisation and, in general, the advancement of the Hindu community. Some of the objects of the Association could not be considered charitable or religious under section 92. The bequest may be a good one if it is to the Samajam; but where a trust is indicated and the Court is asked to frame a scheme under section 92, the provisions of that section should be complied with before the Court can be induced to act. In the first place, the trust should be for a public purpose, and, in the second place, it should be of a charitable or religious nature. There are many public purposes which are neither charitable nor religious. There are many purposes which are charitable or religious but not of a public nature. The discretion is given to the executors to make arrangements for the spread of the Sanskrit language. The expression 'spread of the Sanskrit language' is not capable of any clear definition. It may be spread in the sense of intensive culture or of culture benefiting a large number of people. The expression 'for the spread of the Hindu religion' is also vague. It is very difficult for people belonging to various sects to agree as to what the Hindu religion is. Without in any way being disrespectful to the Hindu religion, or in any way disparaging the religion, the words Hindu religion do not connote anything specific. It may be the Vedantic religion or the religion of a particular sect and it is not within the province of a Civil Court to say that the

Hindu religion is and what should be done to spread it. The trustees of the Rajahmundry Hindu Samajam may all cease to promote the particular form of Hindu religion which for a time the same trustees were prepared to promote, and the Court will then be called upon to frame another scheme by which the trustee of this particular estate may be left to manage things without reference to the trustees of the Rajahmundry Hindu Samajam. These are some of the difficulties which will face any Court which is called upon to frame a scheme for the purpose of carrying out the intentions of the testator. It is a well established principle of law that, where the intention of the testator is so vague the Court cannot give effect to it. The Court can only interpret the Will of a testator, but it cannot be called upon to make a Will for the testator. It is sometimes thought that a charitable bequest should not be allowed to lapse, and, therefore, some sort of scheme should be framed in respect of it. But, with all respect to that view, I think the Court is bound to follow certain principles which have guided the Courts of Chancery for a very long time. The idea of making charitable bequests by Will is new to this country, and it would not be right to throw aside altogether the principles which have guided the Courts of Chancery in England, in interpreting Wills containing bequests for charitable and religious purposes.

I shall proceed to examine the English cases that have been cited to us, but before entering upon the mazes of the decisions of the Chancery Courts, it is but right that one should remember that the Law of Trusts in England is subject to certain peculiar restrictions. In the first place, the laws of mortmain prevent bequests of land being made to Associations and Corporations, and, in the second place, realty cannot be disposed of in perpetuity by Will and only personalty can be disposed of for a charitable or religious purpose, and even in the case of personalty there is a difference between impure and pure personalty. It was by 51 and 52 Vic., Chap. 42, the law relating to mortmain and the dispositions of land for charitable purposes was consolidated. By 43 Eliz., Chap. 4, charitable bequests were validated. It

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has been the attempt of Chancery Lawyers to bring bequests within the purview of 43 Eliz. and that is the reason why we find that in the earlier cases the Court of Chancery gave a wide interpretation to the word 'charity'.

I shall first deal with the cases relied upon for the respondent in support of the validity of the bequest.

The earliest case relied on is *Attorney-General v. Stepney* (13). There a bequest of the residue of personal estate for the use of the Welch Circulating Charity Schools as long as they should continue, and the increase and improvement of Christian knowledge and promoting religion, and to purchase Bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, to go to the same uses with those already bought, and to be kept in a house, devised for that purpose, was held good. The Lord Chancellor (Eldon) in the course of his judgment, after referring to the case of *Browne v. Yeall* (36) observes:—"Lord Thurlow's opinion was that the testator, not having given this Court more of specific direction as to the nature of the books to be purchased and circulated, than that they were to be such as may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, had not given direction enough: and, therefore, Lord Thurlow held the next-of-kin entitled. If this was that very case, I should certainly feel myself bound to follow that decision. But this, independent of the peculiarities belonging to it, is very different; and if that Will had specified Bibles and Testaments, the Court could not have refused to execute that purpose. If, therefore, there was nothing more in this Will, I should be bound to say that whether there is more or less objection to the words 'other religious books and tracts', there is a denotation of a religious purpose, to which the fund may be applied; with an option, how it should be applied; and I must execute one term of that option."

The next case is that of *Milford v. Reynolds* (37). In this case the testator's Will con-

(36) (1802) 7 Ves. 502, 32 E. R. 19.

(37) (1842) 41 E. R. 602; 1 Ph. 185; 12 L. J. Ch. 40; 80 R. R. 27.

tained a bequest in the following terms "I will, devise, give, and bequeath the remainder of my property...to the Government of Bengal, for the express purpose of that Government applying the amount to charitable, beneficial, and public works at and in the City of Dacca in Bengal, the intent of such bequest and donation being that the amount shall be applied exclusively to the benefit of the native inhabitants, in the manner they and the Government may regard to be most conducive to that end." The Lord Chancellor (Lyndhurst) construed it as valid and observed: "According to the construction which I put upon the words of this bequest taken altogether, it is a bequest of money to be applied in the construction or establishment of some works for the general benefit of the native inhabitants of Dacca, for the poor as well as for the rich; and I think that comes within the principle of the cases I have stated, and constitutes, under the Statute of Elizabeth a good charitable bequest."

In *Whicker v. Hume* (17) a bequest to trustees of funds to be applied by them according to their discretion for the advance and propagation of education and learning all over the world was held to be a good charitable bequest and was not void for uncertainty. The discussion in that case turned mainly upon the meaning of the word 'learning'. If 'learning' had stood alone the Court would have held the bequest bad for uncertainty, but inasmuch as the word 'education' was in front of the word 'learning' the Court upheld the bequest. Lord Chelmsford, in delivering the judgment, stated as follows: "Now the question is, in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select that meaning of the word which will carry out the intentions and objects of the testator; and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression) to the word 'learning' which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word 'learning' the word

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'education' I think, that from the society itself in which you find the word, Your Lordships may gather, the meaning which it is necessary to put upon it, and that he means the word 'learning' in the sense of imparting knowledge by instruction or teaching. Well, if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word 'education' although not precisely synonymous with it, and it is admitted in the argument that if the word 'education' had stood alone, the bequest would have been valid." Lord Wensleydale said, 'learning' in this case, I consider as equivalent to teaching; learning, as part of education. No portion of the charitable fund could be devoted by the trustees for the purpose of rewarding learned men unconnected with education."

Now, applying this case to the case before us, can it be said that the trustees are bound to spend the money in educating people in the Sanskrit language? If they choose to give the whole of the amount to a person well versed in Sanskrit so that he may improve his knowledge of the language or as a reward for his past labours, can it be said that they aid a public charitable purpose? This makes it quite clear that the bequest can be good only if education is the object.

The next case relied on by the respondent is a case under the Income-Tax Act. In *Commissioners for Special Purposes of Income-Tax v. Pemsel* (38) the House of Lords had to consider whether certain allowances in respect of the income-tax imposed by Schedule A are to be granted by the Commissioners for Special Purposes of Income-tax. The words 'charitable purpose,' they held, as used in the Income-Tax Act, were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to these words by English Law. Lord Macnaughten, in the course of his judgment (at page 580), observes, "That according to the Law of England a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses,' 'charitable trusts,' or

'charitable purposes' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that, owing to their nature, they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void." This case does not throw any light on the question what are charitable bequests and what are not.

In *In re White, White v. White* (11) the Court of Appeal held that a bequest to a religious institution or for a religious purpose is *prima facie* a bequest for a 'charitable' purpose. "The testator gave his property to the following religious societies to be divided in equal shares among them." The testator did not give a list of the religious societies among whom he wished the properties to be divided. Lord Lindley, in the course of his judgment, observes, "the gift is for religious purposes; and, secondly, that being for religious purposes, it must be treated as a gift for 'charitable' purposes unless the contrary can be shown. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty: *Mills v. Farmer* (39) settles that point. Lord Eldon was clearly of opinion that the nomination of particular objects is only the mode and not the substance of a gift to 'charity.'" In England charity must be of a public nature, but in India it is not so. There can be bequests for charity for private purposes and there can be a bequest for a religious purpose of a private nature. There can be a good bequest in favour of an idol or for the performance of *shradh*. As I have stated above, section 92 is only concerned with trusts for public purposes of a charitable or religious nature and so the reasoning of the learned Lord Justice cannot apply in its entirety to bequests in Hindu Wills.

In *Baker v. Sutton* (9) a bequest of the residue of personal estate for such religious and charitable institutions and purposes within the Kingdom of England as in the

(38) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805.

(39) (1815) 1 Mer. 55; 19 Ves. 483; 13 R. R. 247; 35 E. R. 597.

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opinion of the testator's trustees should be deemed fit and proper was held to be a good charitable bequest. In the case before us the question is not whether the bequest is a good bequest, but whether the Court should be called upon to administer the funds given for a particular purpose. If the bequest was to the Hindu Samajam at Rajahmundry, it would be a good bequest. But the real difficulty is in finding out the intention of the testator and in controlling the discretion of the trustees who are to administer the trust. The case of *Mills v. Farmer* (39) is relied upon as showing that a charitable bequest never fails. Lord Eldon, in the course of his judgment, laid down the law thus: "I am fully satisfied as to all the principles which have been laid down in the course of this argument, and accede to them all. There is no question that the Court has not the power to make a Will for the testator but only to carry into execution that which he has made himself; and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance. Neither is there any doubt that the same words in a Will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor; or, if having appointed an executor he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate and his next-of-kin will take the estate. But, to give effect to a bequest in favour of charity, the Court will, in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman Law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the Ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question,

is that, in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient."

In *Cocks v. Manners* (40) it was held by Sir John Wickers, V. C., that the bequest to the Dominican Convent at C was neither within the letter nor the spirit of 43 Eliz. Chap. 4. At page 585, he observes: "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public, an annuity to an individual; so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore, the gift to the Dominican Convent is not in my opinion, a gift on a charitable trust."

In this case it has been very vehemently urged that, inasmuch as the trustees have the choice of spreading the Hindu religion, therefore, the bequest is for a religious purpose and could not fail for uncertainty. *Cocks v. Manners* (40) is an answer to that. As I said above, the trustees may take into their heads to promote the Hindu religion or to contribute to the spread of the Hindu religion by giving the whole of the amount to one person or to a particular *Mutt*, a religious purpose, which in England should necessarily be a public purpose in order to validate a bequest need not be so in India.

In *Townsend v. Carus* (10) Wigram, V.C., held that a gift to be applied to promote the spiritual welfare of God's creatures was

(40) (1871) 12 Eq. 574; 40 L. J. Ch. 640; 24 L. T. 869; 19 W. R. 1055.

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for religious and, therefore, charitable purposes.

It is contended that a general bequest for the spread of Sanskrit language is good on the authority of *Attorney-General v. Flood* (18). In that case a bequest was given to the Trinity College, Dublin, for the study of Irish language. There can be no objection at all to a bequest to the University or to a College, or even to the Rajahmundry Hindu Samajam being held good if it is for the study of Sanskrit or any other language. Where the bequest is not to a Society but to trustees who are asked to do certain things, and where the Court is not in a position to control the discretion of the trustees, there the Court has to see whether the intention of the testator is specific enough to control the discretion of the trustees. In *In re Scowcroft, Ormrod v. Wilkinson* (41) bequest to the Vicar of a parish for the time being of a building used as a Village Club and readingroom 'to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and 'dancing' was held good. In this case the intention is clear and the object is of a charitable and of a public nature.

In *Clode v. Andrews* (12) the testatrix directed her trustees to pay trust monies to M to be applied by him 'for such Missionary object or objects at home, abroad or in the Colonies as he shall in his absolute discretion select.' M was known by the testatrix to have been engaged in assisting the Christian Mission in Foreign Countries and abroad. Warrington, J., held the bequest to be good. He said: "It is suggested that the words of the gift are too vague, as the words 'Missionary objects' are not necessarily confined to Christian Missions. But there is a widely spread use of the word 'Missionary' as one engaged in the work of religious and particularly Christian Missions. I think that I am entitled to consider who Dr. Maclean was, and that he was engaged for many years in the work of Christian Missions, and that he and his work were known to the testatrix. I think that the testatrix used the word 'Missionary' in its ordinary and popular sense, and I hold that the gift was a valid charitable gift." In the course

of the arguments the Irish case of *Scott v. Brownrigg* (14) was quoted to show that the word Missionary was not capable of any definite meaning. Warrington, J., as the report shows, declined to follow it.

In *Morice v. Bishop of Durham* (42) a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, was not held to be a charitable legacy. The Lord Chancellor (Eldon) in meeting the contention that it was a charitable bequest and that the trustee might devote every shilling to charitable use, observed as follows: "But the true question is, whether if, upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and if, according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with maladministration, if he had applied the whole to purposes, which according to the meaning of the testator, are benevolent and liberal: though not acts of that species of benevolence and liberality, which this Court in the construction of a Will calls charitable acts. But the question is whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word 'charity' in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed."

In the present case if the trustees choose to apply the whole of the amount to a religious purpose which is not of a public character, could the Court say that it is not within the discretion of the trustees to do so? If the trustees be held to have a discretion under

(41) (1898) 2 Ch. 638; 67 L. J. Ch. 697.

(42) (1805) 10 Ves. (Jun.) 522; 32 E. R. 947; 7 R. R. 232.

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the Will to do so, then the Court would be powerless to control that discretion; and, applying the principle of the case of *Morice v. Bishop of Durham* (42), I must hold that the discretion is too wide to be controlled by a Court, and, therefore, the bequest is bad.

In *In re Macduff*, *Macduff v. Macduff* (20) a bequest of money for some one or more charitable purposes philanthropic or was held not bad simply by reason of the existence of the..... (blank), but should be treated as one for the purpose of charitable or philanthropic purposes. Such a bequest is not a good charitable bequest as there are philanthropic purposes which are not charitable. Lord Lindley, after referring to Lord Eldon's dictum in *Morice v. Bishop of Durham* (42), observes at page 463: "Therefore, when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the Court, if called upon to execute it, can see what it has to do can see the limits of its own powers. The words here are 'purposes charitable or philanthropic.' 'Charitable,' I suppose, is there used in the popular sense.*** Then what is the meaning of the word 'philanthropic?' * * * The Attorney-General says, 'What philanthropic purpose is not charitable.' My answer is, you are dealing with two words of so vague a meaning that it is extremely difficult to say, but we can suggest purposes which might be philanthropic and not charitable—purposes indicating good will to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptance of the word that is to say, in the wide, loose sense of indicating good will towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor." He refers to the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income-Tax v. Pemsel* (39) and observes, "Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must ne-

cessarily be a charity. Some may be, and some may not be. In *Kendall v. Granger* (43) where the language was 'for encouraging undertakings of general utility,' Lord Langdale came to the conclusion that that was not a charity, and I am not aware that his decision has ever been overruled or questioned. Now, what Lord Macnaghten said is obviously a paraphrase of the words of Sir Samuel Romilly which I have just read: "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads, leaving out those somewhat significant words of Sir Samuel Romilly as to the fourth head, 'which is the most difficult' which showed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt that Lord Macnaghten saw also, that there might be some purposes of public general utility which might be charitable and some which might not. In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities, but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth."

I may observe that the high water-mark of liberal interpretation as regards the intention of a testator was reached when the House of Lords held that a bequest that a Hospital be established at Dundee to accommodate 100 boys was a good bequest. In *Magistrates of Dundee v. Morris* (44) the Lord Chancellor observed at page 156: "It is said on the part of the respondents that the mere wish to establish a Hospital for a ... number of boys is so indefinite and uncertain that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention. That it is at the best but the indication of a mere floating desire, not of any former and settled determination. But the expression of a wish

(43) (1842) 5 Beav. 300; 11 L. J. Ch. 405; 6 Jur. 919; 59 R. R. 507; 49 E. R. 593.

(44) (1858) 3 Macq. 134; 149 R. R. 233.

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by a testator that his property should be applied to a particular object amounts to a bequest for that object; and the language of this Will appears to convey with sufficient certainty what the testator desired should be carried into effect. The words 'establish an Hospital' must, I think, be taken to express an intention that a building should be provided which seems to have been assumed as the meaning of the word 'establish' in the case of the *Attorney-General v. Williams* (45). He held "that the testator having intimated his wish to devote his property to the establishing an Hospital, every subsequent writing of the testator, upon the same half sheet of paper, is to a certain extent a confirmation of the previous charitable bequest. It amounts to a declaration that the fund which he had appropriated to that purpose is to be subject to a reduction to the amount of the legacies, and the first of them, after those which relate to the Hospital, had an express reference to this appropriation of his property by its commencing with the words, 'I further wish,'"

The later decisions of the Court of Chancery in England are for a narrower construction, not only of the word 'Charity' but also of the terms of the Will regarding the intention of the testator. In *Dunne v. Byrne* (15) the Privy Council held that a residuary bequest to "the Roman Catholic Archbishop of Brisbane, and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese" is not a good charitable bequest and is void. The words of the Will are, "I will and bequeath....that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese." Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council, observes, at page 411, "the language of the bequest (to use Lord Langdale's words) would be 'open to such latitude of construction as to raise no trust which a

Court of Equity could carry into execution.' *Baker v. Sutton* (9). If the property as Sir William Grant said in *James v. Allen* (46) 'might consistently with the Will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute.' " In this case the bequest was to the Archbishop of Brisbane and his successors to be used in a way most conducive to the good of the religion. It may be taken for granted that the Archbishop of Brisbane would not use the income of the property bequeathed to any other purpose than for the good of religion in his diocese. But inasmuch as a discretion was given him to use the amount wholly or in part for such a purpose, the bequest was held void, because the discretion of the Archbishop could not be controlled by the Court.

Can it be said in this case that if the trustees choose in conjunction with the trustees of the Hindu Samajam at Rajahmundry to use the funds for a religious purpose which is not of a public character or a purpose which is not strictly religious as the Courts understand, the Court could pull them up or charge them with maladministration? When such a thing cannot be done, and when the trustees could always plead a discretion under the Will to waive the control of the Court, the bequest cannot be held to be a valid bequest.

In *Blair v. Duncan* (6), where a testatrix by codicil in her own handwriting directed her trustee that, in the events which happened, one-half of the residue of estate should be applied for 'such charitable or public purposes as my trustee thinks proper,' the House of Lords held that the direction was void for uncertainty. Lord Halsbury in the course of his judgment observes: "It appears to me that it would be equally the Law of England as it would be the Law of Scotland that the disposition here given to A. B. to determine what particular public purposes should be the object of the trust is too vague and uncertain for any Court either in England or Scotland to administer." Lord Robertson says at page 49, "the Courts have, I think, as matter of historical fact,

(45) (1794) 2 Cox 387; 4 Bro. C. C. 526; 30 E. R. 178.

(46) (1817) 3 Mer. 17; 17 R. R. 41 36 E. R. 7.

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reflected more or less consciously or unconsciously the bias which disposes everyone favourably towards charity: and this never appeared more plainly or was avowed more frankly, than in the decision of your Lordship's House in the Morgan case *Magistrates of Dundee v. Morris* (44). To this favour for charity I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class."

As I have said above, the House of Lords adopted a very liberal interpretation, as Lord Robertson says, in the case of *Magistrates of Dundee v. Morris* (44). The most important case, in my opinion, which bears upon this question is the case of *Grimond v. Grimond* (7). There a testator directed his trustees to divide a portion of the residue of his estate to and among such charitable or religious institutions and societies, as they might select. The House of Lords held that the bequest was void for uncertainty. The dissenting judgment of Lord Moncreiff applies with great force to the conditions prevailing in India. Speaking of religious purposes, he says (page 608*): "It is said, that the term 'religious purposes' is more restricted and definite than 'public purposes.' This may be true, but it does not follow that the term 'religious purposes' is sufficiently specific to be enforced. Indeed there may be as much doubt and dispute as to its interpretation and limits as in regard to 'public purposes.'" This view was upheld by the House of Lords. If there is so much difficulty in understanding the words 'religious purposes' in a place like Scotland, where there are not many religions, in India, the difficulty will be all the greater, where it is not possible to postulate definitely what the Hindu religion is. No two persons will give

the same answer to the question "what is Hindu religion." The popular expression "Hindu religion" includes in its ambit the highest aspirations of the human soul and the noblest ethics as well as the lowest and debased forms of animal and demon worship. Lord Halsbury says, (at page 126), "In my opinion, the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a Will for him instead of making a Will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any Will himself; he has allowed some one else to make a Will for him after his death, and that the law will not allow." Lord James said "I concur for the reasons which have been given by Lord Moncreiff in his judgment."

What the respondent wants us to do here is to make a Will for the testator. He says, if the objects are not plain the Court should frame a scheme and make the objects plain. That is not the function of the Court and as Lord Halsbury has laid down no Court can make a Will for any testator.

In *Kendall v. Granger* (43), a bequest of personality to trustees to be applied for the relief of domestic distress assisting indigent but deserving individuals, or encouraging undertakings of general utility was held void as a charitable bequest. Lord Langdale laid down the law thus: "Now, a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own, that, in my opinion, according to the decisions which have taken place in this Court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable and comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this

*Page of 1905 A. C.—[Ed.]

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Court is in the habit of considering charitable."

•I will now consider briefly the Indian Cases on the point. In *Chandi Charan Mitra v. Haribola Das* (16), it was held that under the Hindu system of Law a general endowment for the expenses of worship of God without giving the name of the deity for whose benefit the endowment is to take effect, was void for uncertainty. This case follows the case in *Phundan Lal v. Arya Pritinedhi Sabha* (47), where it was held, that a dedication not to any particular deity which was subsequently to be installed in a temple but to *Thakurji* in a *Thakurdwara* without mentioning the particular *Thakurji* to whom the property was dedicated was void for uncertainty. Richards and Banerjee, JJ., held that "it was not a dedication to any particular deity which was subsequently to be installed in a temple. It was a dedication to the *Thakurji* in his *thakurdwara* without mentioning the *Thakurji* to whom the property was dedicated. As we have already said, there was no *Thakurji* and no *Thakurdwara*, therefore, the dedication was bad on the ground of uncertainty."

In *Parbati Bibee v. Ram Barun Upadhyaya* (48) the residuary clause of the Will of a Hindu governed by the Mitakshara School of Hindu Law was as follows: "As to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper." The bequest of the residuary estate was held to be a valid and charitable bequest. Henderson, J., observes at page 899: "In my opinion, however, the direction to spend and give away the whole of the residue in charity governs the words that immediately follow and, therefore, the purposes for which the fund is to be spent must be charitable though they may at the same time be religious. Upon this construction, the executor will not be justified in applying the subject of the trust to objects which

are not charitable. In that view I declare the bequest of the residuary estate of the testator to be a valid charitable bequest."

If the objects of the charity are not definite but if the purpose is definite the Court will uphold the bequest. In *Gordhan Das v. Chunhi Lal* (19) it was held that a settlement of the income of seven villages to the extent of Rs. 500 a month to be applied to charitable purposes at a *Dharmasala*, which he had founded was held to be a good bequest. The learned Judges observe at page 114: "The dedication in the case before us is for charitable purposes and for charitable purposes alone. A trust for such purposes, that is, for charity generally, will always be carried out notwithstanding that the objects of the charity are not specifically defined. The Court can, if necessary, in such a case, settle a scheme for its proper administration."

In the present case also, if the whole amount is to be spent for only a charitable purpose, it will be competent for the Court to indicate the objects of the charity.

In the light of these decisions I must hold, that the bequest contained in clause 11 of the Will is void for uncertainty.

The next point urged is that the defendant is not bound to give effect to the terms of the Will as he, by right of survivorship, is entitled to the whole of the property. It is urged that unless at the time of the adoption it was made a condition, that the bequest should not be disturbed by the adopted son and unless the natural father had agreed to such a condition, the adopted son could repudiate the terms of the Will making a bequest in favour of charity. Before I consider the law on the point, it is necessary to notice a few facts. The testator died in 1909. The adoption was not made till 1911. The widow was in possession of the property and carried out the terms of the Will. The testator was a well-known man in the place. The widow made the adoption by virtue of the power given in clause 6 of the Will. The Will is a registered Will. It cannot be contended, that the natural father was unaware of the terms of the Will and did not tacitly acquiesce in the terms of the Will. The appellant urges that the plaintiffs should have specifically pleaded that there was such a consent on the part of the natural

(47) 11 Ind. Cas. 260; 33 A. 793; 8 A. L. J. 944.
(48) 31 C. 895; 8 C. W. N. 653.

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father. I do not think that, in the circumstances, it was incumbent on the plaintiff to plead that. The Court is entitled to draw an inference of tacit consent from the evidence in the case. It is unnecessary to discuss this point at length on account of my decision on point (2).

The appellant relies upon *Balkrishna Motiram Gujar v. Shri Uttar Narayan Dev* (23), *Bhyri Appamma v. Bhyri Chinnamm* (49), *Lakshmi v. Subramanya* (50). In *Balkrishna Motiram Gujar v. Shri Uttar Narayan Dev* (23) a Hindu, who was in possession of ancestral property executed, when he took the defendant in adoption, a Vyavastapatra with the consent of the natural father of the defendant whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified temple. The Court held, that the grant in favour of the temple was invalid as not having been recognised by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu Law. The learned Judges observe at page 549*: "It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law. But no authorities have been quoted before us in favour of any other persons in such connection or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of the Hindu Law. That burden has here not been discharged." A Hindu can settle a portion of his ancestral property upon anybody he likes and then take a boy in adoption. The adopted boy could not under such circumstances impeach an alienation made before the date of his adoption. The Court would view with suspicion only such arrangements as are unreasonable and subversive of the interests of the adopted son.

The case *Bhyri Appamma v. Bhyri Chinnamm* (49) decided that, in the absence of any agreement with the natural father at the time of adoption, if there is a bequest in favour of the widow in the Will of the testator the adopted son could repudiate the bequest. A widow can, at the time when she makes the adoption with the consent of *sapins*, stipulate for the maintenance of herself in cases of disputes arising between her and her adopted son and such an arrangement is reasonable. The Courts would uphold such an arrangement, but where a widow makes an adoption by virtue of the power given under the Will of her husband then, unless the natural father was aware of the provisions of the Will, it might be contended that if the father was aware of the provisions he would not have given his boy in adoption and, therefore, the adopted son is not bound. In *Ganapati Ayyan v. Savithri Ammal* (24), Subrahmaniam Ayyar, J., observes as follows: "If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not affect the right of the charity, for the latter right had vested long before the adopted son's right arose. The second defendant's rights must, therefore, be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that Exhibit A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same to the duly constituted manager of the charity only as the trustees for the charity. Compare *Baskar Purshotam v. Sarasvatibai* (51)."

In the present case the widow acted in conformity with the Will and it cannot, on the evidence before us, be said that the natural father was unaware of the terms of the Will. The adopted son cannot approbate and reprobate the Will at the same time. He owes his existence to the Will and, in the circumstances of the case,

(49) 58 Ind. Cas. 511; 12 L. W. 17.

(50) 12 M. 493; 4 Ind. Dec. (N. S.) 691.

*Page of 43 B.—[Ed.].

(51) 17 B. 486; 9 Ind. Dec. (N. S.) 316.

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the onus lies heavily upon him to show that his father was unaware of the provisions in the Will and he has not discharged the burden. I find this point against the appellant. The question of arrears need not be considered, as I hold that the defendant cannot be directed in this suit, even if it were held that the suit is maintainable, to pay up any amount due to the trust.

The appeal, therefore, should be allowed. As regards costs, the three executors appointed by the testator declined to act and all the trouble has evidently arisen on account of their unwillingness to act. One of the executors is the second plaintiff. In these circumstances, I think, the plaintiff ought to be made to bear the costs of the appellant both in this Court and in the lower Court.

The appeal is allowed with costs throughout, and the Memorandum of Objections is dismissed without costs.

V. N. V. *Appeal allowed:*
Z. K. & H. B. *Memo. of objections dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1865 TO 1868
OF 1921.

March 16, 1923.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

BANDHU RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM KISHUN SONAR AND ANOTHER
PLAINTIFFS AND JANGALI SONAR—
DEFENDANT—RESPONDENT.

Hindu law—Alienation by father—Legal necessity—Justification—Immediate necessity.

In order to justify an alienation made by a Hindu father it is not sufficient in law to show that at the time of the alienation debts binding upon the family were outstanding. It must further be shown that the alienation had to be undertaken under the pressure of present necessity for the discharge of the debts. [p. 1011, col. 1]

Where, therefore, a Hindu father sold the joint family property in order to pay off debts including a mortgage-debt which formed the bulk of the consideration but which was not to fall due till two years and some months subsequent to the date of the sale, and the scheme adopted for the liquidation of the debts by the father was not a prudent one:

Held, that the sale could not be held to have been made for a legal necessity and was liable to be set aside. [p. 1011, col. 2.]

Second appeal from a decree of the District Judge, Gorakhpur, dated the 25th May 1921.

Mr. E. A. Howard and Dr. K. N. Kalju, for the Appellants.

Mr. J. M. Banerji, for the Respondents.

JUDGMENT.—The plaintiffs in the four suits which have given rise to these appeals are the sons of Jangli Sonar who was impleaded as the third defendant. The suits were brought to set aside four transactions of sale carried out by Jangli in favour of the other defendants to the suits on the allegation, among others, that there was no legal necessity for them.

The Court of first instance decreed the claims subject to payment of certain sums which in its opinion were binding debts for which the plaintiffs were liable. The lower Appellate Court, though differing from the First Court in respect of some of its findings, affirmed the decrees in all four suits. It is argued in second appeal that on the findings arrived at by the District Judge he ought to have held that all four transfers were for legal necessity and ought, in consequence, to have dismissed the suits.

The four sale-deeds were for a total consideration of Rs. 4,799-15-0, made up of the following items:—

(a) Rs. 4,100 left for payment to one Sheo Saran Sahu on account of his mortgage dated the 14th August 1915;

(b) Rs. 249-15-0 due in respect of a promissory-note of the 15th August 1917.

(c) Rs. 50 paid in cash to the vendor prior to registration; and

(d) Rs. 400 paid to one Bilas for repairs of a house belonging to the family.

The learned Judge has found that all these sums except the item (c) of Rs. 50 represent debts which were properly incurred and were binding upon the joint family. But he has, notwithstanding, upheld the judgment of the First Court on the ground that

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although there were in existence at the time of the sales now complained of these debts which bound the family estate, the sales should not be allowed to stand because the vendor was careless and did not take due precautions with regard to the terms of the sales. He refers to the following facts: first, that a sum of Rs. 4,100 was allowed to remain in the hands of the purchasers although the debt could not be called in by the mortgagee till the 30th August 1920 (the sale took place in 1918) the result of this according to the learned Judge, was to cause loss to the family represented by the interest which might have accrued to them, had the money been handed over to Jangli at the time of the sales. In the second place, he found Jangli guilty of negligence in not providing that the purchasers should combine in order to offer the mortgage-money in a lump sum and in not making an arrangement with the mortgagee for the acceptance of the mortgage-money before the due date. The Judge thought that these omissions were calculated to involve the family in expensive litigation. He concludes by saying that the deeds "were entirely apart" from the pecuniary interest of the family, meaning presumably that the sale transactions instead of being beneficial were prejudicial to the family.

The reasoning of the Judge is not altogether clear but we take it that he meant to find that, although there were binding debts, the scheme which Jangli adopted for their liquidation was not a prudent one.

It is argued, however, that the sales ought to have been upheld on the ground that the Judge had found that the whole consideration, except the sum of Rs. 50, was applied or to be applied to the discharge of debts which were legally binding.

But in order to justify an alienation made by the father it is not sufficient in law to show that at the time of the alienation debts binding upon the family were outstanding. It must further be shown that the alienation had to be undertaken under the pressure of a present necessity for the discharge of the debts. As was pointed out in the well-known case of *Hannuman Prasad Pande*, the power of a limited owner to charge the estate can only be exercised rightly in case of need or for the benefit of the estate.

The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. These observations which were made in regard to a case of mortgage apply with equal, if not greater, force to a case of sale.

As the learned Counsel for the respondents points out there is nothing whatever to show that there was any immediate pressure upon Jangli at the time he executed these sale-deeds. The mortgage debt which forms the bulk of the consideration was not to fall due till the 30th August 1920, that is, two years and some months subsequent to the date of the sales, and the mortgagee could not have been insisting upon payment of his debt then for he had no right to do so.

In the absence then of proof of any compelling necessity for these transfers by sale, it must be held that they were not alienations which could be justified under the Hindu Law. There is also the further consideration that the Court below finds that the sales cannot be held to have been made for the benefit of the joint family. We hold, therefore, that no ground has been established for interference with the lower Court's judgment and we dismiss these appeals with costs including in this Court fees on the higher scale.

M. D. J.

*Appeals dismissed.***BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL NO. 174 OF 1923.

April 3, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice.VISHNU NAGAPPA VENKATESH
BHAT—DECREE-HOLDER—APPELLANT*versus*

NARASINHA PANDURANG PRABHU.

—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182
(5)—Execution of decree—Application for postponement, whether step-in-aid of execution.*

An application made by the decree-holder and the judgment-debtor to the Executing Court to postpone the execution proceedings with a view,

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to a compromise being arrived at between the parties, does not constitute a step-in-aid of execution within the meaning of clause (5) of Art. 182 of Sch. I to the Limitation Act.

Abdul Kadir Rowther v. Krishna Malamal Nair, 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305, relied on.

In order to be regarded as a step-in-aid of execution, an application must ask the Court to do something which would assist the decree-holder in furthering the execution of the decree.

An application for postponement of the proceedings with a view to a compromise being arrived at is not intended as a step towards execution but as a step which, if successful, would avoid the necessity for execution.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 153 of 1921, confirming the decree passed by the Subordinate Judge, Honavar, in Darkhast No. 178 of 1921.

Mr. G. P. Murdeshwar, for the Appellant.

JUDGMENT.—This is an application made by the decree-holder for execution of his decree, the application having been made on June 15, 1921. The previous application for execution was presented on May 25, 1918, and it is conceded that the present application must be time-barred unless between these two dates something has been done which would set a new period of limitation running. The appellant relied upon an application made by both the parties to the Court to postpone the application in the Darkhast of May 25, 1918, with a view to a compromise being arrived at between the parties. It is difficult to see how such an application can be considered as a step-in-aid of execution. There was no application made to the Court to do something which would assist the decree-holder in furthering the execution of the decree. On the other hand, the application was similar to the application in *Abdul Kadir Rowther v. Krishna Malamal Nair* (1) which was called an application to get an order in retardation, which would not in the ordinary course be considered as a step-in-aid of execution. We think the learned Judge was right in saying that this application was not intended as a step towards execution, but it was

intended as a step which, if successful, would avoid the necessity for execution. If the suggestion for a compromise failed, then it was necessary for the decree-holder within three years from the date of the Darkhast, to file another Darkhast. The appeal, therefore, is dismissed.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1153 OF 1921.

April 17, 1923.

Present:—Mr. Justice Gokul Prasad.

PARSOTAM—PLAINTIFF—APPELLANT

versus

GANPAT RAM—DEFENDANT—

RESPONDENT.

Agra Tenancy Act (II of 1901), s. 79—Dispossession by stranger with zemindar's permission—Suit for recovery of possession—Limitation.

Where a tenant is dispossessed from a portion of his holding by a person who takes possession of it with the permission of the *zemindar*, the dispossession must be deemed to be a dispossession by the *zemindar*, and a suit for recovery of possession will be barred by limitation if brought more than six months after the dispossession.

Ram Lal v. Chunni Lal, 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 281, *Balbhaddar Chaubey v. Somaroo Rai*, 27 Ind. Cas. 914; 13 A. L. J. 295; followed.

Second appeal against the decree of the District Judge, Ghazipur, dated the 29th of April 1921.

Mr. U. S. Bajpai, for the Appellant.

Mr. K. Varma, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of a portion of a fixed rate tenancy and removal of a house built upon it by the defendant. The defendant pleaded in reply that the construction was not on plaintiff's land, that the plaintiff had not been in possession of the land within 12 years, that he built on the land with the permission of the *zemindar* who was in possession, and that in any event the plaintiff's right, if any, on the land had become extinct because of dispossession by the *zemindar* for more than six months. The Courts

(1) 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305.

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below have concurred in dismissing the plaintiff's claim. The First Court expressly held that the suit was barred by six months' rule of limitation. It also found that the defendant had, as a matter of fact, encroached upon a part of the plaintiff's land. These findings have been confirmed on appeal and the plaintiff comes here in second appeal. It is not necessary now to refer to the findings on the issues referred by me as the case has been argued by the appellant on the ground of limitation only. On the facts found, namely, that a part of the building in dispute stands on the plaintiff's fixed rate tenancy and further that the *zemindar* was responsible for the plaintiff's dispossession I have no hesitation in coming to the conclusion that the decision of the Courts below on the question of limitation is right (see *Ram Lal v. Chunni Lal* (1) and *Balbhaddar Chaubey v. Somaroo Rai* (2)). The plaintiff's suit was, therefore, rightly dismissed. The appeal fails and is dismissed with costs.

M. A. A.

Appeal dismissed.

(1) 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 281.

(2) 27 Ind. Cas. 914; 13 A. L. J. 295.

• LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2508 OF 1922.

May 25, 1923.

Present:—Mr. Justice Moti Sagar.

GENDA RAM AND ANOTHER—DEFENDANTS

—APPELLANTS

versus

RAM CHANDER—PLAINTIFF—AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 16 (sixthly).
—Pre-emption—Sale of different shares in house
—Owner of house contiguous to some shares; whether can pre-empt—*Registration Act* (XV of 1908), s. 17 (2) (v)—Sale of immoveable property—Receipt for earnest-money, whether compulsorily registrable—*Specific Relief Act* (I of 1877), s. 23—Specific performance—Discretion of Court.

Three co-owners of a house sold the respective portions of the house owned by them to the same person on different dates by separate sale-deeds and for varying considerations, Plaintiff, who

owned a house which was contiguous to two of the portions sold, brought a suit to pre-empt the sale of all the portions sold;

Held, that the mere fact that all three portions sold were at one time parts of a single house was not sufficient in law to enable the plaintiff to claim pre-emption in respect of that portion which was not independently subject to his right of pre-emption. [p. 1015, col. 1.]

A document which merely evidences the receipt of earnest-money in respect of a sale of immoveable property of the value of more than Rs. 100 and does not in any way create or declare any rights in the property, but recites that another document would subsequently be executed which would serve as a document of title in respect of the property agreed to be sold falls within the purview of section 17 (2) (v) of the Registration Act and is not compulsorily registrable. [p. 1015, col. 1.]

Courts have an absolute discretion to decree specific performance or not. [p. 1015, col. 2.]

Specific performance should be refused where it is likely to prove a source of constant trouble and friction between the parties and would not result in an appreciable advantage to the plaintiff, or where the decree for specific performance is likely to prove nugatory owing to the exercise by a subsequent vendee of a superior right of pre-emption. [p. 1015, col. 2.]

Second appeal from a decree of the District Judge, Karnal, dated the 11th July 1922, modifying that of the Munsif, First Class, Karnal, dated the 14th November 1921.

Lala Shamair Chand, for the Appellants;

Lala Jagann Nath, for the Respondents.

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2509 and 2510 of 1922 are connected and may conveniently be disposed of by one judgment. The plaintiff in all these three cases is one Ram Chander, and the suits relate to three different portions of a house in ruins at Karnal, possession of which is claimed by him by right of pre-emption. With respect to the portion which is the subject-matter of dispute in Suit No. 77, there is a further allegation that the defendant-vendor had agreed to sell it to the plaintiff for Rs. 180 prior to its sale to Gaiinda Ram and Ladli Parshad, defendants-vendees, and that the plaintiff was consequently entitled to claim specific performance of the contract in respect thereof, irrespective of his claim, on the ground of pre-emption. It was further alleged that the plaintiff had paid a sum of Rs. 50 to the defendant-vendor by way of earnest-money and that in any case he was entitled to its refund and to damages which he

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assessed at Rs. 130. The property sold was owned by the defendants in the following shares:—

(1) Asa Ram, one-half, and (2) Har Sarup and Ram Sarup, one-half in equal shares.

It will be convenient for the sake of reference to designate these shares by the names of A, B and C.

On the 6th of January 1920 Har Sarup and Ram Sarup vendors sold to the defendants, Gaiinda Ram and Ladli Parshad, the portion A for a sum of Rs. 200. The sale-deed was registered on the 27th of January 1920. This is the sale which forms the subject-matter of attack in suit No. 78.

On the 28th of January 1920 Asa Ram sold the portion B to the same vendees for a sum of Rs. 300, and had the sale-deed registered on the next day, i.e., the 29th of January 1920. It is with reference to this portion that specific performance of this contract is claimed by the plaintiff in the first instance and a decree for possession by pre-emption in the alternative. This sale is attacked in Suit No. 77.

On the 29th of January 1920 another sale-deed was executed by Har Sarup and Ram Sarup in respect of the portion C in favour of the same vendees for Rs. 300 and registered on the 30th of January. It is in Suit No. 79 that this sale is attacked by the plaintiff. The plaintiff claimed pre-emption in respect of A and C on payment of Rs. 100 each and in respect of B on payment of Rs. 130. In this suit it was further prayed that in case it was found that the plaintiff was entitled neither to the specific performance of the contract nor to a decree for pre-emption, he should be given a decree for return of the earnest-money and damages.

The Trial Court dismissed the plaintiff's suit in respect of the portion A on the ground that the property by virtue of which pre-emption was being claimed was not contiguous to the property sold, and that, therefore, the plaintiff had no right of pre-emption superior to that of the defendant-vendees. The suit in respect of the portion C was decreed on payment of Rs. 200. As to the suit relating to the portion B it was held that the plaintiff was not entitled to the specific performance of the contract but that he should be given a decree

for pre-emption subject to the payment of Rs. 200. The plaintiff was also given a decree for Rs. 50 against the vendor which had been paid to the latter by the former by way of earnest-money. No appeal was preferred by Asa Ram, vendor, against the decree directing him to pay Rs. 50 to the plaintiff. The vendees, however, appealed in the two suits, Nos. 77 and 79, relating to portions B and C which had been decided against them by the Trial Court. The plaintiff Ram Chander filed cross-objections in these suits on the question of costs and on the issue relating to the specific performance of the contract which had been decided against him. He also appealed against the dismissal of Suit No. 78 relating to the portion A. The Appellate Court reversed the judgment of the First Court in Suit No. 78 on the ground that the three plots sold were all parts of a single house which was contiguous to the plaintiff's house, and that, therefore, it did not very much matter if the particular portion A was situated at some distance and not actually touching the house of the plaintiff. The decree of the Trial Court in Suit No. 79 relating to portion C was maintained by the Appellate Court, and the vendee's appeal dismissed. As to Suit No. 77 relating to the portion B the finding of the Trial Court that the plaintiff was not entitled to claim specific performance of the contract as also the finding that the plaintiff be given a decree for pre-emption was upheld but the pre-emption money was raised from Rs. 200 to Rs. 300.

Against these decisions three appeals have been preferred to this Court by the defendants-vendees, and the points for determination are:—

(1) whether the plaintiff is entitled to claim pre-emption in respect of portions A and C;

(2) whether the plaintiff is entitled to claim specific performance of the contract in respect of portion B;

(3) if not, whether he is entitled to claim pre-emption in respect of this portion, and

(4) if the plaintiff is entitled neither to the specific performance of the contract nor to a decree for pre-emption, whether he is entitled to any damages, and, if so, to what extent.

GENDA RAM V. RAM CHANDER.

On the first question I have no hesitation in holding that the plaintiff has no case and that the decree for possession by pre-emption granted to him by the Court below should be set aside. It is indisputable that the house was owned by different co-sharers and sold by means of different sale-deeds. The sale-deeds were executed and registered on different dates and the prices fixed for the shares sold were also not exactly the same. The plaintiff's house, by virtue of which he is claiming pre-emption, adjoins at the back the portions B and C only. It is admitted that the portion A is situated at a distance of about 11 feet and that it does not adjoin the plaintiff's house. The mere fact that all three portions sold were at one time parts of a single house is not sufficient in law to enable the plaintiff to claim pre-emption in respect of any particular portion if the latter is not independently subject to that right. In the present case pre-emption was claimed on the ground of contiguity and contiguity alone. The plaintiff having failed to establish the ground upon which the suit was based, the suit ought to have been dismissed, and I hold accordingly.

On the second question the plaintiff relies upon a document, dated the 22nd of January 1920, under which a sum of Rs. 50 was paid to the defendant-vendor by way of earnest-money and the latter agreed to sell the portion B to the plaintiff for a sum of Rs. 180. Both the Courts below have concurrently found that this document is inadmissible in evidence for want of registration. This finding, in my opinion, is obviously wrong. The document merely evidenced the receipt of the earnest-money and did not in any way create or declare any rights in immoveable property of the value of more than Rs. 100. The receipt clearly recited that another document would subsequently be executed, which would serve as a document of title in respect of the portion agreed to be sold under that receipt. The document clearly falls within the purview of section 17 (2) (v) which provides, that a document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another

document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest is not compulsorily registrable. In my opinion this document did not require registration and both the Courts below were wrong in excluding it from evidence. The execution of the document is admitted by the defendant-vendor, and I fail to understand why he should not be held bound by it. The question for consideration is, whether, under the special circumstances of this case, specific performance of the contract should or should not be decreed in favour of the plaintiff. On this question the first point to be taken into consideration is, whether the defendants-vendees are purchasers in good faith without notice. None of the Courts below have given any finding upon this point but it is unnecessary to remand the case for the purpose as, in my opinion, this is not a case in which specific performance should be decreed even if the finding on the question of good faith and notice is in favour of the plaintiff. It is not denied that the defendants-vendees have now become the owners of the whole house by purchase. The portion B is situated in between the two portions A and C with respect to which the plaintiff's suit for pre-emption must be dismissed. If a decree is given in favour of the plaintiff in respect of the portion B, it would be a source of constant trouble and friction between the parties and would not result in an appreciable advantage to the plaintiff. Moreover, it appears from the plan that this house and the houses A and C have a common entrance from the street, which would give the defendants-vendees a superior right of pre-emption to claim this property under section 16 (fourthly) of the Punjab Pre-emption Act. The decree for specific performance, therefore, even if allowed, would become nugatory and would not avail the plaintiff in any way whatever. It is not denied that the Courts have an absolute discretion to decree specific performance or not, and I am clearly of opinion that this is not one of those cases in which the plaintiff should be held entitled to such a decree. I accordingly dismiss the suit for specific performance of the contract.

The result of this finding is, that the suit for pre-emption in respect of this portion must also be dismissed. This portion ad-

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joins the portion A, and having been purchased a couple of days after the defendants-vendees had become the owners of the portion A, it is clear that the plaintiff cannot have any right of pre-emption superior to that of the defendants-vendees. There is, however, no reason why a decree for damages should not be given in favour of the plaintiff. It is proved beyond doubt that a contract for the sale of the property had been entered into between the parties prior to the sale to the vendees. Specific performance has not been decreed in favour of the plaintiff for special reasons to which reference has already been made. The property was originally agreed to be sold for Rs. 180 and was sold only a few days after for Rs. 300. Under section 73 of the Indian Contract Act the plaintiff, in my opinion, was certainly entitled to claim damages which naturally arose in the usual course of things. These damages are clearly ascertainable, and I am of opinion, that the plaintiff is entitled to claim the difference between the contract price and the price at which the property was subsequently sold, namely, Rs. 120. On the finding that the plaintiff is not entitled to claim pre-emption in respect of the portions A and B it is obvious that the suit with respect to C must also be dismissed. This portion was purchased last when the defendants-vendees had already become owners of the adjoining portions. It is obvious that the defendants-vendees had as much right to purchase this portion as the plaintiff, and the defendant-vendor having exercised his right in favour of the defendants-vendees, it is not open to the plaintiff to challenge the sale merely because his house also is contiguous to the house sold.

The result is, that all the three appeals are accepted and the plaintiff's suit dismissed with costs throughout. The plaintiff, however, will be given a decree for Rs. 120 against Asa Ram, defendant-vendor, in addition to Rs. 50, which have already been decreed in his favour by the Courts below.

Z. K.

Appeals accepted.

ALLAHABAD HIGH COURT.

APPLICATION FOR REVIEW OF JUDGMENT IN
SECOND CIVIL APPEAL No. 232 OF 1922.

March 16, 1923.

Present.—Mr. Justice Lindsay and
Mr. Justice Rafique.

Musammqi MARIAM-UN-NISSA BIBI—
PLAINTIFF—APPELLANT

versus

BABU RAM AND OTHERS—DEFENDANTS
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLVII,
r. 1—Second appeal, disposal of—Discovery
of fresh evidence—Review.*

An application for review based on the ground of discovery of fresh documentary evidence cannot be entertained after the disposal of a second appeal.

Nandhishore v. Anwar Hussain, 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979, followed.

Application for review of judgment in Second Appeal No. 232 of 1922, under O. XLVII, r. 1 of the Code of Civil Procedure.

St. C. Thompson, for the Appellant.

Messrs. P. L. Banerji, U. S. Bajpai and N. P. Upadhyaya, for the Respondents.

JUDGMENT.—This is an application for review of judgment. The judgment sought to be reviewed is a judgment passed on the 19th May 1922; dismissing, under O. XLII r. 11, the appeal of one Mariam-un-nissa. The appeal was a second appeal.

The application made before us sets out, that certain documentary evidence has been discovered since, which if entertained would prove that the plaintiff-appellant, Mariam-un-nissa, had a good title to the property in dispute.

The application for review has been opposed on the ground that it is not competent to this Court to entertain such an application and various authorities have been cited before us. We need only refer to an authority of our own Court in *Nandhishore v. Anwar Hussain* (1).

It was held there following two other rulings that the High Court cannot in a second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered which;

(1) 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979.

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if sufficiently proved, would have led the Court below to come to a different finding although had such evidence been discovered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower Appellate Court for a review of judgment on the ground of discovery of fresh evidence.

We have already adverted to the fact that the second appeal has already been disposed of by this Court. We can see no ground upon which the present case can be distinguished from the case to which we have just referred. It has been argued before us that the matter before this Court is not a question of fact but a question of law. We cannot agree with this. The case of the plaintiff all through was that certain Revenue Records had been wrongly prepared and that if the records had been prepared in a proper manner her title to the property would have been established. The Courts below found that the plaintiff had failed to give satisfactory proof that the record in question has been wrongly framed. The documentary evidence which has now been discovered is put forward for the purpose of showing that the record was, as a matter of fact, incorrectly framed and to induce us, therefore, to decide in favour of the plaintiff on that basis.

The question whether any particular record has been rightly or wrongly framed is certainly a question of fact and not a question of law. Following the ruling of this Court, to which we have referred above, we hold that this application is not entertainable and we, therefore, dismiss it with costs including in this Court fees on the higher scale.

Let these papers be returned to the Collector of Moradabad.

M. D. J. *Application dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 286 OF 1922.

April 9, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

VISHNU VISHVANATH NIMKAR—

AND OTHERS—DEFENDANTS—APPELLANTS
versus.RAMCHANDRA SADASHIV NIMKAR—
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Minor members, position of—Advantage—Necessity.

An alienation of joint family property by the manager would affect the shares of the minor co-parceners only if it is proved that the alienation was for necessity.

The manager of a joint Hindu family cannot justify the sale of family property merely on the ground that the sale at the time appeared to be advantageous.

Palaniappa Chetty v. Deivasikamony Pandara Sannadhi, 39 Ind. Cas. 722; 44 I. A. 147 at p. 156; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.), referred to.

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 95 of 1920, varying the decree passed by the Subordinate Judge, Devrukh, in Civil Suit No. 139 of 1918.

Mr. V. B. Virkar, for the Appellants.

Mr. P. V. Kane, for the Respondent.

JUDGMENT.—We think that this appeal must succeed. Defendants Nos. 3 and 4 were minors at the time when the property was sold and the sale would only affect their share if it be proved that it was for necessity. It is going too far to say that a manager of a Hindu joint family can justify a sale of joint family property merely on the ground that the sale at the time appeared to be advantageous. The pertinent passage on the subject in Mayne on Hindu Law and Usage can be found at pages 476 and 477, last Edition. At the bottom of page 477 there is the following passage from the judgment in *Palaniappa Chetty v. Deivasikamony Pandara Sannadhi* (1):—

“No authority has been cited giving any countenance to the notion that a *shebait*

(1) 39 Ind. Cas. 722; 44 I. A. 147 at p. 156; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.).

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is entitled to sell *debuttar* lands solely for the purposes of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the *debuttar* land itself."

The Commentary says:—

"The case referred to the latitude of alienation permissible to a *shebait* in charge of *debuttar* lands. But it was argued... and decided on the footing that the same principles were applicable as those which regulate the rights of alienation passed by the manager of joint family property."

It would be going much further than any principle of Hindu law warrants to hold that because a manager of joint family considers it advantageous at the time to exchange joint family land for money, such an alienation can be treated as justified and, therefore, binding on the minor members of the family.

The decree, therefore, of the Trial Court must be restored and the appellants will be entitled to their costs throughout.

Z. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1672 OF 1921.

February 22, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Sahu RAGHUNATH SINGH AND OTHERS
—DEFENDANTS—APPELLANTS

versus

Seth SRINARAIN AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Hundi executed by manager—Liability of co-parceners—Unsecured debt—Liability of estate—Debt by manager—Presumption—High rate of interest—Necessity—Burden of proof.

A *hundi* executed and signed by the manager of a Hindu joint family as such for family necessity is binding on the entire co-parcenary body. [p. 1018, col. 2; p. 1019, col. 1.]

Krishnanand Nath Khare v. Raja Ram Singh, 66 Ind. Cas. 150; 20 A. L. J. 233; (1922) A. I. R. (A.) 116; 44 A. 393, followed.

The manager of a Hindu joint family can incur simple debts in his capacity as such manager and on behalf of the family. [p. 1019, col. 2.]

Dhiraj Singh v. Manga Ram, 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec. (N. S.) 196 and *Kallu v. Fayaz Ali Khan*, 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173, distinguished.

There is no presumption that a debt incurred by the head of a Hindu joint family is one incurred on behalf of the family. The person who asserts that a particular debt of the manager is binding on the family must prove it. [p. 1019, col. 2.]

Soiru Padmanabh Rangappa v. Narayanrao, 18 B. 520; 9 Ind. Dec. (N. S.) 855, relied upon.

Where the rate of interest of a loan taken by the manager of a Hindu joint family is unduly high, the creditor in order to bind the family estate must prove not only the necessity for the loan but also the necessity to borrow it at so extravagant a rate. [p. 1019, col. 2; p. 1020, col. 1.]

Nawab Nazir Begam v. Rao Raghunath, 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 44; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49, followed.

Second appeal from a decree of the District Judge, Budaun, dated the 30th of August 1921.

Dr. K. N. Katju, for the Appellants.

Mr. Harnandan Prasad, for the Respondents.

JUDGMENT.—These appeals arise out of four suits based on four *hundis* executed in November 1914 by Harnam Singh deceased. The defendants-appellants are nephews of Harnam Singh and formed a joint family with him. It has been found by both the Courts below that the debts were incurred in connection with the marriage of one of the appellants, Sahu Raghunath Singh, and that the amount borrowed for the purpose of the marriage was not excessive in view of the status of the family. On this finding it necessarily follows, and it has been held by the Court below that the debts were incurred for legal necessity.

Two pleas have been urged in appeal. The first is that, inasmuch as a *hundi* is a negotiable instrument within the meaning of the Negotiable Instruments Act, it could not be enforced against the appellants whether it was incurred on behalf of the joint family or not. This point, as the learned Advocate for the appellants, admits, has been definitely decided against him in the recent case of *Krishnanand Nath Khare v. Raja Ram Singh* (1).

(1) 66 Ind. Cas. 150; 20 A. L. J. 233; (1922) A. I. R. (A) 116; 44 A. 393.

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It is sufficient for us to say that we agree entirely with the judgment in that case and that we propose to follow it.

The second point taken is that, because the debts were simple debts not secured on the joint family property, they must be treated as personal debts of the manager and are not binding on the other members of the joint family. The learned Counsel for the appellants goes so far as to argue that even where there is a distinct finding that the debts were incurred by the manager as such and on behalf of the joint family, no liability is incurred except a personal liability on the part of the manager.

In Appeals Nos. 1671 and 1672, no such plea was taken in either of the Courts below, and if these had been the only two appeals before us we should have been disposed to dismiss the plea on the simple ground that the appellants were setting up a new case in second appeal, which they are not entitled to do. In the other two Appeals Nos. 294 and 295 of 1922, the point was raised and it has been expressly found by both Courts that the debts were incurred by the manager as such and on behalf of the joint family.

The only semblance of authority which the learned Counsel has been able to adduce for the argument he advances consists of two cases, *Dhiraj Singh v. Manga Ram* (2) and *Kallu v. Faiyaz Ali Khan* (3), in which, it was held, that, where a widow in possession of her husband's estate has incurred simple debts the creditors cannot after her death enforce those debts by sale of the family estate against the reversioners even though the purpose for which the debts were incurred might have been one for which the widow would have been justified in charging the property. It is suggested that the position of the widow and the position of the manager of a joint family are identical. This is not the case. There are no doubt certain resemblances between the two and that the purposes for which they are entitled to charge the joint family property are, generally

speaking, the same. The widow, however, has never to act on behalf of other co-owners. The very fact that the estate has come into her hands shows that the co-parcenary body has ceased to exist. The widow has not, as a manager has, to incur debts and enter into all sorts of transactions in the ordinary course of administration of the estate on behalf of the co-parcenary body of which he is the head. The proposition that a manager can incur simple debts in his capacity as such and on behalf of the family never seems to have been doubted. There are a large number of cases in which it has been held that there is no presumption that any such debt was incurred by the manager on behalf of the family, and some of these cases such as *Soiru Padmanabh Rangappa v. Narayanrao* (4) are cases of simple debts. It is laid down that the person who asserts that a particular debt is binding on the family must prove it, but all these cases clearly assume that, if it is proved the members of the joint family will be liable. The case of *Krishnanand Nath Khare v. Raja Ram Singh* (1) referred to above is also an authority on this point. The case is very similar to the one before us. In that case a *hundi* executed by a manager of the joint family for family purposes, was held to be binding on the entire co-parcenary body. For these reasons we reject both the pleas advanced on behalf of the appellants.

In Appeal No. 1672 a cross-objection is put forward by the respondents as to the rate of interest allowed. The *hundi* carried interest at 18 per cent. per annum. The Courts below have held that, although the debt was incurred for family necessity, there was no necessity to borrow the money at such a high rate of interest. There is the authority of the Privy Council in *Nawab Nazir Begam v. Rao Raghunath* (5), that, where the rate of interest is unduly high a creditor in order to bind the

(2) 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec. (N. S.) 196.

(3) 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173.

(4) 18 B. 520; 9 Ind. Dec. (N. S.) 855.

(5) 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 (P. C.).

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estate must prove not only the necessity for the loan but the necessity to borrow it at so extravagant a rate. The point taken by the respondents is that they paid up the interest on the original loan, so far as it was then due, in 1917. They suggest, therefore, that the interest should only be reduced from that date. This contention is, in our opinion, unsound. In so far as Harnam Singh acted without legal necessity the appellants are not bound by his acts. The appellants are the nephews and not the sons of the deceased and no question of antecedent debt arises. The appellants cannot be compelled to pay an unnecessary high rate of interest merely because during the period since the loan was incurred Harnam Singh made to the creditors a payment on account.

The result is that we dismiss all four appeals with costs including in this Court fees on the higher scale.

We also dismiss the cross-objection in Appeal No. 1672 with costs.

M. A. A.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 501 OF 1922.

April 6, 1923

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

VENKATRAMAN RAMA HEGDE KANNI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BABURAYA VENKATESH PRABHU—

PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), ss. 27, 32 (2)—Suit instituted in Court not invested with small cause powers—Trial and decision after Court invested with such powers—Appeal, whether competent.

In order to bar an appeal against a decree in a suit of the nature of a small cause it is necessary that the Judge trying the case should, before the institution of the suit, have been invested with Small Cause Court jurisdiction entitling him to hear the particular suit.

Sambhu Dhanaji v. Ram Vitlu, 28 B. 244; 5 Bom. L. R. 1008, followed.

A suit of the nature of a small cause was instituted in the Court of a Sub-Judge who was not invested with Small Cause Court powers. Before the suit came on for trial the Sub-Judge was invested with such powers, but he tried the suit as a regular suit and decided it.

Held, that an appeal lay from the decree of the Sub-Judge inasmuch as under clause (2) of section 32 of the Provincial Small Cause Courts Act, the Sub-Judge could not have tried the suit as a small cause, his Small Cause Court powers having been conferred upon him after the suit was instituted.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 150 of 1921, confirming the decree passed by the Subordinate Judge, Honavar, in Civil Suit No. 226 of 1920.

Messrs. G. P. Murdeshwar and D. R. Ugrankar, for the Appellant.

Mr. Nilkant Atmaram, for Respondent No. 1.

JUDGMENT.—The plaintiff sued to recover Rs. 100 as balance due for Mulgeni rent in the Court of the Subordinate Judge of Honavar. The Judge then presiding in that Court had no Small Cause Court powers, but when the suit came on for trial it was decided by Mr. Halbhavi who had Small Cause Court powers up to Rs. 100. The defendants filed an appeal to the District Court, when the District Judge held that there was no appeal on the ground that it was a Small Cause Court suit, and although it had been tried as a regular suit the question of appeal would depend upon the nature of the suit and not on the way in which it was described.

The attention of the District Judge does not seem to have been drawn to the decision of this Court in *Sambhu Dhanaji v. Ram Vitlu* (1). In that case the suit was filed for recovery of Rs. 81-4-0 in the Court of the Subordinate Judge who had only at that time Small Cause Court powers up to Rs. 50. His powers were subsequently raised to Rs. 100 before the suit came on for hearing. But the suit was decided by him as a regular suit and the claim was allowed. In appeal it was held by the District Judge that no appeal lay. In revision it was held by the High Court that under section 32 (2) of Act IX of 1887 it was necessary that the Judge should, before the institution of the suit, be invested with Small Cause Court

(1) 28 B. 244 J. 5 Bom. L. R. 1008.

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Jurisdiction entitling him to hear the particular suit. In this case when the suit was filed the Judge had no Small Cause Court powers at all, and, therefore, on that circumstance depended the question whether the appeal lay to the District Court when the suit came to be ultimately decided in the Subordinate Judge's Court. This is not a second appeal, but an appeal from order, as the District Judge held that no appeal lay to his Court.

The appeal must be allowed and the case sent back to the Court of the District Judge to be disposed of according to law.

Costs to be costs in the appeal.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL, APPEAL No. 49 OF 1922.

April 21, 1923.

Present:—Mr. Baker, J. C., and

Mr. Hattifax, A. J. C.

LAKSHMAN—DEFENDANT—APPELLANT
versus

KESHOA RAO—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 14, 29 (b)—C. P. Land & Revenue Act (II of 1917), s. 169 (i) (b)—Partition proceedings—Title suit—Limitation—Suit filed in wrong Court—Exclusion of period.

Before its amendment by Act X of 1922, section 29 (b) of the Limitation Act of 1908 operated to exclude the applicability of section 14 of the Act to a suit filed in accordance with an order passed under clause (b) of section 169 (i) of the C. P. Land Revenue Act. [p. 1022, col. 1.]

Abdul Hakim v. Latifunnissa Khairun, 30 C. 533; 7 C. W. N. 550, *Kalimuddin Mollah v. Sahibuddin Molla*, 54 Ind. Cas. 705; 47 C. 300; 24 C. W. N. 4; 30 C. L. J. 455 and *Kopparthi Lingayya v. Aravelli Chinmarayana*, 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (F. B.), relied on.

Appeal from the decree of the First Subordinate Judge, Nagpur, dated the 1st February 1922, in Civil Suit No. 37 of 1921.

Messrs. M. R. Bobde and M. R. Indurkar, for the Appellant.

Mr. R. N. Padhye, for the Respondent.

JUDGMENT.—The respondent in this appeal applied to the Deputy Commissioner for an imperfect partition of the village of Irsi which is the common property of himself and the two appellants, each party owning a half share in it. The parties have for some years been in separate possession of different parts of the *sir* and *khudkasht* lands in the village, the appellants holding at present 193'14 acres of *sir* and 144'51 acres of *khudkasht* and the respondent 144'91 acres of *sir* and only 15'60 acres of *khudkasht*. Before the Revenue Officer the appellants pleaded that all the *sir* and *khudkasht* lands were the exclusive property of the party in possession of them, and on the 4th of November 1920 the Revenue Officer passed an order in the following terms:—"Issues framed and explained. I require the applicant under section 169 Land Revenue Act to institute a suit in the Civil Court within 6 months for the settlement of the questions raised in the issues or to have them settled within 6 months by a lawful compromise or award. Case may be filed for the present till the case is decided." The terms of this order are those of clause (b) of section 169 (i) of the Land Revenue Act, 1917.

(2) The respondent, in accordance with the totally incomprehensible but very common habit of Indian litigants, waited till the very last day of the period of six months allowed to him and on the 4th of May 1921 filed the suit out of which the present appeal arises in the Court of the Additional District Judge, valuing his claim at exactly Rs. 10,000. On the 7th of May 1921 Mr. Dharmadhikary, the Additional District Judge, endorsed the following order on the plaint. "Plaint presented on 4th May 1921 by plaintiff's Pleader, Mr. R. N. Padhye. It is returned for presentation to proper Court as the suit is cognisable by the Court of the First Sub-Judge, Nagpur, the subject-matter of it being of the value not exceeding rupees ten thousand." The plaint bears a further endorsement, made and signed by the plaintiff's Pleader, who also appeared for him in this Court, which is as follows. "Plaint

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received back on 16th June 1921. Presented on 16th June 1921."

(3) In anything like strictness, it would have to be held that the plaint was returned on 7th May 1921 as it bears an endorsement by the Judge in accordance with r. 10 (2) of O. VII to that effect and the endorsement by the Pleader is unauthorised and ought not to be considered at all. It is not, however, denied by the respondent that the plaint was in fact left lying in the Court of the Additional District Judge till after the Courts closed for the vacation on the 15th of May and was actually taken back and presented in the Court of the Senior Subordinate Judge on the 16th of June, the first day after the end of the vacation. There is no indication of this having been done with the knowledge of the Judge beyond the fact that in the interval Mr. Dharmadhikary had been transferred from the Court of the Additional District Judge to that of the Senior Subordinate Judge, so that the plaint was both returned by him and presented again to him. The respondent has, however, as has been said, accepted the position that the plaint was returned and presented again on the same day, and nothing more need be said about this matter.

(4) The plea has been raised in this Court by the appellants that the suit is barred by the Law of Limitation, and the plea must undoubtedly succeed unless section 14 of the Limitation Act saves the plaintiff. That section would certainly do so under section 29 of the same Act as it now stands, but section 29 was brought into its present form by Act X of 1922 and these proceedings of 1921 must be governed by section 29 of the Limitation Act, 1908. Under clause (b) of the first part of that section nothing in the Act can affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India. Authority does not seem to be needed for the proposition that these words exclude the operation of section 14 of the Limitation Act in respect of a suit filed in accordance with an order passed under clause (b) of section 169 (1) of the Central Provinces Land Revenue Act, 1917. It is, however, to be found in the

Full Bench ruling of the Calcutta High Court in *Kalimuddin Mollah v. Sahibuddin Molla* (1) affirming the previous decision of the same Court in *Abdul Hakim v. Latif-unnessa Khatun* (2), in the judgment of the Full Bench of the Madras High Court in *Kopparthi Lingayya v. Araveti Chin-narayana* (3) and in that of Batten, A. J. C., in the unreported case of *Balkrishna v. Bala*.*

(5) For the respondent it has been urged that that order under section 169 of the Land Revenue Act cannot take away his right to get the declaration he seeks from the Civil Court within the ordinary period prescribed for such a suit. That is so, but it is obvious, in view of the provisions of clause (b) of the second sub-section of section 169 of the Land Revenue Act, that the declaration would be a *brutum fulmen* if he did get it; on the renewal of the still pending proceedings for partition, for which the appellants would apply if the respondent did not, the Revenue Officer would have to decide that the appellants were exclusive owners of all the *sir* and *khud-kasht* in their possession, and the matter would thereafter be *res judicata* in their favour and against the respondent. For these reasons it must be held that the plaintiff's suit was barred by time when it was instituted. The decree of the lower Court will accordingly be set aside and the plaintiff's suit will be dismissed. The plaintiff-respondent must pay all the costs in both Courts.

Z. K.

Decree set aside.

(1) 54 Ind. Cas. 705; 47 C. 300; 24 C. W. N. 4; 30 C. L. J. 455.

(2) 30 C. 532; 7 C. W. N. 550.

(3) 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (F. B.).

*Since reported as 46 Ind. Cas. 879.—[Ed.]

KAHANDAS NARAIN v. JIVAN PRAG.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 125 OF 1921.

April 11, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

KAHANDAS NARAIN AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

JIVAN PRAG AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Hindu Law—Adoption—Sister's son—Sudras—
Leva patidars of Gujarat, whether Sudras.*The *leva patidars* of Gujarat are *Sudras*, and
the adoption of a sister's son is valid among them.
[p. 1023, cols. 1 & 2.]Among *Sudras* there is no necessity to prove
a custom permitting the adoption of a daughter's
son or a sister's son. [p. 1023, col. 2.]*Manchharam Bhiku v. Dattu Bhiku*, 54 Ind. Cas.
110; 21 Bom. L. R. 1172; 44 B. 166, followed.First appeal from the decision of the
First Class, Subordinate Judge at Broach,
in Civil Suit No. 129 of 1919.Messrs. R. W. Desai and I. K. Vakil, for
the Appellants.

Mr. M. B. Dave, for Respondent No. 1.

Mr. R. J. Thakore, for Respondents
Nos. 2—4.

JUDGMENT.—The plaintiffs sued for a declaration that the adoption of the first defendant was invalid and accordingly to recover possession of the property specified in the plaint. The relationship of the parties is shown in the pedigree at page 2. The original holder of the suit property was one Parag Ranchhod who died leaving a widow Parvati and a sister Lakhi. Parvati adopted the first defendant Jivan, son of Lakhi. Plaintiffs, sons of Naran, who was the first cousin of Ranchhod, claimed that to the property in suit which was *bhagdari* property, paternal kinsmen succeeded in preference to female heirs, so that if the adoption of the first defendant was declared to be invalid, they would be entitled to succeed. The learned Judge held that as the property was *bhagdari*, the plaintiffs would succeed in preference to Lakhi, the sixth defendant. But he held also that the adoption of the first defendant was valid and accordingly dismissed the plaintiffs' suit.

The learned Judge discussed the evidence on the question whether the plaintiffs had established that they being *Leva patidars* of Gujarat could be considered to be *Vaishyas* and not *Sudras*, and he came to the con-

clusion (1) that the weight of the evidence was against the plaintiffs' plea that they were *Vaishyas*; (2) that there prevailed a custom in the caste to take a sister's son or daughter's son in adoption. As pointed out by Mr. Justice Shah in *Manchharam Bhiku v. Dattu Bhiku* (1), if the parties are *Sudras*, there is no necessity to prove a custom permitting the adoption of a sister's son or daughter's son. But it seems to me to be perfectly clear on the evidence that such an adoption was recognised in this community and that would, therefore, go some distance towards showing that the parties were *Sudras* and not *Vaishyas*. Now the evidence, although it may be said to be somewhat indeterminate as well as conflicting, is of very much the same character as in *Manchharam Bhiku v. Dattu Bhiku* (1), in which the appeal was heard by Mr. Justice Shah and myself. Mr. Justice Shah said (p. 1176*):—

"The second question is whether the lower Court is right in its conclusion that the parties are *Sudras*. The evidence on this point has been fully discussed on behalf of the appellants; and in view of the facts found by the lower Court as to the customs obtaining in the community to which the parties belong, it is not necessary to examine the oral evidence in detail. It is found by the lower Court that the members of the community to which the parties belong have no *Vedic* rites and *Sanskaras* prescribed for the twice-born classes among them; that they have not the chief *Sanskara*, *Munj*, which makes a man *Dwij*; that they wear the sacred thread only occasionally; that this occasional wearing also is probably of a recent growth; that they have all the customs which one should expect among the *Sudras*, viz., adoption of a daughter's son, and of sister's son, divorce, *Pat* marriage, widow re-marriage and non-tonsure of the widows which are all badges of an inferior or unregenerate caste as observed by the High Court in *Gopal Narhar Safray v. Hanmanta Ganesh Safray* (2)."

Compare that with what was said by the First Class Subordinate Judge at page 6:—

(1) 54 Ind. Cas. 110; 21 Bom. L. R. 1172; 44 B. 166.

(2) 3 B. 273; 2 Ind. Dec. (N. S.) 183.

*Page of 21 Bom. L. R.—[Ed.]

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"In brief, it is an established fact that *Lewa Kunbis* have no *Vedic* rights and *Sanskaras* prescribed for the *Dwij*; that they do not perform chief *Upanayan Sanskara* which makes a man *Dwij*; that they do not wear sacred thread; that they have all the customs which one should expect among the *Sudras*, viz., divorce and *Natra* marriage by widows, and also adoption of a daughter's or sister's son."

We think that on the evidence there is sufficient justification for the conclusion at which the learned Judge arrived. Again, in *Maychharam Bhiku v. Dattu Bhiku* (1) Shah, J., said at page 1178*—

"It is to be noted that the caste to which the parties belong, and which used to be described originally as *Kunbi* caste has recently been described according to the evidence as *Lewa Kunbis*; and it seems to me that an attempt has been made on behalf of the defendants to show, if possible, a higher status with a view to escape the liability in the present suit. The description of the caste *Pajne Kunbis*, which was originally given to this caste, has apparently been changed to, *Lewa Kunbis* during the last twenty years."

In the same way in this case, it is apparent from the evidence that there have been endeavours in the community to establish their status as *Vaishyas*. Some of the witnesses for the plaintiffs even admitted that they were not *Vaishyas* by birth, but only by deeds. Considering, therefore, the whole of the record and the opinion which was formed on that record by the First Class Subordinate Judge, a Hindu of considerable experience in Gujarat, we think that his decision was right and that, therefore, the appeal must be dismissed with costs. Defendant No. 1 is entitled to his costs in both the Courts. Cross-objections allowed as to costs. Other cross-objections are dismissed.

Z. K.

Appeal dismissed.

* Page of 21 Bom. L. R.—[Ed.]

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 82 OF 1921.

April 30, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Lala SAHEB SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Lala GIRDHARI LAL AND OTHERS—
DEFENDANTS—RESPONDENTS

Hindu Law—Joint family—Transfer by father—Property passing out of family—Sons' power to challenge transfer—Transfer, private—Legal necessity.

Where ancestral property has passed out of a Hindu joint family either under a conveyance executed by the father in consideration of an antecedent debt or in order to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that they were so contracted. [p. 1025, col. 2.]

A purchaser at an auction-sale of joint family property for the father's debts, in the absence of notice that the debts were contracted for immoral purposes, is not bound to make enquiry beyond what appears on the face of the proceedings. [p. 1025, col. 2.]

Suraj Bansi Kher v. Sheo Persad Singh, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), *Nanomi Babuasin v. Modhum Mohun*, 13 C. 21; 13 I. A. 1; 19 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.), *Bhagbut Pershad Singh v. Gurju Kher*, 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.), *Sahu Ram Chandra v. Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Chandradeo Singh v. Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, relied on.

It is, not, however, correct to say that in every case where joint family property has passed out of the family for satisfaction of the father's debts the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. [p. 1025, col. 1.]

Where a property has been sold by the father to pay off a debt and the sons bring a suit to recover it, and the property has not been sold at public auction, it lies upon the transferee to justify the alienation of the estate, by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity. [p. 1026, col. 1.]

First appeal against the decree of the Subordinate Judge, Meerut, dated the 9th of December 1920.

SAHEB SINGH V. GIRDHARI LAL.

Messrs. *Nehal Chand* and *H. K. Mukerji*,
for the Appellants.

Dr. *K. N. Raiju* and Mr. *K. C. Mittal*,
for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for recovery of possession of a shop by avoidance of a sale-deed, dated the 9th of August 1918, executed by the plaintiffs' father Girdhari Lal. The plaintiffs' case was that the property was ancestral and that the sale-deed was without any consideration and, further, that there was no legal necessity for it and that Girdhari Lal was a man of immoral character and habits and the debt, if any, had been tainted with immorality. On behalf of the defendants the allegations contained in the plaint were denied and it was urged that the sale was justified. The learned Subordinate Judge has rejected the evidence of the plaintiffs that Girdhari Lal was a man of immoral character and he has further held that there is no evidence whatsoever to connect the immorality alleged with the amount advanced under the deed. He has further held that the defendants-vendees have shown that in fact part of the sum was paid in lieu of an antecedent debt and that there was legal necessity for the balance.

The plaintiffs have come up in appeal to this Court and challenge the findings of the learned Subordinate Judge.

The learned Subordinate Judge was of opinion that it was the duty of the sons to show why they were not bound by their father's acts. For this view he relies on a passage in Dr. Gour's Hindu Code, at page 590, to the effect that the question of the burden of proof must depend upon whether the property has or has not passed out of the family by an alienation made by the father. If it has, then the son suing to dispossess the alienee must show why he is not bound by the father's alienation.

Reliance is placed on the authority of the earlier Privy Council cases, namely, *Suraj Bansi Koer v. Sheo Persad Singh* (1); *Nanomi Babuasin v. Modhun Mohun* (2) and *Bhagbut Pershad Singh v. Girja Koer*

(3). In all those cases the property had passed out of the family under an execution sale and it was after the execution sale that the sons wanted to challenge the alienation. As was pointed out in the first of these cases, it is only "where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt; or under a sale in execution of a decree for the father's debt, (that) his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." There was no departure in the last two cases from the rules of law laid down in the first case. In the recent case of *Sahu Ram Chandra v. Bhup Singh* (4) their Lordships adhered to the interpretation put by Sir John Stanley in *Chandradeo Singh v. Mata Prasad* (5) on the pronouncement in the case of *Suraj Bansi Koer v. Sheo Persad Singh* (1), and remarked that the correct and useful statement of the law was that it was only where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt.

It is quite clear, therefore, that it is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was

(1) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 113; 3 Suth P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.).

(3) 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.).

(4) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 133; M. L. J. 141 (1917) M. W. N. 439; 22 M. L. T. 221; 6 L. W. 213; 44 I. A. 126 (P. C.).

(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

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tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established) the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity.

In the present case the document in question was in lieu of Rs. 7,500. It consisted of two items, namely Rs. 1,237-8-0 due on a promissory note for Rs. 1,000, said to have been executed on the 2nd of January 1917, and the balance of Rs. 6,262-8-0 paid in cash before the Sub-Registrar.

As to the first item, we think there can be no doubt that it had been paid prior to the execution of the sale-deed. We have the statement of Ram Saran Das, vendee supported by an entry in the account books, that the sum of Rs. 1,000 had been borrowed on the 2nd of January 1917 by Girdhari Lal from him. The amount of the principal and interest due on it would come up to Rs. 1,237-8-0. Girdhari Lal has not gone into the witness-box to deny the passing of this part of consideration and in fact there is no evidence to contradict the vendee. We are, therefore, of opinion that this sum was due. This being a debt due personally from the father and being antecedent in time to the transaction in question and not having been secured on the property, was clearly an antecedent debt and was binding on the family. As to the balance, the defendants' case is, that Girdhari Lal was very much indebted and that there were numerous debts outstanding against him in the bazaar. Before the execution of the sale-deed the vendee was assured by Girdhari Lal that he owed a number of these debts and was in urgent necessity to pay them. Ram Saran's version is that he actually made enquiries in the bazaar and learnt from a number of people that sums of money were due to

them from Girdhari Lal; that after this enquiry he agreed to advance the money to Girdhari Lal. In support of this Ram Saran Das has gone into the witness-box and he has produced some of these creditors. Mohan Lal, witness, has stated that Rs. 1,000 had been advanced by him to Girdhari Lal under a promissory-note and that there are entries in his account books. Peare Lal, another witness, has sworn that a sum of Rs. 1,150 was paid to him on account of the debt due to him. Ram Richpal Singh has stated that Rs. 880 were realised by him on the 9th August 1918 from Girdhari Lal and that there are entries in his account books to prove it. Another Ram Richpal Singh has proved that a sum of Rs. 662 was paid to him on the 28th October 1918 as part of the amount due on a promissory-note for Rs. 600 dated the 11th February 1916. We have also a statement of one Mohan Lal that on the 5th November 1918 he was paid Rs. 3,533 by Girdhari Lal. The total of these sums comes to Rs. 6,225. There is also evidence to the effect that there were other debts due from Girdhari Lal at the time the sale-deed was executed. The learned Subordinate Judge has believed the evidence of these witnesses except that of Peare Lal. The reason given by him for disbelieving this last mentioned witness is that he has not produced any *bahi khata* or documentary evidence in support of the alleged loan, and that it is possible that he has come to support the defendant, he being a friend of his. Peare Lal apparently is a respectable witness. He pays Rs. 500 or 600 Government revenue and about Rs. 300 income-tax. He had stated that the money advanced had belonged to his wife, and it was on that account that it was not entered in his *bahi khata*. We must say that we see no reason to disbelieve his statement. Peare Lal stated that he returned the document as soon as it was paid off which, of course, might have been done. In our opinion, therefore, the defendant-vendee had before taking the sale-deed made reasonable and sufficient enquiries to satisfy himself that antecedent debts were existing and that Girdhari Lal had necessity to transfer the property in order to pay off those debts,

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It was not absolutely necessary for Ram Saran Das to prove how the money advanced by him was actually applied, but in this particular case, we are of opinion, that he has also proved that the greater part of this money was certainly applied for the purposes mentioned.

To disprove the existence of any legal necessity the plaintiffs led evidence to show that Girdhari Lal was a man of immoral character, that he had had two mistresses one after the other and was addicted to drinking and gambling. Four witnesses named, Ashfaq Ali, Puran Devi, Ram Prasad and Shiam Sunder have been examined. Their evidence, however, is only of a general character and has been wholly rejected by the learned Subordinate Judge. We see no reason to differ from his view. Furthermore, the evidence of these witnesses does not in any way connect any of the items proved by the defendant-ven-dee to have been due from Girdhari Lal with his immorality or gambling. We are, therefore, of opinion that it is not open to the plaintiffs to challenge this alienation without proving that these debts are tainted with immorality or illegality. This they have failed to do. The result is that this appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

M. A. A.

*Appeal dismissed.***BOMBAY HIGH COURT.**

CIVIL EXTRAORDINARY APPLICATION

NO. 261 OF 1922.

April 5, 1923.

Present.—Sir Norman Macleod, K.T., Chief Justice, and Mr. Justice Crump.

THE SARASPUR MANUFACTURING COMPANY—PLAINTIFF—APPLICANT
versus

B. B. AND C. I. RAILWAY COMPANY—
DEFENDANT—OPONENT.

Civil Procedure Code (Act V of 1908), O P I r. 17, Appendix A—Suit against Railway Company—Misdescription—Amendment.

In a suit against a Railway Company the plaintiff described the defendant as "The Agent A. B. Railway Company, Ltd." The Company, however, was aware that the suit was brought against itself and not against the Agent:

Held, that the fact that the word "Agent" preceded the name of the Railway Company in the description of the defendant was merely a misdescription and little more than a clerical error which could be amended at any time without prejudice to the opposite party. [p. 1029, col. 1; p. 1028, col. 2.]

Sinehi Ram Behari Lall v. Agent, East Indian Railway Company, 64 Ind. Cas. 125; 2 P. L. T. 679, dissented from.

Per Macleod, C. J.—If it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought, in the interests of justice, to be allowed, if otherwise the rights of the parties would be prejudiced. [p. 1028, col. 2.]

If a Company is a party to a suit it should be described either as "The A. B. Company, Ltd., having its registered office at—" or as "A. B., a public officer of the C. D. Company." [p. 1028, col. 1.]

Civil Extraordinary Application from an order passed by the Small Cause Court Judge at Ahmedabad, in Civil Suit No. 2538 of 1921.

Mr. H. V. Divatia, for the Applicant.

Mr. Campbell, instructed by Messrs. Crawford, Bayley & Co., for the Opponent.

JUDGMENT.

Macleod, C. J.—These are four companion applications under section 25 of the Provincial Small Cause Courts Act. In all the four cases the plaintiffs desired to sue the Bombay, Baroda and Central India Railway Company to recover damages for the loss of goods. The title of the defendant was entered in each plaint as follows:—"The Agent, B. B. & C. I. Railway Company, Ltd." but the prayer was that the defendant Company should pay the amount sued for. In two of the suits the defendant Company filed their written statements pleading to the merits without taking any objection to the form of the title. In the other two suits they filed written statements not only pleading to the merits, but also objecting that the plaintiffs' suits could not lie as they were filed against the defendant's Agent. The Small Cause Court Judge dismissed all the suits on the ground that they were badly framed. He relied upon a decision of Mr. Justice Ross in *Sinehi Ram Behari Lall v. Agent, East Indian Railway Company* (i).

Now, it cannot be disputed that in the past there have been a very large number of suits filed by traders in this Presidency against

(i) 64 Ind. Cas. 125; 2 P. L. T. 679.

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Railway Companies in many of which the title of the defendant has been entered in the plaint in this form: "The Agent A. B. Railway Company, Ltd." and that hitherto no objection whatever has been taken to this description. There can be no question that the Railway Companies considered that they were the defendants in such suits, although it may be conceded that the title of the defendant was not in accordance with the forms in Appendix A, First Schedule to the Civil Procedure Code, under heading "Title of Suits."

If a Company is a party to a suit it should be described either as "The A. B. Company Ltd., having its registered office at" or as "A. B., a public officer of the C. D. Company."

Now, in the case to which I have referred the East Indian Railway Company appeared and filed a written statement pleading to the merits of the case. It was only when the case came on for hearing that the Pleader of the defendant Company took the objection that the suit was not maintainable inasmuch as the Agent of the East Indian Railway Company and not the Company had been sued. The learned Judge said (page 126):—

"This is not a case of mere misnomer, which could have been made a basis of defence. The suit was brought against the Agent of the East Indian Railway Company and the Company was not impleaded according to law. In law the Company is not a defendant to the suit and is not before the Court as defendant. The frame of the suit can only be amended by substituting the Company as defendant in place of the Agent, and it is a well-recognised principle that, however liberal the Court may be in allowing amendments in the interest of justice, an amendment will not be allowed which would prejudice the rights of the opposite party existing at the date when the proposed amendment is to be made. At this stage the East Indian Railway Company has acquired a right by virtue of the Statute of Limitation and this right should not be prejudiced by any amendment at this stage."

With all due respect, I cannot agree with this reasoning. It seems to me in the interests of justice that if it can be said that

there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. If the defendant Company considered as having had no notice that these suits had been brought against it by the plaintiffs then undoubtedly limitation would be considered as running up to the date when the defendant Company had notice of the claims by being made a party to the suits. But the defendant Company not only knew perfectly well that the various claims had been made against it, but also considered itself the party being sued. If the Company was not a party, no appearance should have been entered. In my opinion the fact that the word "Agent" preceded the name of the Railway Company in the description of the defendant amounted merely to a misdescription, and, therefore, the learned Small Cause Court Judge should have allowed the title to be amended. The suits must be restored to the Board to be tried on their merits.

It is desirable, however, to point out that in future parties who wish to sue a Company must follow the directions in Appendix A to the Code.

Rule will be made absolute with costs.

Crump, J.—In my opinion we should in this question look to the substance rather than to the form and if we do that I agree that we must dissent from the decision in *Sinehi Ram Bihari Lall v. Agent, East Indian Railway Company* (1). It seems to me that there is no doubt whatever that all the parties were perfectly well aware that the suit was against the Railway Company and that it was against the Railway Company that the relief was asked for. Though the description of the Company may not have been that which is in conformity with the Schedule A to the Code of Civil Procedure, nevertheless, the Company was substantially on the record, and it appears to me impossible to argue that if the title in the plaint were amended so as to bring it in conformity with the Schedule, the result would be to prejudice any rights acquired by the company by virtue of the Statute of Limitation. For, as I have said, the Company was in substance the defendant at the time the plaint was first filed, and it was not a case

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of adding a new party in which case, considerations of that kind might be relevant. It seems to me that really this is nothing more than a misdescription, and, as has been pointed out by my Lord, the Chief Justice, the practice certainly has been to describe Railway Companies in the manner which has been done in the present case. No body up to this time has ever been misled or has ever suggested that any formal amendment to the plaint was necessary. All that would be required to bring the title of the plaint in conformity with the Schedule would be to strike out the word "Agent". Therefore, it seems to me that this is little more than a clerical error which can be amended at any time without any prejudice to the opposite party.

Z. K.

*Rule made absolute.***ALLAHABAD HIGH COURT.**

SECOND CIVIL APPEAL NO. 1695 OF 1922.

March 7, 1923.

Present :—Mr. Justice Rafique and
Mr. Justice Lindsay.

Musammal ALIMAN BEGAM—PLAINTIFF
—APPELLANT

versus

ALI HASAN AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Muhammadian Law—Pre-emption—Several vendees—Talab-i-istishhad, performance of.

The Muhammadan Law of Pre-emption requires that the second demand should be made either in the presence of the vendor or the vendee or on the property sought to be pre-empted. The singular words "vendor and vendee" include the plural also.

Therefore, *talab-i-istishhad*, if it is made in the presence of the vendee, cannot, in case there are more vendees than one, be said to be properly made, unless it is made in the presence of all the vendees.

Second appeal against the decree of the District Judge of Shahjahanpur, dated the 17th of July, 1922.

Mr. M. A. Aziz, for Dr. S. M. Sulaiman,
for the Appellant.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant on the ground of pre-emption under the Muhammadan Law. The claim was decreed by the Court of first instance. The Appellate Court, however, took a different view, and dismissed the claim. The ground upon which the Appellate Court dismissed the claim was, that the second demand, known under the Muhammadan Law as "*talab-i-istishhad*," was not carried out by the plaintiff-appellant as required by the Muhammadan Law. It appears that the vendees were husband and wife. The pre-emptor went to the house of the vendees and sent for the husband, who came out. In the presence of the witnesses the pre-emptor made a second demand, the husband listened to it. The wife was admittedly not present at the time when the second demand was made. The Muhammadan Law requires that the second demand should be made either in the presence of the vendor or the vendee or on the property, that is the subject of pre-emption. The singular words, "vendor and vendee" include the plural also. According to the interpretation of the Muhammadan Lawyers, if the demand is made neither in the presence of the vendor, nor on the property sought to be pre-empted, but in the presence of the vendee then in case there are more than one vendee, the demand should be made in the presence of all.

The view taken by the learned Judge of the lower Appellate Court that the second demand made by the pre-emptor was defective is quite correct.

The appeal fails and is dismissed under O. XLI, r. II, of the Code of Civil Procedure.

M. A. A.

Appeal dismissed.

GOVINDDAS V. GANPATDAS.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 282 OF 1921.

March 20, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

GOVINDDAS RAJARAMDAS DEVI

PLAINTIFF—APPELLANT

versus

GANPATDAS NARROITAMDAS—

DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Appeal against order in execution, whether step-in-aid of execution.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution within the meaning of clause (5) of Art. 182 of Sch. I to the Limitation Act.

Kristo Coomar Nag v. Mahabat Khan, 5 C. 595; 2 Ind. Dec. (N. S.) 986, *Nand. Kishore v. Sipahl Singh*, 26 A. 608; A. W. N. (1904) 139; 1 A. L. J. 336, relied on.

First appeal from a decision of the First Class, Subordinate Judge, Satara, in *Darkhast* No. 671 of 1920.

Mr. M. V. Bhal, for the Appellant.

Mr. K. N. Koyajee, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge dismissing the plaintiff's *Darkhast* as time-barred. The decree was a partition-decree passed on June 30, 1906. Some of the suit properties were partitioned by the Commissioner, but it seems that with regard to the house, the subject-matter of the present *Darkhast*, the parties thought that they might arrive at a settlement, with the result that it remained unpartitioned. The last *Darkhast* No. 193 of 1915 taken out by any of the parties was dismissed on September 12, 1917. That was a *Darkhast* by defendant No. 1, and it had nothing to do with the partition of the suit properties. The defendants' appeals to the High Court against the orders passed in that *Darkhast* and on plaintiff's *Darkhast* No. 428 of 1913 were decided on March 1, 1920. The present *Darkhast* was presented on October 4, 1920, and unless time can be computed from March 1, 1920, the present *Darkhast* is clearly time-barred.

In *Nand Kishore v. Sipahl Singh* (1) it was decided that the prosecution of an appeal

(1) 26 A. 608; A. W. N. (1904) 139; 1 A. L. J. 336.

SAJJAD HUSSAIN V. WALI MUHAMMAD.

from an order made in the course of a proceeding in execution of a decree could not be looked upon as an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution within the meaning of Art. 179 of the Second Sch. to the Indian Limitation Act of 1877. The decision in *Kristo Coomar Nag v. Mahabat Khan* (2) was followed. We agree with these decisions.

It certainly cannot be said that an appeal to the High Court against an order in a *Darkhast* is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Courts. So the *Darkhast* in this case was time-barred. The plaintiff has only himself to blame that the house has not been partitioned, since the decree was passed in 1906. Now, he can either come to an arrangement with the defendant for partition of the house or he can file another suit.

The appeal must be dismissed with costs.

Z. K.

Appeal dismissed.

(2) 5 C. 595; 2 Ind. Dec. (N. S.) 986.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1472 OF 1921.

March 6, 1923.

Present.—Mr. Justice Gokul Prasad.

Shaikh SAJJAD HUSSAIN—PLAINTIFF

—APPELLANT

versus

Shaikh WALI MUHAMMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Succession to holding—"Sharing in cultivation," meaning of.

The expression "sharing in cultivation" occurring in section 22 of the Agra Tenancy Act means sharing in actual cultivation. In the case of the subletting of a holding, the tenant cannot himself be said to cultivate, and, therefore, there can be no sharing in the cultivation of such a tenancy. [p. 1032, col. 1.]

SAJJAD HUSAIN v. WALI MUHAMMAD.

Second appeal against a decree of the District Judge, Ghazipur, dated the 10th of May, 1921.

Dr. M. L. Agarwala, for the Appellant.

Mr. Iqbal Ahmad, for the Respondents.

JUDGMENT.—It appears that one Tajammul Husain owned a one-anna-six-pie *Zemindari* share and was in cultivatory possession of certain plots of *sir* land. He made a gift of one-anna-two-pie share to Wali Muhammad, Musammam Butan Bibi and Musammam Majidan Bibi. The defendant, Tufail Ahmad, is an heir of Musammam Majidan Bibi. Later on, he sold the remaining four-pie share to Ali Kabir and thus became an ex-proprietary tenant of the plots of *sir* appertaining to that share. He alleged that the defendants were sub-tenants of the plots appertaining to the aforesaid share and sued for their ejection. In all, there were five suits by the plaintiff, Sajjad Husain, who claimed title as a daughter's son of the late Tajammul Husain. The suits related to various plots of *sir* land. The suits were Nos. 321 to 325 of 1916.

The defence pleaded was that the plaintiff was not an ex-proprietary tenant and that no relation of landlord and tenant subsisted between the parties.

The Trial Court found for the plaintiff on both the issues and decreed the claim.

The defendants in all these suits except Suit No. 323 of 1916 went up in appeal to the Commissioner. The Commissioner however, returned the memoranda of appeal for presentation to the proper Court on the 30th of August 1917 having come to a conclusion that the question of proprietary title was involved in the appeals. On the 1st of September 1917 the appeals were filed in the District Judge's Court and then the District Judge dismissed all the four appeals there being no appeal from Suit No. 323 of 1916, as I have stated above, on the ground that they were barred by limitation. There was a second appeal to this Court and this Court came to the conclusion that the learned District Judge should not have dismissed the appeals summarily but should have gone on and found as a fact whether sufficient cause had been made out for admitting the appeals after the expiry of the period of limitation.

The learned Judge of the lower Appellate Court has found that the appeals were filed before the Commissioner because of the mistaken advice of the lawyers and that the appeals were so filed *bona fide*, and there was sufficient cause for extending the period of limitation. He had some doubts in his own mind about the question whether the appeals really lay to him. He has, however, gone on to find on all the points raised before him and has decreed the appeals and dismissed the plaintiff's claim.

The plaintiff comes here in second appeal and raises three points, (1) that no appeal lay to the District Judge as no question of proprietary title was raised in the appeal; (2) that the plaintiff shared in the cultivation of the holding with his maternal grandfather, Tajammul Husain, and was as such competent to bring the present suit, and (3) that the appeal in the Court below was barred by the rule of *res judicata* inasmuch as the judgment of the Assistant Collector in Suit No. 323 of 1916 in which no appeal had been preferred to the Judge became final and concluded the defence.

As to the last point I may dispose of it shortly. There are not sufficient materials on the record to enable me to decide this question and it is too late to send for those records now.

As to the point that no appeal lay to the District Judge, it is too late now to raise this question. It would appear from ground No. 5 of the grounds of appeal before the lower Appellate Court that question of proprietary title was raised before the District Judge. The plaintiff wanted to eject the defendants on the ground that they were his sub-tenants and the defendants pleaded that they were in possession as donees, that is, in proprietary possession. This ground of appeal must also fail.

As to the remaining point, namely, if the plaintiff shared in the cultivation with his late maternal grandfather, this is a point not covered by any authority of this Court and is one of first impression. Reading the proviso as it stands and giving the words their natural meaning, it would appear that a daughter's son or a collateral could only inherit if he shared in the cul-

GANGADAS NARAYANDAS v. JEKISONDAS MANCHARAM.

tivation of the holding at the time of the tenant's death. I take those words to mean actual cultivation. In case of sub-letting the tenant himself could not be said to cultivate the plots and if the tenant was not himself in cultivation no body could be said to share it with him, and, as here, the land was admittedly let out to the sub-tenants, the plaintiff's claim on the ground that he shared in the cultivation of the holding at the time of the tenant's death must fail. The fact that the plaintiff has succeeded in a civil matter on the ground that he was the heir of his maternal grandfather is beside the question. The point before me is not that the plaintiff was the heir of his maternal grandfather, but that he was not an heir of his maternal grandfather, so far as his ex-proprietary rights were concerned. The plaintiff is consequently not an heir to the ex-proprietary tenancy and his suit on that ground must fail. The suit has been rightly dismissed, and I dismiss the appeal with costs.

M. A. A.

*Appeal dismissed.***BOMBAY HIGH COURT**

SECOND CIVIL APPEAL NO. 307, OF 1921.

March 23, 1923.

Present—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
**GANGADAS NARAYANDAS—AND
OTHERS—DEFENDANTS—APPELLANTS**

versus.

**JEKISONDAS MANCHARAM AND
OTHERS—PLAINTIFFS—RESPONDENTS.**

Pleadings—Appeal, second—Question of fact—Wagering contract.

The question whether a contract is of a wagering nature is a pure question of fact, that is to say, the party disputing that he is liable under the contract has to show that, at the time the contract was entered into, the parties did not intend to carry out the contract, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received.

Second appeal from the decision of the Acting District Judge, Surat, in Appeal No. 50 of 1920, reversing the decision passed by the First Class, Subordinate Judge at Surat, in Civil Suit No. 225 of 1918.

Mr. H. C. Coyajee, with him Mr. M. B. Dave, for the Appellants.

Messrs. G. S. Rao and P. B. Shingne, for the Respondents.

JUDGMENT.—The plaintiffs filed this suit against the defendants to recover Rs. 1,396-9-0 being differences on the suit contracts for purchase and sale of cotton seeds. The defence was that the contracts were of a wagering nature, and the onus would lie upon the defendants to prove that fact. The Trial Court held that the contracts were wagering contracts and dismissed the suit. The Appellate Court came to a different conclusion and decreed the suit in favour of the plaintiffs.

The question whether the contracts were of a wagering nature was really a pure question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received. It is unfortunate that on such a simple question it was considered necessary in the Courts below, before deciding the case, to cite so many authorities. When it is a question of fact in each case as to what was the intention of the parties, there is no necessity whatever to refer to other cases. The test to apply has long ago been definitely settled. The Appellate Judge in dealing with the oral evidence found that he could not come to a definite conclusion in favour of the defendants, and it would necessarily follow, as the defence was not made out, that the defendants could not escape from the legal consequences of the breach of the contracts. The defence having failed in the opinion of the learned Appellate Judge, the plaintiffs were entitled to a decree. As a matter of fact, no second appeal lies as no question of law arises in the appeal.

The appeal must be dismissed with costs.

Z. K.

Appeal dismissed.

JIWANDAS V. AGENT E. I. R. COMPANY.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 317 OF 1922.

April 14, 1923.

Present:—Mr. Baker, Offg. J. C.

D. B. JIWANDAS AND ANOTHER—

PLAINTIFFS—APPLICANTS

versus

THE AGENT, E. I. RY. COMPANY—

DEFENDANT—NON-APPLICANT.

Railways Act (IX of 1890), s. 77, applicability, of—Claim based on non-delivery—Notice to Railway Company.

The provisions of section 77 of the Railways Act apply not only to claims for compensation arising out of loss, destruction or deterioration of goods, but also to claims arising out of non-delivery or wilful mis-delivery. [p. 1033, col. 2.]

Madras and Southern Mahratta Railway Company v. Haridoss Banmali Doss, 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 35; 24 M. L. T. 38; 8 L. W. 340 and *Deorao v. Great Indian Peninsular Railway Co.*, 14 Ind. Cas. 684; 8 N. L. R. 34, relied on.

East Indian Railway Company v. Kali Charan Ram Parshad, 69 Ind. Cas. 103; 3 P. L. T. 215; (1922), Pat. 145; (1922) A. I. R. (Pat.) 106, dissented from.

In the matter of requiring a notice of a claim to a Railway Company in order to enable the latter to make enquiries and, if possible, to recover the goods, there is no reason for making a distinction between cases of loss and cases of non-delivery. [p. 1034, col. 1.]

Courts ought not to import distinctions such as the above into the Railways Act unless they rest upon some basis of sound reason which would be likely to have commended itself to the Legislature. [p. 1034, col. 1.]

The provisions of the Railways Act as to notice must be strictly observed; and a person who is desirous of serving an effective notice of claim must direct it to the Manager or the Agent, as the case may be. [p. 1035, col. 1.]

Application for revision of the decree of the Judge Small Cause Court, Sohagpur, dated 27th October 1922, in Civil Suit No. 528 of 1922.

Mr. J. Sen, for the Applicants.

Mr. P. Lobo, for the Non-applicants.

ORDER.—The plaintiffs, who are a firm carrying on business at Jubbulpur, sued the defendants, E. I. Railway Co., for damages for non-delivery of goods consigned to them at Pipria, in the Small Cause Court at Sohagpur. The suit was dismissed for want of proper notice to the E. I. Railway Co. Plaintiffs apply in revision to have the decree set aside.

2. It is contended on behalf of the applicants (1) that the suit being based on

non-delivery of goods and not on loss, no notice is necessary under section 77 of the Indian Railways Act; (2) that if notice was necessary, sufficient notice was given; and (3) that, in any case, the Court should have examined the parties on this point.

3. As regards point (1), the learned Pleader for applicants relies on a recent case of *East Indian Railway Co. v. Kali Charan Ram Parshad* (1), in which it was held by a Single Judge of the Patna High Court that no notice is necessary under section 77 of the Indian Railways Act in a case of a claim for compensation for non-delivery of goods as distinct from a case of a claim for loss, destruction or deterioration of goods.

4. A contrary view has been taken by the Madras High Court in the *Madras and Southern Mahratta Railway Co. v. Haridoss Banmali Doss* (2) in which a Bench of the Madras High Court held that section 77 of the Indian Railways Act applies not only to claims for compensation arising out of loss, destruction or deterioration of goods but also to claims arising out of non-delivery or wilful mis-delivery. In *Deorao v. Great Indian Peninsular Railway Co.* (3) which was a case of non-delivery, this Court held that the suit was bad for lack of proper notice. The question of necessity of notice does not seem to have been expressly raised. So far as I am aware, the Patna High Court case above referred to is the first case in which it has been held that there any distinction between a claim based on non-delivery and a claim based on loss or damage.

5. It has been contended by the learned Pleader for applicants that the remarks in the Madras High Court judgment are *obiter dicta*. This is not in my opinion correct. In that case an express issue of limitation was raised as to the suit being barred under section 77 of the Act for want of notice, and in dealing with this issue the learned Chief Justice of the Madras High Court dealt with the whole question of notice and pointed out that the liability of Railway Companies is that of a bailee under sections 152 and 161 of the Indian

(1) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.

(2) 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 35; 24 M. L. T. 38; 8 L. W. 340.

(3) 14 Ind. Cas. 684; 8 N. L. R. 34.

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Contract Act, the latter of which covers all cases of non-delivery and mis-delivery, and points out at page 877 * that these sections of the Contract Act, which are applied by the Indian Railways Act, purport to deal not merely with the bailee's duty of safe custody but also with the performance of the bailee's duty to deliver at the proper time. Therefore, Chapter VII of the Indian Railways Act must be taken, and was intended, to cover the whole liability of the Railway Company including among other things the responsibility of the Railway Company for mis-delivery by whatever reason caused. That being so, when section 77 required notice in any claim for compensation for the loss, destruction or deterioration of animals or goods, a notice is required in all claims which arise with reference to the liability defined in the earlier section (72) and in the specified sections of the Contract Act, sections 151 and 161, the latter of which covers all cases of non-delivery or mis-delivery. Section 9 of Act III of 1865 which is reproduced in section 76 of the Indian Railways Act, refers to loss, damage or non-delivery of goods, but in section 76 of the Indian Railways Act it was not thought necessary to reproduce the word "non-delivery," the reason being that cases of non-delivery are already sufficiently provided for by the reference to sections 152 and 161 of the Contract Act in the earlier section. In this matter of requiring notice to the Railway Company within a reasonable time in order to enable them to make enquiries, and, if possible, to recover the goods, there is really no reason for making a distinction between cases in which goods have been delivered inadvertently to the wrong person and cases such as the present, in which they were delivered to a person other than the consignee who claimed to be entitled to them but did not produce the Railway Receipt as he should have done in support of his claim. We ought not to import distinctions of this sort into the Railways Act unless they rest upon some basis of sound reason which would be likely to have commended itself to the Legislature.

6. With these observations of the learned Chief Justice of the Madras High Court I respectfully agree. The view of the Patna High Court is based principally on Arts. 30 and 31 of the Indian Limitation Act, and it is said that there is a cardinal difference between "non-delivery" and the "loss, destruction or deterioration" of goods while in charge of a carrier such as the Railway Company. In the former there is a deliberate withholding of property from the person entitled to its delivery and in the latter the loss, destruction or deterioration takes place on account of certain extraneous causes. In the latter case there is no deliberate withholding of the property though there may be wilful neglect in not taking proper care of the goods. "Section 77 requires notice of the claims arising out of loss, destruction or deterioration of goods delivered to be carried by a Railway Company to be given to the Railway Administration within six months from the date of the delivery of the goods to be carried. This is obviously with a view to enable the Railway Administration to make an enquiry and investigation as to whether the loss, destruction or deterioration was due to the plaintiff's laches or due to the wilful neglect of the Company or its servants, or due to the theft or robbery committed by the servants of the Company. Unless notice of the loss, destruction or deterioration is given promptly, the enquiry would be prejudiced and, therefore, section 77 prescribes that notice must be given within six months from the date of the delivery of the goods. But in a case of non-delivery such an enquiry will not be necessary. In this view also section 77 has no application and the Company is not entitled to a notice in a case of non-delivery. With all respect to the Patna High Court, I am unable to follow this reasoning which appears to me to be importing a distinction into the Railways Act, which is not sound. In the case of a Railway Company which carries hundreds of thousands of parcels, it appears to me that even in a case of non-delivery enquiry will be necessary to enable the Railway Company to find where the goods are. They do business in a large number of places and some time is necessarily required to trace missing goods which

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may be lying in any station on the system. In these circumstances, where an opposite view has been expressed by two High Courts, I prefer to follow the ruling of the Madras High Court, and I hold, therefore, that notice is necessary.

7. Turning to the second point, whether notice was, as a matter of fact, given, the plaintiff has produced a receipt for a registered letter addressed to the Manager or Agent, E. I. Ry. Co. The E. I. Ry. Co. deny receipt of the notice. The notice was addressed in the alternative by the plaintiff because he did not know whether it should be sent to the Manager or the Agent. In *Deorao v. Great Indian Peninsular Railway Company* (3) it was held that a notice to the Traffic Manager is not sufficient even if it comes to the knowledge of the Agent. That, however, was based upon the special circumstances of that case. I need not refer to cases which lay down that the provisions as to notice must be strictly observed, and if the plaintiff is desirous of serving an effective notice of claim the notice must be directed to the Manager or the Agent, as the case may be. These cases will be found quoted in the judgment of this Court referred to above.

8. It has been argued on behalf of the applicant that it may be presumed that the notice was received. There is no reported case in which a notice in the alternative was sent, as in the present case, the notice being addressed to the Manager might possibly have been delivered to the Traffic Manager, but there is no evidence as to whether notices received by the Traffic Manager, supposing such an officer to exist, are handed over to the Agent. In these circumstances, I think, the case must go back for enquiry into the point as to who receives letters addressed to the Manager, E. I. Ry. Co., and whether notices of this kind are handed over to the Agent. Costs will be costs in the cause.

Z. K.

Order accordingly.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 37 OF 1921.

February 19, 1923.

Present:—Sir Norman Macleod, Kt.,

Chief Justice, and Mr. Justice Crump.

AHMED BALLU DABIR AND OTHERS—

DEFENDANTS—APPELLANTS.

versus

GANESH VISHNU PENDSE—PLAINTIFF

—RESPONDENT.

Khoti-nisbat lands—Injali trees, property in—Dunlop's Proclamation, effect of—Kabuliyat, failure of Khot to execute, effect of.

Defendants who had held certain *Khoti-nisbat* lands as tenants of the *Khot* since the introduction of the Survey Settlement, subject to certain rights in the nature of occupancy rights, claimed to be the owners of the *injali* trees standing on the lands. It was found that, before the introduction of the Survey Settlement, the lands used to be let out by the *khot* from year to year on an annual lease. The trees were originally the property of Government.

Held, that by virtue of Dunlop's Proclamation of 1824, the *khot* had become the owner of the trees and that, afterwards, there had been nothing to extinguish those rights or to transfer them to the defendants. [p. 1036, col. 2.]

Collector of Ratnagiri v. Vyankatrao, 8 B. H. C. R. (A. C. J.) 1, followed.

Per Crump, J.—The mere failure on the part of a *vatandar khot* to sign the annual *kabuliyat* can have this result only, that he would not be entitled for the time being to the right of management of the village. That would not, however, affect any other rights which he might have independent of that right of management, such as the right to timber growing in *khoti-nisbat* lands. [p. 1036, col. 2.]

Per Macleod, C. J.—There is no general rule that no *vatandar khot* can claim to be the owner of the soil. With regard to *Khoti khasgi*, and *Khoti-nisbat* lands he is very much in the position of an owner. [p. 1037, col. 2.]

Collector of Ratnagiri v. Vyankatrao, 8 B. H. C. R. (A. C. J.) 1, *Tajubai v. Sub-Collector of Kuldaba*, 3 B. H. C. R. (A. C. J.) 132 at p. 149, *Nagaradas Sanbhagyadas v. Conservator of Forests, Bombay*, 4 B. 264; 7 I.A. 55; 4 Sar. P.C.J. 93; 3 Suth. P. C. J. 700; 2 Ind. Dec. (N. S.) 683 (P. C.), referred to.

Second appeal from the decision of the District Judge, Thana, in Appeal No. 129 of 1919, confirming the decree passed by the Subordinate Judge at Roha, in Civil Suit No. 1159 of 1917.

Mr. N. M. Patwardhan, with him Mr. P. B. Shingne, for the Appellant.

Mr. G. S. Rao, with him Mr. P. A. Bhat, for the Respondent.

JUDGMENT.

Crump, J.—The plaintiff in this case was a *vatandar khot* of the village of Padh-

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van in the Mangaon Taluka of Kolaba District, and the substantial question in the suit is whether the plaintiff or the defendants were the owners of certain *ingali* trees standing upon lands which were in the occupation of the vendors of defendants. These vendors, it is now conceded, were not Dharekaris, but held their lands since the introduction of the Survey Settlement as tenants of the *khot*, subject to certain rights in the nature of rights of occupancy.

The case appears to have been approached in the lower Court on the footing that the Government were formerly owners of the trees growing upon these lands, and there seems little reason to doubt that that is the true view of the matter. The lands are *Khoti-nisbat* lands, and it has been held by this Court in *Collector of Ratnagiri v. Vyankatray* (1) that by virtue of Dunlop's Proclamation of 1824, the *khets* became the owners of the trees standing in such lands. That decision, if followed, is practically conclusive on the facts of the present case, and the same conclusion must follow if the particular circumstances here are considered.

There are three persons, and three only, in whom the rights to these trees are conceivably vested, viz., the Government, the *khot*, and the vendors of defendants, and if it is true, as appears to be the case, that trees were originally the property of Government, then whatever rights Government may have had were conceded by the Proclamation alluded to, and the person in whose favour that grant was made was the person on whose lands the trees were actually growing at the date of the Proclamation.

Now, it is proved in the present case that before the introduction of the Survey Settlement, the lands were let out from year to year by the *khot* on an annual lease or *makia*. That was the general system of the village, and there is nothing whatever to show that these *Khot-nisbat* lands were dealt with on any terms different from those which were applied to the generality of the *khedi* lands in the village. If that is so, there was, before the intro-

duction of the Survey Settlement, no one other than the *khot* who can be said to have had any permanent occupation of the lands, or to have been the 'occupant' of the lands in the popular sense, which was the explanation placed on Dunlop's Proclamation in *Sadashiv v. Secretary of State for India*. (2). The *khot's* connection with the lands *qua khot* was continuous, and as regards the *Khoti-nisbat* lands he had at least *quasi* proprietary rights, which would suffice to make Dunlop's Proclamation operative in his favour.

Therefore, in accordance with the decision in *Collector of Ratnagiri v. Vyankatray* (1), the conclusion would appear to be inevitable that the *khot* by virtue of that Proclamation became the owner of these trees. If that is so, then there has been nothing to extinguish those rights or to transfer those rights to the present defendants.

Apart, therefore, from the question of the annual *kabuliyat* which as to trees governs the rights of the *khot* and of the Government as between themselves, it is clear that the title of the plaintiff here is established. In this view of the case, it seems unnecessary for the plaintiff to fall back upon the *kabuliyat*, or consider the effect of his having failed to sign that *kabuliyat*, owing to the difference that has arisen between himself and Government. But if it is necessary to decide that point, it seems obvious that the mere failure on the part of the plaintiff to sign the annual *kabuliyat* could have this result only, that he would not be entitled for the time being to the right of management of the village. That would not, however, affect any other rights which he might have independent of that right of management, such as the right to timber growing in *Khot-nisbat* lands. Put shortly, it is clear that the defendants have made out no right in their vendors, so that, in accordance with the decisions of this Court, the *khot* must be taken to be the grantee of the rights of Government, at all events as regards *khoti khasgi* and *Khoti-nisbat*

(1) 8 B. H. C. R. (A. C. J.) 13.

(2) 44 Ind. Cas. 872; 29 Bom. L. R. 141.

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lands. It follows, therefore, that defendants obtained nothing by their purchase, and the plaintiff was rightly awarded damages, and an injunction.

The decree of the lower Appellate Court must be confirmed and the appeal dismissed with costs.

Macleod, C. J.—I should like to add one word with regard to the following passage in the judgment of the lower Appellate Judge with regard to the rights of the plaintiff as a *vatandar khot*:—"In the absence of a *sanad* conferring on him the proprietorship of the village, he cannot claim to be owner of the soil." Reference was made to *Tajubai v. Sub-Collector of Kulaba* (3) and *Nagardas Sanbhagyadas v. Conservator of Forests, Bombay* (4). But the latter case does not support the proposition that a *vatandar khot* cannot claim to be owner of the soil in the absence of a *sanad*. Their Lordships of the Privy Council, in referring to *Tajubai v. Sub-Collector of Kulaba* (3), said (p. 271):—

"In that case the Government had resumed the *khoti*, had granted certain rights to the sub-tenants of the estate, and were willing to allow the plaintiff to take the *khoti* again upon certain conditions, namely, that she should be bound by the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the *khoti* except upon those conditions. The reasons for the decision were that the *khot* was not the proprietor of the soil. The learned Judge who decided the case in the first instance went very fully into the matter, and held that the *khot* was merely an hereditary farmer of the revenue. The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain Wingate to which reference was made from the records of the Government of India."

Their Lordships, without expressing any opinion that no *khot* is or can be the proprietor of the soil, thought it was sufficiently clear that the proprietorship of the soil is not vested in every *khot*.

(3) 3 B. H. C. R. (A. C. J.) 132 at p. 149.

(4) 4 B. 264; 7 L. A. 55; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 700; 2 Ind. Dec. (N. S.) 683 (P. C.).

It also appears that Mr. Justice Tucker dissented from the opinions expressed by Arnould and Newton, J.J., in *Tajubai v. Sub-Collector of Kulaba* (3).

Therefore, there is no general rule that no *vatandar khot* can claim to be the owner of the soil. Certainly it would appear to me that with regard to *khoti khasgi* and *Khoti-nisbat* lands, he is very much in the position of an owner. It was so held in *Collector of Ratnagiri v. Vyankatray* (1). I think, therefore, that the plaintiff has established his case, considering the land from which the jungle was cut was *Khoti-nisbat* land, and unless the defendants could satisfy the Court that they were *Dharekaris*, in whom the ownership of the trees might then have been vested, they were not entitled to succeed.

Z. K.

Decree confirmed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 437-B OF 1921.

April 14, 1923.

Present:—Mr. Kotval, A. J. C.

ONKARSA AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

BRIDICHAND AND OTHERS—

DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907) ss. 2 (e), 16 (2), (6), 38—*Right to receive debt, whether property—Payment of debt to insolvent, before order of adjudication, effect of.*

A right to receive a debt is property within the meaning of section 2 (e) of the Provincial Insolvency Act and vests in the Receiver under section 16 (2) of the Act from the date of the application by the insolvent to be adjudged an insolvent. [p. 1039, col. 1.]

The provisions of section 16 of the Provincial Insolvency Act as to the vesting in the Receiver of the insolvent's property are controlled by those of section 38 of the Act and by virtue of the provisions of the latter section a debt vested in the Receiver may be discharged by a *bona fide* payment, without notice, made to the insolvent after the date of the application for being adjudged an insolvent and before the date of the adjudication order. [p. 1039, col. 1.]

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Section 38 of the Provincial Insolvency Act is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency. [p. 1039, col. 1.]

Appeal from the decree of the District Judge, Amraoti, dated the 30th August 1921 in Civil Appeal No. 179 of 1920.

Sir *Bipin Krishna Bose*, Kt. and Mr. *D. T. Mangalmurti*, for the Appellant.

Messrs. *R. R. Jainant* and *S. C. Dutt Chowdhury*, for the Respondents.

JUDGMENT.—An application to have the fourth defendant, Tejpal, adjudged an insolvent was made on the 15th April 1914 and Tejpal was adjudicated an insolvent on the 2nd October 1914. Tejpal was a member with defendants Nos. 1 to 3 of a Ginning Factory Combine for the year 1913-14 of which defendant No. 2 was the custodian. This Combine owed some money to Tejpal for his share of the profits. The Receiver sold by auction the debt owed by the Combine to Tejpal and the plaintiff purchased it for Rs. 85. He files the present suit to recover Rs. 963-4-1 as the principal amount due to Tejpal from the Combine and Rs. 232 interest by way of damages.

Defendant No. 2 pleaded that the total amount due from the Combine to Tejpal was Rs. 1,157-3-1 and that after deducting payments to the extent of Rs. 647-6-0 made to Tejpal and settling the accounts between the various members Rs. 509-13-1 were found due from defendant No. 1 to the Combine and the same amount due from the Combine to Tejpal. He alleged that on the 20th or 21st July 1914 Tejpal agreed to recover the amount direct from defendant No. 1 and his account with the Combine was closed as settled.

Defendant No. 1 pleaded that he paid Rs. 509-13-3 to defendant No. 4 on 22nd July 1914 by the direction of defendant No. 2.

Defendant No. 3 stated that he owed nothing to the Combine that he had received his share of the profits that defendant No. 2 was the custodian and it was the latter's duty to keep accounts and distribute the profits.

It appears that the Rs. 647-6-0 were paid to the insolvent or to the persons by his direction in four sums, namely, Rs. 195-0-6,

Rs. 200, Rs. 227-15-9 and Rs. 24-4-0. There is a difference of a few annas in one or more of these sums but it is immaterial. Of these four payments the first one is not challenged or claimed by the plaintiff, the remaining three are challenged. They were, like the payment of Rs. 509-13-1 by defendant No. 1 to Tejpal, all made after the date of the petition for adjudication but before the date of the order of adjudication.

The plaintiff denied these payments and pleaded that the settlement with Tejpal was fraudulent and did not bind the plaintiff being made after the commencement of the insolvency proceedings and, therefore, invalid.

The Trial Court found that the total amount due to Tejpal was Rs. 1,157-3-1, that payments to the extent of Rs. 647-6-0 were made to Tejpal by the Combine, that Tejpal agreed to receive the balance of Rs. 509-13-1 from defendants No. 1, that the Combine was thus discharged from liability for this amount; that defendant No. 1 paid this amount to Tejpal on the 22nd July 1914, and that there was no fraud or collusion in the matter. It dismissed the suit.

The lower Appellate Court upheld the First Court's decree. It held that there was no fraud or collusion in the matter, and that defendants Nos. 1 and 2 had no knowledge of Tejpal's insolvency when they made the payments to the insolvent. Plaintiff appeals.

A number of points are raised in the memorandum of appeal but only one was pressed at the hearing. Reference was made to clauses 6 and 2 of section 16 of the Provincial Insolvency Act and it was argued that as the adjudication order relates back to the date of the petition for adjudication and the whole of the insolvent's property vests from that date in the Receiver, the right to receive the amount of Rs. 962-2-7 vested in the Receiver on the 15th April 1914 the date of the petition. It was contended that the payments made to the insolvent after this date were not binding on the Receiver or his transferee, the plaintiff.

It is contended by the respondents that the right to receive a debt is not property within the meaning of the Insolvency Act.

MAUNG AUNG U. MAUNG SHWE LIN.

Reference is made to section 2 (e) and it is said property means tangible property. This contention has no force. Section 2 (e) does not profess to define property.

A right to recover a debt is a proprietary right; *vide* Salmond on Jurisprudence, section 82, page 208, 5th Edition. Under section 68 of the English Bankruptcy Act property includes things in action. The claim to the debt is an actionable claim as defined in section 3 of the Transfer of Property Act. It must be held that right to receive money due is property within the meaning of section 16 (2). By reason of relation back under section 16 (6) the right to receive the debt vested in the Receiver from the 5th April 1914. But the provisions of section 16 must be deemed to be controlled by those of section 38, the material part of which is as follows:—

"Subject to the...provisions of this Act with respect to the effect of insolvency of an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency,

* * * * *

"(b) any payment or delivery to the insolvent;

"provided that any such transaction takes place before the date of the order of adjudication."

Even though the debt vested in the Receiver the payments in respect of the debt having been made *bona fide*, that is, without notice of the insolvency proceedings, to the insolvent before the date of the order of adjudication are not invalidated. There is no question here of the effect of the insolvency on any execution, nor is there any question of the avoidance of any transfer or preference. The payments being, so far as the defendants are concerned, valid the defendants are discharged from the debt and cannot be made to pay over again to the Receiver. Section 38 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to the defendants in this case. The effect of the application of section 38 in a case like this seems to be this,

that a debt vested in the Receiver may be discharged by payments made under the circumstances specified in that section to the insolvent.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 225 OF 1921.

June 23, 1922.

Present:—Mr. Justice Pratt.

MAUNG AUNG AND ANOTHER—

APPELLANTS

versus

MAUNG SHWE LIN AND ANOTHER—

RESPONDENTS.

Evidence Act (I. of 1872), s. 18 (2)—Admission by vendor subsequent to sale—Purchaser, whether bound.

A purchaser is not bound by an admission made by his vendor subsequent to the purchase by him. He is not the representative-in-interest of his vendor, though he claims his title by virtue of the purchase through him. [p. 1040, col. 13.]

Second appeal against the decree of the District Judge, Henzada.

JUDGMENT.—Plaintiff sought to redeem certain land on payment of the debt for which it was temporarily handed over. The land was made over to the first defendant in consideration of a debt of Rs. 400, but there was no document drawn up.

First defendant admitted the claim; second and third defendants obtained possession from the first defendant on a money payment, but no deed of sale was drawn up.

Plaintiffs do not allege a mortgage of the land to first defendant, and there was no valid mortgage.

The District Court framed an issue as to whether plaintiffs handed over the land to defendant No. 1 for a debt, but in the judgment altered the issue to one of whether it was mortgaged, and then dismissed the suit on the ground that the mortgage was incapable of proof.

The District Court on appeal rightly remanded the case for evidence, but the

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only relevant issue framed was: "What was the real and actual nature of the transaction between plaintiffs and first defendant?"

It was clear on the pleadings there could be no valid mortgage or sale, and plaintiffs never alleged that there was.

The District Court, nevertheless, held that the transaction was an out-right sale, which was manifestly an unwarrantable finding.

The District Court found that the first defendant admitted the mortgage by plaintiff, and that as second and third defendants derived their title from the first, they were bound by this admission.

Defendants Nos. 2 and 3 cannot be bound by an admission made by their vendor subsequent to the purchase by them. They are not the representatives-in-interest of their vendor though they claim their title by virtue of the purchase through him. It is obvious that this vendor might collude with the original owner and make an untrue admission.

It is perfectly clear, however, that on their own written statement, and the evidence adduced by them, second and third defendants have not purchased under a registered deed of sale, and that their vendor has no valid title. They allege they purchased from first defendant, but not by registered deed, which was the only possible legal mode of effecting a sale.

They did not set up that the first defendant was the ostensible owner with possession, but alleged that plaintiff assigned the land out-right to first defendant for Rs. 400.

The oral evidence adduced by them as to the assignment shows that the transaction was an oral one, and that no registered deed was executed. It is obvious, therefore, that neither the second and third defendants nor their vendor had obtained a valid title to the land.

Plaintiff is entitled to recover on payment of the debt for which the land was handed over, and that is obviously the relief sought. The expression used in the plaint is to "redeem and withdraw."

She did not sue to redeem land mortgaged, but to recover land made over as security for debt on re-payment of the debt.

The Burmese in the plaint is not worded in legal phraseology, and the word "redeem" has a wide meaning, and does not imply a mortgage necessarily, as the Courts below seem to have thought.

The conjunction of the word "redeem" and "withdraw", together with the allegations in the plaint, shows that the suit was meant to be one for recovery of land made over as security for debt on re-payment of the debt.

The decree of the lower Appellate Court was framed as a decree in a redemption suit, and the transaction was wrongly treated as a mortgage.

Plaintiff is entitled to redeem in a popular sense, but not in the legal sense of redeeming mortgaged property.

The decree of the Appellate Court will be modified and plaintiff will be granted a decree for recovery of the land on payment of Rs. 400. Plaintiff will be granted costs in the two Courts below, but in this Court each party will bear its own costs.

W. C. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 877 OF 1921.

February 27, 1923.

Present:—Mr. Justice Gokul Prasad.

BOHRA TARA CHAND AND ANOTHEER—

PLAINTIFFS—APPELLANTS

versus

Musammal RAYAZI BEGAM—DEFENDANT—RESPONDENT.

Easement—Privacy, right of.

The existence of the right of privacy does not depend on the caste or the creed of the person owning the building or on the fact whether or not the building is used by ladies. It is a custom of the country and is protected as such.

Gokal Prasad v. Radho, 10 A. 358; A. W. N. (1888) 135, 6 Ind. Dec. (N. S.) 241 and *Jamiludin v. Abdul Majid*, 28 Ind. Cas. 674; 13 A. L. J. 361, followed.

Second appeal against the decree of the District Judge, Agra, dated the 25th of February 1921.

NEELAKHANDAN NAMUDRI v. VASUDEVAN NAMUDRI.

Mr. N. Upadhyaya, for Mr. G. Agarwala,
for the Appellants.

Mr. N. P. Asthana for the Respondent.

JUDGMENT.

Gokul Prasad, J.—(November 30, 1922.)—This is a plaintiffs' appeal arising out of a suit brought by them for removal of a wall alleged to have been built by the defendant on the plaintiffs' land and for the closing up three windows which were alleged to interfere with the plaintiffs' right of privacy. The defence raised was that the wall stood on defendant's own land and that two of the windows were old ones, and one a new one, and that there was no interference with the plaintiffs' right of privacy. The First Court decided that the wall was on defendant's own land and that the question of right of privacy did not arise as the land was lying waste and was *rasta*. It dismissed the plaintiffs' claim. The plaintiffs went up in appeal and the learned Judge has come to the conclusion that the wall was on defendant's own land and that the plaintiffs could not have it removed. He further went on to hold that as there was no *zenana* house of the plaintiffs, there the question of the right of privacy did not arise. The existence of the right of privacy does not depend on the caste or creed of the person owning it or on the fact, *viz.*, if it was used by the ladies. It is a custom of the country and has as such to be protected, [see *Gokal Prasad v. Radho* (1) and *Jamilud-din v. Abdul Majid* (2).]

In order to enable me to decide this appeal it is necessary to have findings on the following issues:—

(1) Is the plot of land belonging to the plaintiffs to the south of the wall A B open to the gaze of other people living in houses to the south and west thereof?

(2) Have the plaintiffs, as a matter of fact, been enjoying the right of privacy with reference to this plot?

(3) Have the *Janglas* put by the defendant in fact invaded the right of privacy of the plaintiffs?

The issues are to be decided on the evidence actually on the record and if necessary by another inspection of the locality. No

fresh evidence will be received. On receipt of the finding the usual ten days will be allowed for objections.

Gokul Prasad, J.—(February 27, 1923.)—

The facts of the case are given at length in my order of the 30th November 1922 referring certain issues to the Court below. The findings, on all the three points referred, have been returned. They are against the appellants. These findings are findings of fact and cannot be interfered with. The appeal, therefore, fails and is dismissed with costs.

M. A. A.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 37
OF 1921.

February 9, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

KARUTHEDATH PULAKKAI MANAK-
KAI, NEELAKHANDAN, NAMUDRI
URULIAN, OF TIRUNARAYANAPURAM
DEVASWOM—APPELLANT

versus

VASUDEVAN, NAMUDRI KARNAVAN
AND MANAGER AND ANOTHER—
RESPONDENTS.

*Civil Procedure Code (Act V. of 1908), s. 144—
Landlord and tenant—Ejectment—Possession
obtained by landlord—Compensation, amount of, en-
hanced on appeal—Mesne profits—Interest.*

A landlord obtained possession of a tenant's holding in execution of a decree for ejectment obtained by him under the provisions of the Malabar Compensation for Tenants' Improvements Act. On appeal, the amount of compensation awarded by the Trial Court was enhanced.

Held, that under the provisions of section 144 of the Civil Procedure Code, the defendant was entitled to interest at a sufficient rate on the additional sum awarded by the Appellate Court from the date on which the landlord took delivery till the date on which the defendant became aware that the landlord had deposited the additional amount, in lieu of mesne profits.

Kalyan Das v. Maqbul Ahmad, 46 Ind. Cas. 548; 35 M. L. J. 169 at p. 176; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 24 M. L. T. 110; 20 Bom. L. R. 864; 40 A. 397 (P. C.), *Mantani v. Kuthiravattath Kettayil Ramjan*

(1) 10 A. 358; A. W. N. (1838) 133; 6 Ind. Dec. (N. S.) 241.

(2) 28 Ind. Cas. 674; 13 A. L. J. 361.

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62 Ind. Cas. 724; 41 M. L. J. 15; 13 L. W. 449. *Manakal Murihi Sankaran v. Areekara Azhakath Sankaran Nair*, 66 Ind. Cas. 129; 44 M. W. N. 960; (1921) M. W. N. 470; (1922) A. I. R. (M.) 347, followed.

Appeal against an order of the Court of the Subordinate Judge, Ottapalam, dated the 28th September 1920, in A. S. Nos. 52 and 56 of 1920, preferred against the order of the Court of the District Munsif, Waluvanad, dated the 18th March 1920, in Execution Petition No. 125 of 1920 in Original Suit No. 435 of 1917.

Mr. K. P. Ramakrishna Ayyar, for the Appellant.

Mr. C. Madhavan Nair, for the Respondents.

JUDGMENT.—Following the observations of the Privy Council in the case quoted by the lower Appellate Court, *Kalyan Das v. Magbul Ahmad* (1), interest at a sufficient rate may be substituted for the profits which the person in possession under a mortgage-decree which was subsequently varied, enjoyed during the period between his execution of the First Court's decree and his giving notice that he had deposited the additional amount.

It was unnecessary to remand this case for ascertainment of the mesne profits. The defendants were not entitled to recover possession merely because the amount of compensation for improvements was increased; *vide Manian v. Kuthiruvattath Kottayil Raman* (2) and *Manakal Murihi Sankaran v. Areekara Azhakath Sankaran Nair* (3), but under section 144 of the Civil Procedure Code they were entitled to interest or other compensation consequential on the variation of the First Court's decree.

We set aside the Subordinate Judge's order of remand and direct that the petitioners do recover interest on the additional compensation amount awarded at 12 per cent. from 4th April 1919, when plaintiff took

delivery, till 1st March 1920, when the defendants became aware that the amount had been deposited. Each party will bear their own costs in these restitution proceedings, in the lower Courts. In this Court appellant will get his costs. Appeal allowed.

V. N. V.
Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 431 OF 1922.

March 9, 1923.

Present:—Mr. Hallifax, A. J. C.

FIDA ALI—PLAINTIFF

—APPELLANT

versus

SANAI BADAR AND ANOTHER—

DEFENDANTS — RESPONDENTS.

Muhammadian Law—Divorce—Delegation of power—Agreement entitling wife to divorce on husband's expulsion from community—Public policy.

Under the Muhammadan Law marriage is purely a civil contract and an agreement that the wife should be entitled to get a divorce pronounced on the breach of certain conditions of the marriage contract is not void as being opposed to the principles or policy of that law, though a Court may not give effect to the condition if as in the case of an ordinary contract, it is unreasonable and ought not to be enforced. [p. 1044, col. 1.]

A condition in a marriage contract under the Muhammadan Law that the wife will be entitled to a divorce if the husband forsakes the faith of the community to which both the husband and wife belong or is expelled from it by its Spiritual Head is not an unreasonable condition and the wife is entitled to a divorce for a breach of the condition. [p. 1043, col. 2; p. 1044, col. 1.]

Budrunissa Bibee v. Nufseutollah, 15 W. R. 555; 7 B. L. R. 442, *Meer Askruf Ali v. Meer Arshad Ali*, 16 W. R. 260, *Ayatunnisa Beebee v. Karam Ali*, 1 Ind. Cas. 513; 36 C. 23; 12 C. W. N. 907, *Maharvam Ali v. Ayessa Khatun*, 31 Ind. Cas. 562; 19 C. W. N. 1226, *Hamidoolla v. Faizunnissa*, 8 C. 327; 10 C. L. R. 291; 6 Ind. Jur. 414; 4 Ind. Dec. (N. S.) 209, *Nuruddin v. Chanurt*, 3 C. L. J. 49, relied on.

Under the Muhammadan Law a husband can authorise another person to pronounce a divorce between him and his wife, and when this is done unconditionally, the person so appointed can pronounce a divorce for any reason that would

(1) 46 Ind. Cas. 548; 35 M. L. J. 169 at p. 176; 22 C. W. N. 866; 16 A. I. J. 693; 5 P. L. W. 159; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 24 M. J. T. 110; 20 Bom. L. R. 864; 40 A. 497; (P. C.).

(2) 62 Ind. Cas. 724; 41 M. L. J. 15; 13 L. W. 449.

(3) 66 Ind. Cas. 129; 44 M. W. N. 960; (1921) M. W. N. 470; (1922) A. I. R. (M.) 347.

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entitle the husband himself to do so, with the exception of a mere whim or caprice of his own, a divorce by an agent for such a cause being an unreasonable and unjustifiable use of his powers. [p. 1043, col. 2.]

Appeal from the decree of the Additional District Judge, Nagpur, dated the 8th August 1922, in Civil Appeal No. 146 of 1921.

Messrs. W. G. Dillon, W. R. Purank and G. R. Pradhan, for the Appellant.

Messrs. M. K. Padhye and A. V. Vazalwar, for the Respondents.

JUDGMENT.—The plaintiff-appellant was at one time a seceder from the Mehdi Bag or *Atba-e-Malak-o-Badar* community of the Daudi Bohra sect of Shiahhs founded at Nagpur about 1897, but he re-joined that community on the 18th of June 1905. On the 14th of October 1913 he married the defendant-respondent who was a member of the same community. On that day he executed an ante-nuptial agreement in favour of the defendant which is on the record as Exhibit 2 D-1. The gist of that agreement is as follows: "I am a member of the Mehdi Bag community and owe allegiance to its Spiritual Head, the Malak, and will follow the Laws of Islam as interpreted by him. Those who refuse to obey the rules of the community are to be excluded from it and will be treated as apostates from Islam. I, therefore, agree, that if I forsake the faith of the community or am expelled from it by its Spiritual Head I shall be liable to be treated as an apostate from Islam in that my wife (if she remains a member of the community) will be divorced from me by the fact of my having left it. I also accept as binding upon me the rule laid down in the *Fatwa-i-Alamgiri* that a man may agree on his marriage that on breach of any of the conditions of the marriage his wife shall be entitled to appoint a Vakil for him to pronounce a divorce for him. I accordingly agree that if I forsake the *Malak-o-Badar* community or am expelled from it by its Spiritual Head my wife may get a divorce from me pronounced by a person appointed by her on my behalf, which divorce I will accept as valid."

2. On the same day and after the marriage the plaintiff executed the *vakalatnamah*, which is filed as Exhibit 2 D-2, appointing Dr. Liwa-e-Haqq his Vakil *Mullaqi*

or fully empowered agent in the matter of the divorce of his wife, authorising him to divorce her at any time and also to delegate that power to another and agreeing that such a divorce by the Vakil or his Deputy would be equivalent to one by himself. He also promised never to revoke the *vakalatnamah*. On the 20th of October 1918 Dr. Liwa-e-Haqq executed Exhibit 2 D-3 appointing Shamsam-e-Haqq in his place as Vakil *Mullaqi* for the plaintiff in the matter of the divorce of the defendant under the power given to him by Exhibit 2 D-2. On the 27th of November 1919 the plaintiff was expelled from the community under the orders of its Spiritual Head, his wife remaining in it. On the 28th of January 1920 (Exhibit 2 D-4) the defendant appointed Sheikh Saleh Hassan Bhai to be her husband's Vakil to divorce her, under the power given to her by Exhibit 2 D-1 and on the same day Sheikh Saleh pronounced a complete divorce (*Talugh-ul-sunnat*) executing a written instrument to that effect (Exhibit 2 D-5) which he read to her in the presence of witnesses. Three days latter, on the 31st of January 1920, Shamsam-e-Haqq pronounced a similar divorce (Exhibit 2 D-6) by virtue of the power given to Dr. Liwa-e-Haqq by Exhibit 2 D-2 and passed on to him by Exhibit 2 D-3.

3. The only objection that the learned Counsel for the plaintiff could find to the validity of either divorce was in the contention that the condition on which the defendant became entitled to claim divorce under the marriage contract (Exhibit 2 D-1) was opposed to the principles and policy of the Muhammadan Law and the contract was, therefore, void at least to that extent, under section 23 of the Contract Act. This objection will not apply at all to the divorce pronounced by Shamsam-e-Haqq, the Vakil appointed by the plaintiff himself, who could pronounce a divorce for any reason that would entitle the plaintiff himself to do so, with the exception, perhaps, of a mere whim or caprice of his own, a divorce by an agent for such a cause being an unreasonable and unjustifiable use of his powers. But the reason in this case was that the husband had forsaken the faith to which his wife still adhered and also that he had promised, even if that

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promise was not enforceable, to give her a divorce if he did so.

4. As to the agreement that the wife should be entitled to get a divorce pronounced on the breach of a certain condition of the marriage contract by her husband, there appears to me to be no substance in the argument that that condition is void as being opposed to the principles or policy of the Muhammadan Law, as that Code treats marriage as a purely civil contract. All that can be urged is that the condition, regarded as a condition of an ordinary contract, is unreasonable and ought not to be enforced.

5. We have the following instances of conditions in exactly similar contracts which were held to be reasonable so that the breach of them entitled the wife to get a divorce pronounced by an agent appointed for her husband by herself. In *Budrunissa Bibee v. Nuseutoollah* (1), *Meer Ashruf Ali v. Meer Arshad Ali* (2), *Ayat-unnessa Bibee v. Karam Ali* (3) and *Maharam Ali v. Ayesa Khatun* (4) the condition was that the husband should not marry a second wife; in *Hamidoola v. Faizun-nissa* (5) one condition was that he would allow her to go to her father's house four times a year and another that if disputes arose between her and the people then living with him he would build a house for her and live in it with her. In *Nuruddin v. Chenuri* (6) the condition of which the breach was to entitle the wife to pronounce her own *talaq* was no more than that the husband was to deliver to her on her demand certain gold ornaments of which he made her the owner at the marriage. In the list of similar conditions that have been held valid and enforced, given on page 369 of Volume II of Ameer Ali's Muhammadan Law, we find, that the husband shall not remove the wife from the conjugal domicile without her consent; that the husband shall not absent himself from the conjugal domicile

beyond a certain specified time; that the husband and wife shall live in a specified place; that the husband shall pay the wife a fixed maintenance; that he shall maintain the children of the wife by a former husband; that he shall not prevent her from receiving the visits of her relations whenever she likes.

6. The condition to which the plaintiff agreed in the present case is quite as reasonable as any one of these and more so than most of them. Either of the two divorces pronounced is, therefore, perfectly valid. In that view it is unnecessary to examine the other pleas put forward in this case. The defendant is not the plaintiff's wife and he cannot be given a decree for the restitution of conjugal rights. The appeal will be dismissed and the plaintiff must pay all the costs in all three Courts.

Z K.

Appeal dismissed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 276 OF 1922.

January 22, 1923.

Present—Mr. Justice Heald and Mr. Justice May Oung.

MAUNG THA DUN AND OTHERS

—DEFENDANTS—APPELLANTS

versus

MA THEIN YIN—

PLAINTIFF—RESPONDENT.

Buddhist Law—Burmese—Polygamy—Inheritance—"Superior" and "inferior" wives, rights of—Marriage—Presumption.

Under the Burmese Buddhist Law, polygamy is lawful, and a Burman Buddhist may have, at the same time, two or more wives, who are on an equal footing. [p. 1045, col. 2.]

Mi Me v. Mi Shive Ma, 14 Ind. Cas. 475; 1 U. B. R. (1912) 111; 11 M. L. T. 166; (1912) M. W. N. 201; 15 C. L. J. 276; 9 A. L. J. 276; 14 Bom. L. R. 204; 22 M. L. J. 360; 16 C. W. N. 529; 5 Bur. L. T. 65; 3 C. 42; 39 I. A. 61 (P. C.) and *Mi Kin Gale v. Mi Kin Gyi*, 8 Ind. Cas. 1169; 1 U. B. R. (1910) 42, followed.

But, for the purposes of the law of inheritance, it is necessary to examine closely the relations that subsisted between a second, or, as she is commonly termed, lesser wife and her deceased spouse in order to determine her true status. Before she

(1) 15 W. R. 555; 7 B. L. R. 442.

(2) 16 W. R. 260.

(3) 1 Ind. Cas. 513; 36 C. 23; 12 C. W. N. 907.

(4) 31 Ind. Cas. 562; 19 C. W. N. 1226.

(5) 8 C. 327; 10 C. L. R. 291; 6 Ind. Jur 414;

4 Ind. Dec. (N. S.) 209.

(6) 3 C. L. J. 49.

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can succeed to her husband's estate, she must show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal, rights, and the proof required of her is more strict, where she had prior knowledge of the existence of the first wife and lived separately from, and unknown to her. [p. 1045, col. 2.]

Under the Burmese Buddhist Law, although there may not be sufficient evidence of actual giving and taking in marriage—since no ceremony of any kind is essential for the purpose of lawful wedlock—the conduct of the parties since their coming together may raise a strong presumption of marriage specially when the union has lasted for a long period. [p. 1047, col. 1.]

First appeal from the judgment of the District Court, Hanthawaddy.

Messrs. Higinbotham, Tun Phoo and Burjjez, for the Appellants.

Mr. Maung Pu, for the Respondent.

JUDGMENT.

May Oung, J.—The plaint sets out that one U Po Tok, a Burman Buddhist, during his lifetime had two wives, namely Daw Le Me and the plaintiff; that U Po Tok and Daw Le Me died in 1918, the latter first and the former four days later; that the plaintiff was lawfully married to the said Y Po Tok in 1912, and they had ever since been living as man and wife till the death of said U Po Tok; that U Po Tok had no issue by either of his wives, and that the plaintiff claimed to inherit the whole estate of the said U Po Tok as his surviving widow.

The defendants, who are the surviving relatives of U Po Tok and Daw Le Me, denied that the plaintiff was lawfully married to the said U Po Tok and that she had ever lived with him as husband and wife; they further submitted that, even if the plaintiff had been a wife of U Po Tok, she was not such a wife as would be entitled to a share in the estate of U Po Tok according to Buddhist Law.

The cause then proceeded to trial on the following issues:—

(i) Was the plaintiff a lawful wife of the late U Po Tok?

(ii) What share, if any, is she entitled to in the estate?

If the result, the District Court held, first, on the facts that the plaintiff was lawfully married to U Po Tok; and, secondly, without any discussion of the law on the

subject that, as the surviving widow, she is entitled to the entire estate of the late U Po Tok. This apparently includes the interest of U Po Tok's admitted wife Daw Le Me.

Defendants appeal and it is urged on their behalf that the plaintiff was no more than a mistress or concubine of U Po Tok and that, even if it be held that she was a wife, properly so-called, she is not entitled to more than a moiety of the estate left by U Po Tok and Daw Le Me.

The Burmese Buddhist Law relating to polygamous marriages may now be said to be settled. Polygamy is undoubtedly lawful (*Mi Me v. Mi Shive Ma* (1) and a Burman Buddhist may have, at the same time, two or more wives, who are on an equal footing [*Mi Kln Gale v. Mi Kln Gyi* (2)].

It is necessary, however, for the purposes of the law of inheritance, to examine closely the relations that subsisted between a second, or, as she is commonly termed, lesser wife, and her deceased spouse, in order to determine her true status. On the one hand, a man already married may contract a second lawful union, and the two women may occupy identical positions, both in respect of personal rights and obligations and as regards the ownership of property. On the other hand, a husband may enter into and maintain conjugal relations with a person whose position falls short of that of his first or chief wife. In the former instance, as has been held in several cases, no difficulty as regards succession and inheritance presents itself. In the latter, the second wife must, before she can succeed to her husband's estate, show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal, rights; and the proof required of her is more strict where she, as in the case under consideration, had prior knowledge of the existence of the first wife and lived separately from, and unknown to, her. The Mohavicchedani Dhammathat employs the terms

(1) 14 Ind. Cas. 475; 1 U. B. R. (1912) 111; 11 M. L. T. 169; (1912) M. W. N. 201; 15 C. L. J. 276; 9 A. L. J. 276; 14 Bom. L. R. 204; 22 M. L. J. 360; 16 C. W. N. 529; 5 Bur. L. T. 65; 39 C. 492; 39 I. A. 57 (P. C.).

(2) 8 Ind. Cas. 1169; 1 U. B. R. (1910) 42.

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"superior" and "inferior" wife to denote the distinction between these two kinds of wives.

Now, it is common ground that U Po Tok was a wealthy land owner, residing permanently with his wife Daw Le Me at Tharawaddy; that he had a saw-mill at Let padan, which was managed for him by a relative and which he regularly visited; that he had a fairly large and furnished residence within the mill compound which he occupied on the occasions of his visits; and that he was over sixty years of age when he first became acquainted with the plaintiff. The latter was then about twenty-five years old, had been divorced from her husband and was maintaining herself and her unemployed father as a petty bazaar seller and cigar-roller on hire. Her brother obtained employment at U Po Tok's mill on a monthly pay of Rs. 30, and she sometimes went there to sell rice to the mill hands; for this purpose her brother had borrowed Rs. 70 from U Po Tok and had given it to her as capital. It was in these circumstances that U Po Tok met the plaintiff. Before this, U Po Tok possessed a mill at a place called Teinmyok and there, it seems, he "kept" a girl. Maung Po Tha (P. W. No. 6) says: "I asked him what become of the girl which (*sic*) he was keeping at Teinmyok mill. He said he no longer had her with him. I then asked him about the girl which (*sic*) he took afterwards; he said that he had her at the mill at Letpadan. We both referred to Ma Thein Yin (plaintiff) at the time." This witness claims to have been an intimate friend of U Po Tok.

According to the plaintiff, there does not appear to have been any courtship or negotiation for a marriage. One of the defence witnesses, Ma Shan Ma (D. W. No. 5), speaks to having seen the plaintiff being brought to U Po Tok at the mill on three or four occasions at night, but she is not corroborated in this, and plaintiff has denied it; I would disregard this testimony altogether.

The first indication of the projected union was a statement by plaintiff to one Maung Po Kun (P. W. No. 2) to the effect that she was in love with U Po Tok and that *he wanted to marry her*. She asked Maung Po Kun to speak to her father, U San Hla,

about it. U San Hla says that Maung Po Kun came and told him that plaintiff said that she was in love with U Po Tok and that *she wanted to marry him*. Three or four days later U Po Tok is alleged to have gone to Maung Po Kun's house with three men belonging to Rangoon. U Po Tok said that he wanted to get married to plaintiff and solicited Po Kun's help in the matter. Half an hour later U Po Tok, Po Kun, and the three Rangoon men went to plaintiff's house. There, besides the plaintiff and her father, they met some women, including one Ma Mi, plaintiff's cousin (since deceased), and Ma Mi's husband, Maung Po Han. It is further alleged that there was then a formal giving and taking in marriage and that U Po Tok stayed in the house for about twenty days. U San Hla says that he asked U Po Tok what *Kanwin* property he would give to the plaintiff. U Po Tok replied, "I will not give *Kanwin* property now. I have my first wife Ma Le Me. I have no children to inherit my property. All that I possess is my first and second wife's property." Po Kun says nothing of this. According to him, U San Hla said, "We are very poor. I shall give my daughter in marriage if U Po Tok fulfils the five duties of a husband." U Po Tok said, "I am a good and respectable *lady*. I shall fulfil the five duties of a husband."

This alleged formal marriage is also spoken to by Maung Po Han. He says that he and his late wife, Ma Mi, were asked by the plaintiff to attend the marriage and that they did so. He supports U San Hla as to the conversation about the property. Now there is nothing inherently improbable in the story that U Po Tok, accompanied by some others, went to the plaintiff's house and, with the consent of the plaintiff's father, entered into conjugal relations with the plaintiff, and that he, as the witnesses go on to state, thereafter proceeded to provide a house for the plaintiff and her relatives, where he might visit her. But this must not, in my opinion, be magnified, as the plaintiff wishes to do, into a formal wedding, such as a man in U Po Tok's position would arrange if he were really contracting a public marriage. The entire absence of any preliminary overtures on the part of

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U Po Tok, the fact that Po Kun was total stranger to U Po Tok, the circumstances that no elders of either Tharrawaddy or Letpadan were invited, and the conduct of U Po Tok in not suggesting at any time, then or later, that plaintiff should go to live at the mill, all these go to show that U Po Tok had no intention to confer on the plaintiff a status which in any way approached that of Daw Le Me. I note that the learned District Judge said: "In the present case, perhaps, it may be said that the evidence of Maung San Hla, Po Kun and Po Han is not sufficiently strong enough by itself, to hold that plaintiff was lawfully married to U Po Tok." He went on, however, to say that "there was abundant evidence of other respectable witnesses who depose to the joint living of the plaintiff and U Po Tok, their conduct and admissions, and their general repute."

There can be no doubt that, under Burmese Buddhist Law, although there may not be sufficient evidence of an actual giving and taking in marriage—since, no ceremony of any kind is essential for the purposes of lawful wedlock—the conduct of the parties, subsequent to their coming together, may raise a strong presumption of marriage, especially when the union has lasted for a long period. The evidence referred to by the learned District Judge will, therefore, now be examined, in order to ascertain whether the plaintiff, after she began to cohabit with U Po Tok, acquired the status of the "superior" wife equal to that of Daw Le Me.

The plaintiff herself says that she was kept in a hired building for about a year; her father and younger sister lived with her, and U Po Tok paid the rent; then with a sum of Rs. 325 provided by U Po Tok, she purchased, in her own name, a house in the Belindan quarter of Letpadan. This house was rather old and, after one rainy season, it was dismantled and a new building was put up, costing about Rs. 2,000. She alleges that U Po Tok lived with her in that house till his death about six years later, and that, during that period, he gave her a diamond ring worth about Rs. 300, gold bangles worth about Rs. 450, and various sums of money ranging from Rs. 25 to Rs. 400 for her use. At the time of

his death there were in this house four *longyis* and four or five jackets belonging to U Po Tok and a table and two chairs. U Po Tok and she never went together to any house at Letpadan, and she was never taken to visit any of U Po Tok's relations. She says that she and U Po Tok took sabbath together at U Gandamas' monastery in Letpadan and that on one occasion he took her to the Pagoda festival at Paungde, and that this latter fact is known to Maung Po Ta and one Ma Ngwe Ko. Apparently, she never went to Tharrawaddy except when her cousin, Ma Mi died and when U Po Tok was in hospital just before his death. She never, at any time, had any share in U Po Tok's business and there was no property of any kind, or any document, in the joint names of herself and U Po Tok.

Here first witness, Maung San Hla, father of the plaintiff, says that, although U Po Tok often went back to Tharrawaddy at Letpadan, he always lived with his daughter in the same house. He also says, "U Po Tok used to live in our house for about seven or eight days in a month." He speaks to one occasion on which U Po Tok and the plaintiff invited some *phongyis* and gave a feast in their house. He further states that sometimes they went to Rangoon together and also went to Pagodas and *Kyauungs* together at Letpadan. The second witness, Maung Po Kun already mentioned, says that at the time of the plaintiff's alleged marriage, he was living temporarily at Letpadan; that about three or four days after the marriage, U Po Tok and Ma Then Yin lived together in a brick house near his house; that he saw them in the brick house for about three months and that he then went away to Pyapon, not returning till after U Po Tok's death. This witness is forty-five years old, has no house of his own, and, apparently, does not work at Letpadan. The third and fourth witnesses, Maung Po Hla and Maung Po Kye, are Pleaders of Letpadan and considerable reliance has been placed on their evidence. They state that U Po Tok built a house at Letpadan for the plaintiff and kept her publicly as a wife. They were not, however, on terms of social intimacy with U Po Tok and all that they can testify to is that they saw U Po

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Tok and the plaintiff together twice : the couple did not, at any time, visit them together.

The fifth witness, Maung Po Si, a trader, resident at Letpadan for about eighteen years, says that as he was going along the road in front of the plaintiff's house he saw U Po Tok there once ; his own house is about two furlongs away from plaintiff's house.

The sixth witness, Maung Po Tha, is sixty-five years old and a trader of Tharrawaddy. He says that he saw U Po Tok and the plaintiff in plaintiff's house at Letpadan twice ; that on one occasion he met them together in the train going to Rangoon, travelling third class. He says that on one occasion, at Tharrawaddy, U Po Tok had a quarrel with Daw Le Me when Daw Le Me said (referring to U Po Tok), "He has taken a lesser wife and built a house for her, I cannot live with him. Let me divorce from him." Witness told U Po Tok that he should not have taken a lesser wife and U Po Tok replied, "My former wife, Ma Gank Te, had no child by me; Ma Le Me has also no child by me; so I have to take Ma Thein Yin to get a child." This statement is somewhat extraordinary in view of the allegation that U Po Tok, at the time when he took the plaintiff, said that he had no children to inherit from him and that his first wife and second wife would succeed to his estate. There is no corroboration of Maung Po Tha's evidence on this point and on his own showing he is not a disinterested witness. He engaged a lawyer for the plaintiff and took her to the house of one U Kyaw. The plaintiff's cousin, Ma Mi, lived in his house paying rent, and died there. He claimed to possess diamonds and houses worth about Rs. 20,000 but his brother, the next witness, says he is worth about Rs. 3,000.

The seventh witness, Maung Po Ka, is a brother of Po Tha and is a retired Inspector of Police, and says that on one occasion he saw U Po Tok and the plaintiff together at the Letpadan Railway Station, and, on another, at the Tharrawaddy Railway Station ; also that U Po Tok told him that he had kept her at Letpadan.

The 8th witness, Maung Po Han, already mentioned, is a Sub-Inspector of Excise and used to live with Po Tha. He says

that U Po Tok came to his house three or four times with the plaintiff ; that when his wife, Ma Mi, was ill both came to his house to see her and they both attended Ma Mi's funeral. He also says that Ma Mi and he once took sabbath in a *pongyi kyaung* with U Po Tok and the plaintiff ; but he does not know the name of the presiding monk of the *kyaung*. The 9th witness, Ma Shwe, is a resident of Rangoon and states that Po Tok and the plaintiff came to her house and put up there many times, not less than ten times, and for four or five days at a time ; they ate together and slept together at her house. Witness says she has no occupation, and there is no indication in her evidence that she is a person of any standing.

The 10th witness is a physician and shampoer of Rangoon and says he was called in to treat the plaintiff who was suffering from fever, U Po Tok being present and referring to plaintiff as his wife. He does not say in whose house this took place.

The 11th and 12th witnesses are Maung Po Ta and his wife ; the former gives his residence as Gyobingauk, and the latter hers as Nattalin. Maung Po Ta describes himself as the managing agent of a rice mill, but it appears from his wife's deposition that he used to receive Rs. 100 a month while he was employed as a manager in one U Po Chit's mill, and that U Po Chit has sold his mill. She herself sells cloth in a stall in the Nattalin Bazar and their house is worth about Rs. 1,500 with a mortgage of Rs. 300 on it. This couple speak, among other things, to a visit to their house at Nattalin by the plaintiff, followed up two days later by U Po Tok, after which they all went to a Pagoda festival at Papun. It will be remembered that the plaintiff herself mentioned Paungde as the place where the Pagoda festival was held.

The 13th witness, Maung Po Set, was formerly a school-master at Letpadan, his house was about five doors away from plaintiff's. He says that U Po Tok and the plaintiff lived publicly as man and wife for about four or five years--an obvious exaggeration. He also says that he went to their house to attend a ceremony at which *phongys* were fed ; that he met U Po Tok on that occasion, and that he met U Po Tok

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and the plaintiff together two or three times at the Pagoda at Letpadan.

The fourteenth witness, Maung Thin Mya, is the wife of a clerk living at Tharrawaddy. She saw U Po Tok at the plaintiff's house "only very seldom" and does not know if he ever slept at the plaintiff's house. She first came to know that the plaintiff was U Po Tok's lesser wife because they went to Ma Mi's funeral together.

The fifteenth and last witness is Afor Ali, an Engine Driver. He says he found U Po Tok with the plaintiff at the latter's house and that U Po Tok engaged him for his mill. U Po Tok asked the plaintiff to pay him Rs. 10 as an advance and she did so. He worked in U Po Tok's mill for about two years and then left. About a month afterwards he heard that U Po Tok's chief wife had died and that U Po Tok was also ill; he went to see U Po Tok at Tharrawaddy; U Po Tok asked if the plaintiff had returned from Rangoon, and, on being told she had not, requested the witness to go and call her; he did so. The learned Counsel for the plaintiff points to this circumstance as showing U Po Tok's strong regard for the plaintiff, but on a consideration of the evidence of this witness I must hold that he cannot be believed, for not only is he not corroborated but he contradicted plaintiff about taking money from U Po Tok to her and he makes the extraordinary statement that he fetched the plaintiff from Latter Street, which is situated far to the west of the Sule Pagoda and later, in cross-examination, that the street in which plaintiff lived was on the east of the Sule Pagoda. This is a statement by a man who had been in Rangoon for about eight or nine years. He also admits that he once wrote to the 1st defendant, Maung Tha Dun, offering to work under the latter if he would give him more pay than that he was then getting; Maung Tha Dun sent no reply.

This is all the evidence on the plaintiff's side. There has been no attempt to show that the plaintiff was at any time publicly acknowledged as the wife of a rich mill owner. Letpadan is an important business centre, the head quarters of a large township, a busy Railway Junction, and a Municipal town containing about 4,000 houses. It is but reasonable to suppose that

a man of U Po Tok's wealth and standing would have had a considerable number of friends and acquaintances in that place who would have been able to testify to the plaintiff's position if she had been a wife in the sense that she makes herself out to be. The only witnesses who were on mutual visiting terms with U Po Tok and the plaintiff were Maung Po Ta and his wife, and yet Maung Po Ta says: "I do not know whether plaintiff was a legal wife or a *apayaw-maya* (mistress or concubine) of U Po Tok."

If the plaintiff had been a wife on an equal footing with Daw Le Me, and if U Po Tok had at any time intended that she should occupy a position higher than that of a person who received visits from him, I have no doubt whatsoever that plaintiff would have gone to live in the house within the mill-compound, and that there she would have, as Burmese wives usually do, taken a hand in U Po Tok's business and that she would, in a very short time, have made herself known all over the town as the wife of the rich mill owner. The reason she gives for not going to live at the mill is not convincing; she says that she was kept away so that she might not encounter Da Le Me. But Daw Le Me was an aged lady and hardly ever came to Letpadan.

Having considered all the circumstances in favour of the plaintiff's case, I hold that the plaintiff was, at best, no more than an "interior" wife of U Po Tok, living separately from him and only receiving his visits, and that, therefore, she is not entitled in law to inherit any portion of U Po Tok's estate. I would reverse the decision of the Court below and order that the plaintiff's suit be dismissed with costs throughout. She will also pay the Court-fees which she would have had to pay had she not been permitted to sue as a pauper.

Heald, J.—I concur.

W. C. A.

Appeal accepted.

MARAKKARUTTI v. VEERAN KUTTY.

MADRAS HIGH COURT.

REFERRED CASE NO. 17 OF 1922.

March 12, 1923.

Present:—Sir Walter S. Schwabe, Kt., Chief Justice, Justice Sir Francis, Oldfield, Kt., and Mr. Justice Ramesam.

MARAKKARUTTI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

T. P. M. VEERAN KUTTY AND OTHERS

—PLAINTIFFS AND DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—*Inherent power of Court—Re-construction of destroyed record—Appellate Court, power of—Procedure.*

There is inherent power in every Court to re-construct its own records, and there is inherent power in an Appellate Court to re-construct the records of the Court from which an appeal lies to it. [p. 1050, col. 2.]

Where the records of a case are destroyed subsequent to the decree, the party appealing from the decree can ask the Appellate Court to re-construct the record. It may be that in re-constructing the records, the Court will have to go very near to re-hearing; but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when re-constructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. Affidavits, counter-affidavits, hearing of witnesses, admission of copies are methods which can be properly allowed. It will also be open to the Court to call for a finding from the Court of first instance on what the record was, as also, in a proper case, to direct the first Court to do the re-constructing and to send down the case for the recording of evidence and a finding as to what the record consisted of. The judgment of the first Court would probably be the best evidence of what took place in that Court. [p. 1051, cols. 1 & 2.]

Where, however, the Appellate Court comes to the conclusion that no amount of re-constructing of the record would assist the appellant in his appeal, the Court has not got to have the case re-heard. The respondent in that event is entitled to the benefit of having the judgment which he has got in his favour at the original hearing, because the onus is on the appellant in an appeal to establish his grounds of appeal. [p. 1051, col. 2.]

Douglass v. Yallop, (1759) 2 Burr. 722; 97 E. R. 532, *Babu Gooroo Dyal Singh v. Durbaree Lal Tiwaree*, 7 W. R. 18 and *Mc Lendon v. Jones*, (1845) 42 Am. Dec. 640; 8 Ala. 298, referred to.

Case stated, under section 113 of the Civil Procedure Code, by the District Judge, South Malabar, in Appeal Suit No. 525 of 1921 (Original Suit No. 674 of 1920,

on the file of the District Munsif, Parappanangudi).

Mr. K. P. Ramakrishna Ayyar, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This case is referred to us by the District Judge of South Malabar. It is an appeal from the District Munsif of Parappanangudi. Difficulty has arisen owing to the fact of the District Munsif's Court having been destroyed in the Mopla rebellion and the records in this case at the same time destroyed. We are informed that there are many cases similarly affected, and the learned District Judge asks our direction as to what is the proper course to adopt.

The respondent only has been represented before us, but his Vakil, Mr. K. P. Ramakrishna Ayyar, has assisted the Court very much by placing before us fully every thing that he could find whether it was for him or against him in the matter. I think that one can safely start with the proposition that there is inherent power in every Court to re-construct its own records, and I think it follows that there is inherent power in the Appellate Court to re-construct the records of the Court from which an appeal lies to it. This power has been recognised in England and in America, which follows the English Common Law, and also in this country. The English case that is quoted on the subject, is *Douglass v. Yallop* (1). The matter was more fully discussed in an American case, *Mc Lendon v. Jones* (2), a judgment of the Court of Alabama which quoted and followed *Douglass v. Yallop* (1) and a case which had been decided by the Supreme Court of New York and that case points out, "cases must frequently have occurred in which, by accident, the records of Courts of Justice have been destroyed or lost, and it would seem strange, if the Common Law had provided no adequate means, by which the injuries growing out of such accident could be averted, or remedied," and then goes on to discuss the methods by which the remedy should be provided. I call attention to it because it states the matter more fully than the other reported

(1) (1759) 2 Burr. 722; 97 E. R. 532.

(2) (1845) 42 Am. Dec. 640; 8 Ala. 298.

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cases. In this country the matter came before the Calcutta Court in 1867 in *Baboo Gocroo Dyal Singh v. Durbaree Lal Tewaree* (3) a judgment of Sir Barnes Peacock, C. J., and Jackson, J. In that case records had been lost in transit from the first Court to the second; the second Court acted on some documents purporting to be office copies which the High Court held were not regularly proved or admitted. The Court held that there were two alternative courses open, to direct the lower Appellate Court to receive such secondary evidence of the contents of original records as may be forthcoming or to order an entirely new trial. It decided against the second alternative for very cogent reasons with which we agree. It directed the lower Appellate Court to receive secondary evidence of the contents of the whole record, but if not able thus to re-place the record, that the parties should be at liberty to adduce further evidence and, on the record so re-constructed and supplemented, give judgment. While agreeing in the main with this, we think it desirable to state our own view of the matter.

The first thing to observe is that the appellant has, in order to get his appeal heard at all, to satisfy the Court what the record is of the case in which he has failed. He can come to the Court and say that he has tried to get the record which has been destroyed. He can then ask the Court to be allowed to re-construct that record. It is then for the Court, if so minded—I say that because it is conceivable that the Court may say, on the material at hand before it or on the appellant's application, that no amount of re-constructing of the record would assist the appellant in his appeal—to permit the appellant to get the record re-constructed. The Court has not got to have the case re-heard. The respondent is entitled to the benefit of having the judgment which he has got in his favour on the original hearing. It may be that, in re-constructing the record, the Court will have to go very near to re-hearing; but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and

on that record, when re-constructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge to whom the application is made to decide how the re-construction of the record is to be attempted—affidavits, counter-affidavits, the hearing of witnesses, and the admission of copies are all methods which he can in a proper case allow. He will, of course, get the best evidence available. It will be open to him in a proper case to call for a finding of the District Munsif on what the record was. It may well be in some cases that it would be more convenient that the Court that heard the matter and made the record should do the re-constructing rather than the Appellate Court and with that in view, the Appellate Court may well in a proper case send the case to the District Munsif for the recording of evidence and a finding as to what the record consisted of, which finding, when given, it will be open to the Appellate Court to accept or reject in the ordinary way. It is worth observing that in the Appellate Court probably the best evidence of what took place in the Court below will be found in the judgment, if that has been preserved, of the District Munsif or the Subordinate Judge, as the case may be, who heard the case and recorded findings.

In the case at present before us, we have the District Munsif's judgment still existing and he states on several matters the facts that were proved before him, and it is very clear that his statement as a contemporaneous statement of what took place before him or statement made at any rate a short time after it had taken place will be as good evidence as can be obtained and in all probability better than any other. In the event of the Appellate Judge being unable to re-construct the record to his satisfaction it must be borne in mind that the onus is on the appellant to establish his grounds of appeal and on the respondent his cross-objections, if any.

Therefore, in this case we direct the District Judge of South Malabar to hear the appeal and, if he thinks it necessary to re-construct the record for the purposes of the appeal in the manner suggested above. I do not think we can in anticipation usefully give any further instructions

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as to what should be done in these matters.

Costs of this reference will be costs in the appeal.

Oldfield, J.—I agree and have nothing to add.

Ramesam, J.—I agree.

V. N. V.

Z. K.

Reference answered.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 51 OF 1922.

March 19, 1923.

Present.—Mr. Justice Lindsay and Mr. Justice Daniels.

SUKHNANDAN AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

BRIJNANDAN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Nucleus of ancestral property—Separate acquisitions—Burden of proof—Nucleus, whether must be substantial.

In a joint Hindu family, where there is a nucleus of ancestral property, with the assistance of which subsequent acquisitions have been made, the burden of proving that any particular property is separate lies on the person who asserts it.

Lal Bahadur v. Kanhaiya Lal, 29 A. 244; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 34 I. A. 65 (P. C.), followed.

There is no authority for the proposition that in order to raise a presumption about the jointness of the acquisitions of a Hindu joint family the nucleus must be a substantial one; although a property which is incapable of yielding any income, such as an ancestral house, cannot be treated as a nucleus.

Second appeal against a decree of the District Judge, Jhansi, dated the 20th December 1921.

Dr. S. N. Sen and Mr. S. C. Das, for the Appellants.

Mr. N. P. Asthana, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition. The main issue in the case and the sole issue in this appeal is whether the bulk of the property in suit is joint family property or is the self-acquired property of the defendant-appellant, Sukh-

nandan. The plaintiffs are two brothers of Sukhnandan. Their father and the eldest brother named Sarju are dead. It has been found, and it is not now disputed, that the family was joint. The findings of the Court below are that, although Sukhnandan is the most capable member of the family and the acquisition of the property in suit is due mainly to his exertions, yet there was a nucleus of joint family property with the assistance of which the subsequent acquisitions have been made and that in consequence the property in dispute must be held to be joint property. The fact that where there is a nucleus of joint family property with the assistance of which subsequent acquisitions have been made, the burden of proving that any particular property is separate lies on the person who asserts it, was laid down by the Privy Council in 1906 in the case of *Lal Bahadur v. Kanhaiya Lal* (1). This burden, as the Courts below have found, has not been discharged by Sukhnandan. On the contrary, he set up a case which has been found to be false, that the ancestral business came to an end on the death of his father, whereas in fact it was carried on by the eldest brother Sarju until Sarju became insane and the appellant came from Jhansi, where he had settled, to take over the management of the business. The only legal ground put forward by the appellant assailing the findings of the Court below is that there should have been a finding that the nucleus of joint family property was a substantial nucleus. No authority has been quoted in support of this proposition except an unreported case of the Madras High Court and there is nothing either in the rulings of this Court or of the Privy Council to support the proposition. No doubt it is true that property which was incapable of yielding any income might not be treated as a nucleus for the purpose of affecting the presumption as to subsequent acquisitions. This might apply, for instance, to an ancestral house. Here, however, the finding is that there was not only an ancestral house but an ancestral business the management of which was

(1) 29 A. 244; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 34 I. A. 65 (P. C.).

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taken over by the appellant. The state of that business when the appellant took over the management of it is a fact peculiarly within the knowledge of the appellant and if he wished to show that the business was ended or yielded no income it was for him to prove it and not call the other side to prove the contrary. As we have seen, he did not attempt to prove it but, on the contrary, set up a false allegation that there was no business at all. No legal ground for assailing the findings of fact of the Court below has, therefore, been made out. Those findings are fatal to the appeal which we hereby dismiss with costs including in this Court fees on the higher scale.

M. A. A.

*Appeal dismissed.***PATNA HIGH COURT.**

CIVIL REVISION PETITION No. 155 OF 1923.

June 7, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and
Mr. Justice Bucknill.

Musammal RATNA KOER—**APPLICANT—PETITIONER***versus***Musammal NANHAKI AND OTHERS—****2ND PARTY*—OPPOSITE PARTY.**

*Transfer of Property Act (IV of 1882), s. 83—
Deposit by mortgagor—Non-acceptance by mortgagee—Disposal of case—Subsequent payment to mortgagee—Jurisdiction of Court—Security bond, legality of.*

Where a mortgagee refuses to accept a tender made by a mortgagor in Court and the Court disposes of the matter by passing an order that the mortgagor is entitled to withdraw the money, it is not open to the Court afterwards to direct payment of the money to the mortgagee.

Section 83 of the Transfer of Property Act does not authorise the Court to take any security bond from any party when disposing of the money tendered by the mortgagor in respect of the mortgage.

Civil revision from an order of the Subordinate Judge, First Court, Arrah, Shahabad District, dated the 11th April 1923.

Mr. Mahabir Prasad, for the Petitioner.

Mr. Raghunandan Prasad, for the Opposite Party.

JUDGMENT.

Mullick, J.—On the 13th June 1922 the mortgagor deposited a sum of Rs. 2,825 in the Court of the Subordinate Judge of Arrah by way of tender in satisfaction or discharge of two mortgage-debts due to the opposite party mortgagees. On the 29th June the mortgagees filed a petition objecting to the tender on various grounds and the Subordinate Judge, instead of disposing of the petition summarily, allowed the parties time to compromise the case. Finally, there was no compromise and on the 29th July 1922 the Subordinate Judge made the following order:—“Hazri on behalf of both parties filed. Ordered that the case be disposed of.”

On the face of it, the order does not seem to be very clear; but having regard to the papers on the record it seems that what the Subordinate Judge decided was that as the tender was not accepted, the case was disposed of, and the mortgagor was entitled to withdraw his money. On the 29th November 1922 the mortgagee, apprehending that the mortgagor was about to carry out the order of the Court filed an application that a criminal case of theft in connection with the mortgage-deed was pending against the mortgagor and praying that the money might not be paid over to the mortgagor till the disposal of that case.

On the 4th December 1922 the mortgagor applied for the return of the money but the Subordinate Judge directed that the payment should be withheld till the disposal of the criminal case. On the 11th April 1923 the case was heard in the presence of both sides, the criminal case by that time having been disposed of and having ended in the acquittal of the mortgagor. On that day the mortgagees finding that the money was about to be returned to the mortgagor suddenly changed their mind and intimated their willingness to accept the tender in full discharge of their dues. The Subordinate Judge allowed the prayer and directed that the money should be paid to the mortgagees upon their executing a security bond to refund the money. Here, again, it is not at all clear why the Subordinate Judge allowed the mortgagees to reconsider their decision after the tender had been once refused. In my opinion,

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the Subordinate Judge had no power to direct the money to be paid to the mortgagees when the tender was no longer open. After the disposal of the case on the 29th July 1922 there was no other tender and money was the mortgagor's money and the mortgagor was entitled to withdraw it at her own pleasure. Being, therefore, of opinion that there was no tender outstanding the order directing the money to be paid to the mortgagees seems to have been made without jurisdiction.

It is also not clear how a security bond was taken, for section 83 of the Transfer of Property Act does not authorise the Court to take any security bond from any party.

The result is that the order of the Subordinate Judge will be set aside and the mortgagor will be entitled to withdraw the money and the mortgagees must pursue such a remedy as they may think fit for the recovery of their mortgage-debt.

The application is allowed with costs, hearing fee one gold mohur.

Bucknill, J.—I agree.

N. H.

Application allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 3 OF 1923.

March 7, 1923.

Present:—Sir Walter S. Schwabe, Kt., Chief Justice, and Mr. Justice Ramesam, KRISHNA REDDY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THANICKACHELA MUDALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Letters Patent (Madras), cls. 13, 15—Transfer of suit from District Court to High Court, by Original Side Judge—Order, whether “judgment.”

An order of a Judge sitting on the Original Side transferring a suit from a District Court to the High Court under clause 13 of the Letters Patent of the Madras High Court is a judgment within the meaning of clause 15 of the Letters Patent and is, therefore, appealable.

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. L. J. (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1. *DeSouza v. Coles*, 3 M. H. C. R. 384, *Vaghoji Kuverji v. Camaji Bomanji*, 29 B. 249; 6 Bom. L. R. 958 and *Kanatal Bhoya v. Balaram Paramasukhdoss*, 68 Ind. Cas. 921; 16 L. W. 608; 31 M. L. T. 284; 43 M. L. J. 480; (1923) A. I. R. (M.) 44, followed.

Justices of the Peace for Calcutta v. The Oriental Gas Co., 8 B. L. R. 433 at p. 435; 17 W. R. 364 and *Khatizan v. Sonairam Daulatram*, 60 Ind. Cas. 963; 47 C. 1104, not followed.

Letters Patent Appeal against an order passed by Mr. Justice Kumaswami Sastri, in the exercise of his Extraordinary Original Civil Jurisdiction of this Court, dated the 18th December 1922, in the matter of Original Suit No. 29 of 1922, on the file of the District Court, Chingleput.

Messrs. T. S. Ramaswamy Aiyar and V. Sundaram Aiyar, for the Appellants.

Mr. V. Viswanatha Sastry, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This is an appeal from an order of the Judge sitting on the Original Side transferring a suit from the District Court of Chingleput to the High Court under clause 13 of the Letters Patent. As a preliminary point, it is argued that no such appeal lies on the ground that the order is not a judgment within the meaning of clause 15 of the Letters Patent. In the recent case of *Kanatal Bhoya v. Balaram Paramasukhdoss* (1) I stated that “I do not propose to attempt to add a further definition to those which have already been given in other cases.”

Definition after definition has been attempted to the word. A very narrow meaning was given to it by Sir Richard Corch in *Justices of the Peace for Calcutta v. The Oriental Gas Co.* (2). A much wider defi-

- (1) 68 Ind. Cas. 921; 16 L. W. 608; 31 M. L. T. 284; (1923) A. I. R. (M.) 44; 43 M. L. J. 480.
(2) 8 B. L. R. 433 at p. 435; 17 W. R. 364.

*NOTE.—In my judgment in *Kanatal Bhoya v. Balaram Paramasukhdoss* 68 Ind. Cas. 921; 16 L. W. 608; 31 M. L. T. 284; (1923) A. I. R. (M.) 44; 43 M. L. J. 480, the sentence “and the guiding principle is that a decision is a judgment which is given in an action” should run “and the guiding principle is that a judgment is a decision which is given in an action.” It is my own fault and not the fault of the reporter.

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nition was given by a Full Bench of this Court in *Tuljaram Row v. Alagappa Chettiar* (3) and it is enough for me to say that, in these matters, this Court is bound by the decision of its own Full Bench in that case. An attempt was made to give rules in that case which should be exhaustive of any matter that can come before this Court, and, in my judgment, all we have to do now is to say whether the matter in question before us is excluded from or included in the class of judgments referred to there. I find that it was there held that the case of *De Souza v. Coles* (4) in which it was held that the granting or refusing of leave to sue in this Court under clause 12 of the Letters Patent was a judgment in respect of which an appeal lay under clause 15 was rightly decided. This has also been held in *Vaghoji Kuwerji v. Camaji Bomanji* (5). I can see no difference in principle between such an order and the order in this case. The learned Judge in this case by his order puts an end to the case as it now stands in Chingleput and confers a jurisdiction on this Court in respect of that particular case. In my judgment, we are bound by the decision of the Full Bench of this Court referred to above and we hold that this is a matter which is appealable. The contrary view has been taken in *Khatizan v. Sonairam Daulatram* (6) where, on this precise point, a Bench of the Calcutta High Court has held that no appeal lies, but that Bench has applied the reasoning of Sir Richard Couch in his judgment in *Justices of the Peace for Calcutta v. The Oriental Gas Co.* (2) and the passage which they followed in that case is the passage which was expressly dissented from by the Full Bench of this Court, *Tuljaram Row v. Alagappa Chettiar* (3). The Calcutta High Court followed the earlier Calcutta decisions on this point but this Court must follow its own Full Bench decision. It may be that some day this point may somehow get to the Privy Council and then perhaps we shall know whether Madras or Calcutta

is right. But for the present, all we can do is to hold that this appeal lies. The preliminary point, therefore, fails.

Both parties state that, by consent, this appeal had been settled on the terms that it should be dismissed without costs, the respondent undertaking to pay Rs. 100 to the appellants in respect of costs already incurred and also undertaking, if further Court-fee has to be paid by reason of the case having been transferred from Chingleput to Madras, to provide what may be necessary up to Rs. 100. Civil Miscellaneous Petition No. 681 of 1923 for stay will also be dismissed:

Ramesam, J.—I agree.

V. N. V.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 78-B
OF 1922.

January 9, 1923.

Present:—Mr. Prideaux, A. J. C.

PADAMSI—APPLICANT

versus

SHESHRAO—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Decision on point of fact—Revision.

Small Cause Courts have been given very wide powers with regard to decisions on questions of fact. But in cases where their findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence, or are opposed to the evidence on record or are based on meagre or little evidence or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done, the High Court has power to interfere in revision.

Civil revision against a decree of the Judge, Small Cause Court, Akola, dated the 9th March 1922.

Mr. G. G. Hatvalne, for the Applicant.

Sir B. K. Bose and Mr. M. R. Bobde, for the Non-applicant.

JUDGMENT.—This is an application for revision of the judgment and decree of the Small Cause Court, Akola, in Small Cause Suit No. 832 of 1921 decided on the 19th March last. Plaintiff's case is that on 25th April 1921 the defendant orally agreed to sell to him 24 bales of old *rui* at the rate of Rs. 87-10-0 per bale including

(3) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

(4) 3 M. H. C. R. 384.

(5) 29 B. 249; 6 Bom. L. R. 958.

(6) 60 Ind. Cas. 963; 47 C. 1104.

PADAMSI V. SHESHRAO.

pressing charges. These were to be delivered within eight or ten days after the agreement as they happened to be then in possession of one Ratnappa who was absent. On 6th May 1921 the plaintiff demanded delivery from defendant but the latter failed to deliver the goods. On 7th May 1921 plaintiff gave the defendant a telegraphic notice asking for delivery and on the same date the defendant wired back denying the contract. On 6th May 1921 the market-rate rose to Rs. 97-10-0 per bale and plaintiff thus suffered a loss at Rs. 30 per bale or Rs. 720 on 24 bales. The defendant admitted that negotiations had taken place as regards the sale but his story was that he had 26 bales of cotton two of them being of inferior *ru* and he wanted to sell the 26 bales or none at all. Plaintiff wanted to purchase only the 24 bales of good cotton and this prevented any agreement being come to. The lower Court has dismissed the suit holding the agreement was not proved.

No substantial question of law is involved in the present case, and it is contended for the non-applicant that this Court should not interfere on questions of fact. Small Cause Courts have doubtless been given very wide powers with regard to decisions on questions of fact and in revision this Court is always reluctant in questioning a decision on the facts. But there is no doubt that it has for good reasons power to do so. In cases where the findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence, or where the finding of fact is opposed to the evidence on record, or is based on meagre or little evidence, or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done, this Court has power to interfere in revision.

In the present case I do not think the Trial Court has sufficiently considered plaintiff's evidence or the probabilities of the case. The first witness is the plaintiff who naturally speaks to his version of the case. P.W. No. 2 is Damji *Dalal* who settled the contract. He supports the plaintiff. P. W. No. 3, Goculdas, does the same as does

Sukhdeo (P. W. No. 4), another *Dalal*. Balwant (P. W. No. 7) is a *karkun* in the Mulji Jetha Factory. He states that the defendant told him that he had sold 24 out of the 26 bales to the plaintiff. Now, it is difficult to imagine that these witnesses would conspire to support the plaintiff; P. W. No. 7 is certainly an independent witness as are the two *Dalals*.

Against this testimony there is the evidence of Bhagwant Rao (D. W. No. 1). He speaks to negotiations and states that Damji *Dalal* said he could not settle the contract unless he took inspection of the two bales of inferior cotton. Thus, it is clear that no contract was come to in this witness's presence; matters were still pending when he left. Raoji (D. W. No. 2) speaks to negotiations and to Damji offering to take 24 bales and not the inferior cotton and the witness states Damji said he would inspect the bales in the afternoon and give his final word. It is clear that this witness also was not present while Damji finally agreed to take only the 24 bales or the 26 bales. Mohammad Hyat (D. W. No. 3) is a servant of the defendant. He speaks to negotiations and to Damji and plaintiff inspecting the two bales and after inspection the witness was told to tell his master that Damji was prepared to purchase only the 24 bales of good cotton. Gangaram (D. W. No. 4) was again not present when either the final contract was come to or Damji *Dalal* declined to buy. The last witness is the defendant.

Now, it seems to me that the weight of evidence is entirely with the plaintiff. The probabilities are also with him and I think that the Trial Court, owing to the delay in writing judgment after the hearing of the evidence in the case, has gone astray in its decision. I, therefore, allow this revision. I set aside the decree of the lower Court and decree in plaintiff's favour for the amount claimed, namely, Rs. 722-3-0 with Court interest on that amount from the date of the institution of the suit to date of payment. The non applicant will pay his own and the plaintiff's costs in both Courts. I fixed Pleader's fee at Rs. 15.

M. D. J.

Revision allowed.

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Acquiescence, doctrine of. See TRESPASS 223

— Encroachment on land of another—Standing by—Acquiescence, whether question of fact.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to acquiescence in the building on his land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building.

Premji Jivan Bhale v. Haji Cassum Juma Khan, 20 B 298; 10 Ind. Dec. (N. S.) 758, *Ramsden v. Dyson*, (1866), H. L. 129 at p. 170; 12 Jur. (N. S.) 506; 14 W. R. 926; *Plimmer v. Wellington Corporation*, (1884) 9 App. Cas. 619 at p. 710; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116; *Dattatraya v. Shridhar*, (1892) P. J. 348; relied on.

It has to be decided in each case whether the special circumstances of that case do or do not amount to such standing by.

Acquiescence is not a question of fact, but of legal inference from the facts found.

Narayan v. Bhalagir, 6 B. H. C. R. 80, relied on. *N. RAMRATAN v. SHEODATTARAI* 137

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- 1915 (5 & 6 GEO. V.) C. 61). See GOVERNMENT OF INDIA ACT.

Admissions—Admission of Counsel on point of law, whether binding on party.

A Counsel cannot bind his client by an admission made purely on a point of law. *PESH HABIB GUL v. SHAHDAD KHAN* 594

Adverse possession—Mortgage—Sale of equity of redemption to mortgagee, after sale to stranger, mortgagee, whether can set up adverse possession.

The owner of the equity of redemption in certain property sold it to the plaintiffs. He subsequently purported to sell the same equity of redemption to the defendant who was an assignee of one-third of the mortgagee rights in the property. On the strength of this purchase of the equity of redemption the defendant redeemed the remaining two-thirds of the mortgage. In answer to a suit by the plaintiffs to redeem the property the defendant set up his adverse possession from the date of the sale of the equity of redemption in his favour:

Held, (1) that the sale of the equity of redemption in favour of the defendant which had already been sold to the plaintiffs was a mere nullity and did not operate to confer any title on the defendant;

(2) that the defendant's possession as co-mortgagee could not, as the result of the alleged sale of the equity of redemption in his favour, become adverse to the plaintiffs;

(3) that the redemption by the defendant of the shares of the other mortgagees was in his character of co-mortgagee and did not effect the character of his possession which was that of a mortgagee.

Mohan Lal v Bhagu Shah, 14 Ind. Cas. 513; 252 P. W. R. 1912, *Jiwa Khan v. Lakhmi Chand*, 11 Ind. Cas. 429; 146 P. W. R. 1911; 232 P. L. R.

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1911 and *Ariyaputhira Padayachi v. Muthukumarasawmy Padayachi*, 15 Ind. Cas. 343; 37 M. 423, 12 M. L. T. 425; 23 M. L. J. 339; (1922) M. W. N. 854, relied on.

Lala Kanhoo Lal v. Musammam Manki Bibi, 6 C. W. N. 601, *Putappa v. Tummaji*, 14 B. 176; 7 Ind. Dec. (N. S.) 576, *Hubdar Khan v. Gajadhar Chaube*, 25 Ind. Cas. 600; 17 O. C. 294 and *Ram Narayan Rai v. Ram Deni Rai*, 63 Ind. Cas. 282; 6 P. L. J. 680, (1922) Pat. 129 (1923) A. I. R. (Pat.) 98, distinguished. *L. SHUJA-UD-DIN KHAN v. SHER MUHAMMAD KHAN*, (1923) A. I. R. (L.) 366 475

—Mortgagor and mortgagee—Registration Act (XVI of 1908), s. 49—Unregistered document—Admission for collateral purpose.

It is going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property.

A mortgagee can set up adverse possession if his possession at its inception was that of a trespasser.

Jiwa Khan v. Lakhmi Chand, 11 Ind. Cas. 429; 232 P. L. R. 1911; 146 P. W. R. 1911, followed.

It is to be decided on the facts of each case whether or not the circumstances establish an adverse title in a mortgagee.

A document although inadmissible for want of registration to prove title, can be referred to in order to ascertain the nature of the possession of the holder of the property.

Varada Pillai v. Jeevarathnammal, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.), *Karnam Kandasami Pillay v. Chinappa*, 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423; *Musigadu v. Maniam Gopal Reddy*, 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251, *Mahendra Bahadur Singh v. Chandrapal Singh*, 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622, *Jhamphu v. Kutramani*, 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761 and *Ram Singh v. Basti*, 48 Ind. Cas. 447; 89 P. W. R. 1918, relied on.

Defendant was in possession as mortgagee of certain property belonging to the plaintiffs. In 1884 a portion of the property was redeemed and a fresh mortgage was created of the remainder, but without possession. On that date the mortgagors obtained possession of the whole of the property. In 1888 the portion under mortgage was sold to the defendant by an unregistered sale-deed and the latter obtained possession of the property sold and continued in possession for over twelve years. In a suit for redemption of the property:

Held, (1) that although the unregistered sale-deed was inadmissible in evidence to prove the defendant's title, it could be referred to in order to ascertain the nature of his possession after 1888;

(2) that the defendant having obtained possession of the property in 1888 without title, that is, as a trespasser, his possession was adverse to the plaintiffs from its inception and having continued for

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over twelve years had ripened into ownership. **L QADAR BAKHSH v. MANGHA MAL**, 5 L. L. J. 175, (1923) A. I. R. (L) 495; 4 L. 249 889

— **Shamlat—Partition—Land to continue joint till certain harvest, effect of—Punjab Land Revenue Act (XVII of 1887), s. 121.**

It is quite possible that a partition of *shamlat* should be made and possession of the several lots be given and taken and that no formal instrument of partition be prepared, in which case the giving and taking of possession by the several sharers of their several lots would be held to be the date on which the joint holding ceased to be joint and became severally.

Where, however, on the termination of partition proceedings, a deed of partition was drawn up under the directions of the Revenue Officer conducting the partition, and in obedience to the provisions of section 121 of the Punjab Land Revenue Act it was provided in the deed that partition should take effect from the following *kharrif*:

Held, that the land remained joint till that harvest and that even if the sharers took possession of the plots allotted to them before the harvest, their possession up to that date was merely the possession of co-sharers in separate possession of portions of the joint estate, and did not become adverse to each other till after the harvest.

Khudad v. Alamgir, 116 P. R. 1900, **Lakhera v. Mahji**, 50 Ind. Cas. 550. **L HADAYAT KHAN v. SHAHMAND** 665

Agra Tenancy Act (II of 1901), s. 22—Succession to holding—"Sharing in cultivation," meaning of.

The expression "sharing in cultivation" occurring in section 22 of the Agra Tenancy Act means sharing in actual cultivation. In the case of the sub-letting of a holding the tenant cannot himself be said to cultivate, and, therefore, there can be no sharing in the cultivation of such a tenancy. **A SAJJAD HUSSAIN v. WALI MUHAMMAD**, (1923) A. I. R. (A) 451 1030

— **ss. 25, 29—Occupancy tenant—Sub-lease unregistered for more than one year, validity of—Rent, whether can be recovered.**

All agreements which are contrary to the law are void and unenforceable and no party to such agreements can obtain any relief from the Courts in respect of any portion of the agreements.

An occupancy tenant cannot recover rent from a sub-lessee holding under a sub-lease made in contravention of the terms of section 25 of the Agra Tenancy Act.

Section 29 of the Agra Tenancy Act does not say that where there has been a sub-letting in contravention of the terms of the Act, the sub-lease is valid and enforceable. All it says is that when there has been such a sub-letting and where the interest of the tenant becomes extinguished before the period of the sub-lease has expired, the landlord has a right or option to treat the sub-lessee as his principal tenant, and may enforce against him any of the covenants which he entered into with the tenant at the time the sub-lease was made. **A DHARAMAN v. SUKHI**, (1923) A. I. R. (A) 453 981

Agra Tenancy Act—contd.

— **s. 32—Suit for possession of portion of holding, maintainability of.**

Section 32 of the Agra Tenancy Act does not bar a suit for the recovery of a fractional share in a holding against a person in lawful possession.

Kedar v. Deo Narain, 39 Ind. Cas. 80; 37 A. 656; 13 A. L. J. 919, followed. **A RAM KISHEN RAI v. SHEO SAGAR** 462

— **s. 34—Person cultivating land without consent of landholder—Option of landholder, to treat as tenant.**

Under section 34 of the Agra Tenancy Act, a person who has cultivated land without the consent of the landholder, becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment, but until the landholder has exercised his option, such a person cannot be considered to be a tenant.

Sat Narain Frasad v. Ram Kumar, Sel. Dec. No. 3 of 1910, relied on. **A TARIF v. ASA RAM**, (1923) A. I. R. (A) 419 212

— **ss. 34, 177 (e)—Question of proprietary title—Appeal.**

In a suit for ejectment under section 34 of the Agra Tenancy Act, if the defendant pleads that he is not a tenant but a mortgagee of proprietary rights, a question of proprietary title is raised within the meaning of section 177 (e) of the Act, and an appeal lies to the Civil Court.

Kalyan Mal v. Samad, 18 Ind. Cas. 244; 35 A. 157; 11 A. L. J. 118; followed. **A NANJADIK RAI v. RAM JATAN RAI**, (1923) A. I. R. (A) 558 584

— **s. 79—Dispossession by stranger with zemindar's permission—Suit for recovery of possession—Limitation.**

Where a tenant is dispossessed from a portion of his holding by a person who takes possession of it with the permission of the *zemindar*, the dispossession must be deemed to be a dispossession by the *zemindar*, and a suit for recovery of possession will be barred by limitation if brought more than six months after the dispossession.

Ram Lal v. Chunni Lal, 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 281, **Balbhaadar Chaubey v. Somaroo Rai**, 27 Ind. Cas. 914; 13 A. L. J. 295, followed. **A PARSOTAM v. GANPAT RAM**, (1923) A. I. R. (A) 517 1012

— **ss. 95, 167—Suit for declaration that defendant is sub-tenant of plaintiff—Civil Courts, jurisdiction of.**

A suit for a declaration that the defendant is a sub-tenant of the plaintiff, is a suit which comes under section 95 of the Agra Tenancy Act, and the Civil Court has no jurisdiction to try it.

Jagar Nath v. Ajudhya Singh, 17 Ind. Cas. 376; 35 A. 14; 10 A. L. J. 408 and **Kanhi Ram v. Durga Prasad**, 27 Ind. Cas. 913; 37 A. 223; 13 A. L. J. 278, distinguished. **A GHISWA v. DEO NARAIN**, (1923) A. I. R. (A) 568 947

— **s. 146, clause first and second—Wrongful restraint—Damages, suit for—Cause of action.**

The cause of action for a suit for damages in respect of a wrongful restraint under the first

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clause of section 146 of the Agra Tenancy Act takes its origin from the day on which the distraint comes to an end and the suit may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. *Dahp Upadhi v. Gauridat Upadhi*, 2 Leg. Rem. 61, relied on.

Obiter.—Where the cause of action for a suit for damages under the second clause of section 146 of the Agra Tenancy Act is the loss, damage or destruction to property, it is to the date of such loss, damage or destruction that the Court must look when computing the prescribed period of limitation.

Dambar Singh v. Balwant Singh, 10 Ind. Cas. 504; 8 A. L. J. 563, relied on. *A JHABBU v. BATUL*, (1923) A. I. R. (A) 146; 45 A. 208 299

— s. 194—*Joint patti—Lambardar's powers.*

It is within the competence of a *Lambardar* to give permission to a tenant to erect a *kuccha* house on land belonging to the joint *patti*. *A ABDUR RAOF v. BACHCHOO*, (1923) A. I. R. (A) 532 495

— s. 202—*Suit for cancellation of lease granted by Lambardar—Plea that lease was granted by consent of co-sharers—Procedure.*

A co-sharer brought a suit in the Civil Court for the cancellation of a perpetual lease granted by the *Lambardar*, on the ground that it was beyond the powers of the *Lambardar* to grant it. The defence set up by the lessee was that the lease was executed by the *Lambardar* with the consent of all the co-sharers:

Held, (1) that the defence amounted in substance to a plea that the defendant was a tenant or the whole proprietary body including the plaintiff;

(2) that, under the circumstances of the case, the procedure laid down in section 202 of the Agra Tenancy Act was applicable, and the defendant should have been directed to file a suit in the Revenue Court within three months to establish the tenancy which he had set up.

Raghunath v. Ganesh, 54 Ind. Cas. 381; 18 A. L. J. 214; 2 U. P. L. R. (A) 79; 42 A. 222 and *Bhauji v. Ram Dayal*, 64 Ind. Cas. 426; 19 A. L. J. 850, followed. *A KALI DIN v. RAMAPAT*, (1923) A. I. R. (A) 534 953

Appeal, second—Finding of fact, interference with Letters Patent Appeal.

A finding of fact should not be disturbed in second appeal. Where a Single Judge of the High Court interferes in second appeal with a finding of fact of the lower Appellate Court, his judgment is liable to be set aside in a Letters Patent Appeal. *L. GIRDHARI v. ABDULLAH*, (1923) A. I. R. (A) 36; 7 P. W. R. 1923 232

Apportionment—Equity of redemption, whether extinguished by mortgage-decree See MORTGAGE 661

Arbitration—Arbitrators sole judges of law and fact—Exceptions to rule—Error of law on face of award, meaning of—Jurisdiction, question of.

Arbitration—cont'd.

Where a cause or matters in difference are referred to an arbitrator, he is constituted the sole and final judge of all questions both of law and fact. The only exceptions to this rule are, where the award is the result of corruption or fraud, or where a question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. This latter exception should not be given an extended meaning.

Hodgkinson v. Fernie, (1857) 3 C. B. (N. S.) 180; 27 L. J. C. P. 66; 8 Jur. (N. S.) 818; 6 W. R. 181; 140 E. R. 712; 111 R. R. 614, followed.

An error of law on the face of the award means that there is in the award, or a document actually incorporated thereto, some legal proposition which is the basis of the award and which is erroneous.

The question of whether an arbitrator acts within his jurisdiction is for the Court to decide, but whether the arbitrator acts within his jurisdiction or not, depends solely upon the clause of reference. *P. C. CHAMPSIEY BHARA & Co. v. JIVRAJ BALLOO SPINNING & WEAVING CO*, 44 M. L. J. 706; 25 Bom. L. R. 588; (1923) A. I. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 47 B. 436

— *Minor—Award based on misapprehension, whether binding.*

Where there is in the minds of both parties to an arbitration and of the arbitrators, a complete misapprehension as to the true, legal position of the parties, and this misapprehension is the cause of the non-inclusion for consideration in the arbitration proceedings of the legal rights of some of the parties, the award is bad and is not binding on the parties.

The principles under which the validity of an arbitration should be judged are more rigid than those which apply when a family settlement is under consideration.

In some cases in which although as an arbitration proceeding the result of an award cannot be supported it is still capable of support on the ground that the award represents what is in effect the outcome of a family compromise.

Defendant No. 1, a Hindu minor, had a reversionary interest in the property in dispute. His mother, acting on his behalf, agreed to refer the dispute to arbitration, but neither in the agreement of reference nor in the course of the arbitration proceedings were the true legal position and rights of defendant No. 1 put forward or considered. The arbitrators finally gave an award which had the effect of retarding the vesting in the defendant No. 1 of his reversionary interest for an indefinite period after the date when in law it should vest in him:

Held, (1) that the award being based on a complete misapprehension of the legal position and rights of defendant No. 1 was bad in law and was not binding on him;

(2) that the award could not be held binding on defendant No. 1 as a family settlement inasmuch as the result of the award was that the reversionary interest of the minor was affected in a manner very prejudicial to him and that

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no acquiescence on the part of his mother could make the award binding on defendant No. 1. **PAT RAM BAHADUR SEN v. GANESH BHAGAT** 542

—*Private reference—Partition of joint family property—Powers of arbitrators—Mother's share, declaration of—Consent of parties to reference, effect of.*

Where on a reference to arbitration by brothers forming a joint Hindu family for partition of family property, a provision for the maintenance of their widowed mother and sister is made with their consent, they cannot resile from the arrangement subsequently, even though the original terms of reference contained no provision entitling the arbitrators to provide for such maintenance.

Obiter.—In the case of a reference to arbitration by members of a joint Hindu family for partition of family property, the arbitrators have an authority to determine anything incidental or consequential to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. **O MUKHI DHAR v. MOOL CHAND**, 10 O. L. J. 226; 9 O. & A. L. R. 875 39

—*Property of deceased testator, division of—Reference during pendency of Probate proceedings, legality of.*

Where the parties concerned with the Will of a deceased person refer to private arbitration the question how the properties of the deceased should be divided, the reference would not be rendered illegal by the mere fact that it was entered upon during the pendency of an application for the grant of Probate of the Will of the deceased and before the Probate proceedings had come to an end. **B SHANKAR RAMCHANDRA KULKARNI v. RAMCHANDRA ANNAJI KULKARNI**, 25 Bom. L. R. 437; (1923) A. I. R. (C.) 365 416

—*Reference by agent—Authorisation, proof of—Arbitration in criminal proceeding, nature of.*

No instrument in writing is necessary to establish a valid authorisation by a principal to his agent to make a reference to arbitration.

Ram Dis v. Abbas Khan, 51 P. R. 1893 (F. B.) **Unniraman v. Chathan**, 9 M. 451; 3 Ind. Dec. (N. S.) 70, **Saturji Partop Bahadoor Sahi v. Dullin Gulab-Koer**, 24 C. 469; 12 Ind. Dec. (N. S.) 980, relied on.

At the same time, proof is required, whether there has been an instrument in writing or not, that the agent was actually authorised to make a reference to arbitration. **Pesh FATEH MUHAMMAD KHAN v. WAFI BEGUM** 609

Bengal Alluvion and Diluvion Regulation XI of 1825, s. 4, cl. (2). See RIPARIAN OWNER 727

Bengal Municipal Act III of 1884, ss. 209, 353—*Gift of land to Municipality on condition that it would erect necessary fencing—Requisition requiring erection of fencing, failure to obey—Offence.*

The language of section 209 of the Bengal Municipal Act is only indicative of this, that there is power in a Municipality to require a person to

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cause a fence to be erected by the side of a tank; but because the power is existent in a Municipality by virtue of statutory provisions, it does not follow that a Municipality cannot accept a condition or enter into a binding engagement that it would erect a certain fencing at its own cost.

Accused made a free gift of certain land to the Howrah Municipality on condition that if at any time it was found necessary to erect a fencing at a certain place the Municipality would erect it at its own cost. Some years later the Municipality issued a requisition under section 209 of the Bengal Municipal Act calling upon the accused to erect the fencing. The accused failed to comply with the requisition and was prosecuted under section 353 of the Bengal Municipal Act.

Held, that the Municipality having accepted a gift of the accused's land on condition that it would erect the fencing at its own cost was bound by the condition and had no power to issue a requisition calling upon the accused to erect it, and that, consequently, the accused was not bound to comply with the requisition. **C SUPDT. AND REMEMBRANCE LEGAL AFFAIRS, BEHAL v. NARAYAN CHANDRA BANERJEE**, 38 C. L. J. 131; 24 Cr. L. J. 680 776

Bengal Tenancy Act (VIII of 1885), s. 12—*Permanent tenure, transfer of, when complete.*

Under section 12 of the Bengal Tenancy Act, a transfer of a permanent tenure by a registered document is complete as soon as the document is registered.

Hamendra Nath Mukerji v. Kumar Nath Roy, 12 C. W. N. 478 and **Kristo Bullu Ghose v. Kristo Lal Singh**, 16 C. 642; 8 Ind. Dec. (N. S.) 424, followed. **P C SURAPATI ROY v. RAM NARAYAN MUKERJI**, (1923) A. I. R. (P. C.) 88; 45 M. L. J. 219; 50 C. 680; 18 L. W. 681; 33 M. L. T. 314 192

—*s. 50, presumption under—Rent receipts for twenty years, production of, whether necessary.*

Under section 50 of the Bengal Tenancy Act what has to be established is, not that rent has been actually paid at a uniform rate during twenty years, but that the tenant has held at a rate of rent which has not been changed during twenty years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the twenty years.

Mohini Kanta Saha v. Preo Nath Neogy, 67 Ind. Cas. 381; 35 C. L. J. 3; 9; (1922) A. I. R. (C.) 141; 49 C. 661, followed.

To entitle a tenant to the benefit of the presumption embodied in section 50 of the Bengal Tenancy Act, it is not necessary for him to produce receipts for a continuous series of twenty years. If some of the receipts are missing uniform payment may be proved for the wanting years by other proof and from surrounding circumstances.

Kattiyani Debea v. Soonduree Debea, 2 W. R. Act X Rul. 69, **Elahee-Buksh v. Roopun Telee**, 7 W. R. 284, followed. **C SATISH CHANRA BISWAS v. M. MADHAB SAHA**, 37 C. L. J. 598; (1923) A. I. (C.) 665 77

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— s. 50 (1), (2), (3), operation of—
Sub-division or amalgamation of tenure, effect of—Construction of Statutes—Expressio unius exclusio alterius, applicability of.

The operation of section 50 (1) and 50 (2) of the Bengal Tenancy Act is not excluded in the case of tenures merely by reason of sub-division or amalgamation.

The sub-division of a tenure does not operate as a breach of the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equals the original rent.

The maxim "*expressio unius exclusio alterius*" is often a valuable servant, but a dangerous master to follow in the construction of Statutes or documents. The *exclusio* is often the result of inadvertence of accident and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice. **C** KRISHNA KAMINI DAS *v.* NIL MADHAB SAHA, 36 C. L. J. 382; (1923) A. I. R. (C.) 66 **312**

— s. 50 (2)—Presumption, whether applicable to suit for ejectment.

Section 50 of the Bengal Tenancy Act is by its terms limited in its application to suits or proceedings under the Bengal Tenancy Act, but even in cases where the section is not directly applicable the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference.

The presumption contained in section 50 of the Bengal Tenancy Act applies whether the rent is payable entirely in cash or partly in cash and partly in kind or entirely in kind, and the same principle applies to suits or proceedings to which the rule embodied in section 50 is extended by analogy.

Dina Nath Pal v. Rajar Salt Prasad, 72 Ind. Cas. 663; 36 C. L. J. 220; 27 C. W. N. 115; (1923) A. I. R. (C.) 74, followed. **C** MONMOTHA NATH *v.* PROBODH CHANDRA, 37 C. L. J. 52; (1923) A. I. R. (C.) 102 **416**

— s. 55, effect of.

Section 55 of the Bengal Tenancy Act was not intended to abrogate the ordinary rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. Section 55 refers not to the right of a debtor to make a part payment, but to the appropriation of a payment when accepted by the landlord; in other words section 55 treats, not of tender but of appropriation. **C** BEHARI LAL *v.* NASIMANNESSA BIBI, 37 C. L. J. 222; (1923) A. I. R. (C.) 527 **482**

— s. 106—Question of title between rival proprietors, decision of.

A Revenue Officer in deciding disputes between rival proprietors under section 106 of the Bengal Tenancy Act is confined to the question of possession alone and is not competent to decide a question of title.

A Revenue Officer is competent to decide a question as to the relationship of landlord and tenant provided the question does not

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arise between the proprietors of neighbouring estates.

A certain plot of land was recorded in the Record of Rights as in the possession of plaintiff, who was the owner of an estate, as tenure-holder, while defendant, who was the owner of a neighbouring estate was recorded as the proprietor of the plot. Plaintiff brought a suit under section 106 of the Bengal Tenancy Act for a declaration that the plot was part of his estate and that he was in possession of it as proprietor and asking that the word "tenure-holder" appearing against his name in the Record of Rights in respect of the plot should be struck out:

Held, (1) that the suit raised a question of title between proprietors of neighbouring estates;

(2) that a Revenue Officer had no jurisdiction under section 106 of the Bengal Tenancy Act either to entertain the suit or to refer it to a competent Civil Court for trial. **PAT** MOORE *v.* GULAB CHAND, 4 P. L. T. 68; 1 P. L. R. 157; (1923) A. I. R. (Pat.) 213 **5**

— s. 170—Application for leave to deposit decretal amount—Notice—Procedure.

When an application is made for permission to deposit the amount of a decree under section 170 of the Bengal Tenancy Act, notice must be given to the judgment-creditor and to the judgment-debtor of the application, and a definite adjudication must be given as to whether the deposit can or cannot be made by the person who desires to make it. **PAT** KUNJA SINGH *v.* BARHO RAY, 4 P. L. T. 247; (1923) A. I. R. (Pat.) 353 **12**

Bombay High Court Rules, 1922, r. 215, applicability of—Partnership, denial of—Originating summons.

Rule 215 of the Rules of the Bombay High Court, 1922, Original Side, as amended, has no application where a partnership is denied, the question, therefore, as to the existence of the partnership itself cannot be determined by originating summons. **B** SUKHANAND GURUMUKHRAI *v.* BHIMRAJ, 25 Bom. L. R. 390; (1923) A. I. R. (B.) 394 **254**

Bombay Rent (War Restrictions No. 2) Act (VII of 1918), s. 4 (6)—"Change of conditions," meaning of.

The words "change of conditions," occurring in section 4 (6) of the Bombay Rent (War Restrictions, No. 2) Act do not refer to any change of occupiers, but to the premises leased. **S** VELJI HIRJI *v.* CHELLARAM COOVERJI, (1923) A. I. R. (S.) 15 **319**

Buddhist Law—Burmese—Polygamy—Inheritance—"Superior" and "inferior" wives, rights of—Marriage—Presumption.

Under the Burmese Buddhist Law, polygamy is lawful, and a Burman Buddhist may have, at the same time, two or more wives, who are on an equal footing.

Mt Me v. Mt Shive Ma, 14 Ind. Cas. 475; 1 U. B. R. (1912) 111; 11 M. L. T. 160; (1912) M. W. N. 201; 15 C. L. J. 276; 9 A. L. J. 276; 14 Bom. L. R. 204; 22 M. L. J. 360 16 C. W. N. 529; 5 Bur. L. T. 65;

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39 C. 492; 39 I. A. 61 (P. C.). and *Mi Kin Gale v. Mi Kin Gyi*, 8 Ind. Cas. 1169; 1 U. B. R. (1910) 42, followed.

But, for the purposes of the law of inheritance, it is necessary to examine closely the relations that subsisted between a second, or, as she is commonly termed, lesser wife and her deceased spouse in order to determine her true status. Before she can succeed to her husband's estate, she must show that her connection with the deceased was such that she may be said to have been endowed with proprietary, as well as personal rights, and the proof required of her is more strict, where she had prior knowledge of the existence of the first wife and lived separately from, and unknown to her.

Under the Burmese Buddhist Law, although there may not be sufficient evidence of actual giving and taking in marriage—since no ceremony of any kind is essential for the purpose of lawful wedlock—the conduct of the parties since their coming together may raise a strong presumption of marriage specially when the union has lasted for a long period. *R MAUNG THA DUN v. MA THIN YIN*, 1 R. I. 1044

Burma Habitual Offenders Restriction Act (II of 1919), ss. 2, 10—Area of restriction—Magistrate, duty of.

An order under the Burma Habitual Offenders Restriction Act confining a person to the four corners of his house is improper. The narrowest limits of restriction should be the village of the person concerned, or the limits of the village to which he is restricted.

Before making an order of restriction under the above Act the Magistrate should satisfy himself that the accused is able to earn his livelihood within the area of restriction. *L B NGABA SEIN v. EMPEROR*, 11 L. B. R. 383; (1923) A. I. R. (R.) 102; 24 Cr. L. J. 559 175

—ss. 6, 7, 10—*Restricted offender—Surety bond, whether can be taken—Restriction of person to village other than his own—Double report, legality of.*

A person restricted under the Burma Habitual Offenders Act, should not be made to report himself to the Police in addition to reporting himself to the village headman.

A person who is proceeded against under the Burma Habitual Offenders Restriction Act cannot be required to execute a surety bond.

In order to justify the restriction of a person to a village other than his own, there must be proof that he is able to support himself at that village. *L B EMPEROR v. NGA KATA*, (1923) A. I. R. (R. 68, 24 Cr. L. J. 541 157

Burma Municipal Act (III of 1898), ss. 92 (4), 180—Walls, whether building—Walls built without sanction—Committee, right of, to demolish.

Walls built to enable the occupier of a house to use the enclosed area as part of his habitation are buildings within the meaning of the Burma Municipal Act, and the erection of such walls without the sanction of a Committee,

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would justify the committee in directing their demolition. *L B KALOO KHAN v. M. A. RAHM*, (1923) A. I. R. (R.) 65 972

Burma Village Act (VI of 1907), ss. 10, 28—Village headman—Protection from prosecution.

A village headman is protected by section 28 of the Burma Village Act to this extent that he cannot be prosecuted for an act or omission punishable under section 10 of that Act, or for an abuse of his power similarly punishable, even though such act or omission, or such abuse of power is punishable under the Penal Code, or some other law, unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner. *U B NGA TUN LIN v. EMPEROR*, 4 U. B. R. (1922) 101; (1923) A. I. R. (R.) 271 24 Cr. L. J. 581 325

Calcutta Rent Act (III B. C. of 1920), s. 18—Rent-Controller fixing standard rent—Jurisdiction, wrong exercise of—Revision.

Under section 18 of the Calcutta Rent Act a party aggrieved by an order of the Controller of Rent fixing a standard rent is entitled, by way of revision, to obtain a decision from the President of the Calcutta Improvement Tribunal as to whether or not the Controller of Rent had jurisdiction to fix any standard rent in the case brought before him. The fact that the petitioner before the President of the Tribunal contends that the Controller had no jurisdiction in the matter, cannot be construed to be a point against the petitioner disentitling him to any relief at the hands of the President under section 18 of the Calcutta Rent Act. *G DAMANIA BROTHERS & Co. v. JORTON & Co*, 27 C. W. N. 287; (1923) A. I. R. (C.) 180 47

Carriage of goods—Damages for non-delivery—Railway Company—Risk Notes, Forms A and B—Loss, proof of.

A Railway Company seeking shelter behind a Risk Note in Form A or B for the non-delivery of the whole or a part of a consignment must show, in the first instance, that the goods have been lost, before the person claiming compensation for their loss can be called upon to prove that the loss was due to the neglect of the Company or to theft or to wilful neglect of its servants, etc.

Ghelabhat Punsi v. East Indian Railway Company, 63 Ind. Cas. 41; 23 Bom. L. R. 525; 45 C. 1201, relied on.

Agent, G. I. P. Railway v. Karaylal, 48 Ind. Cas. 294; 14 N. L. R. 122, *East Indian Railway Company v. Kanak Behary Halder*, 44 Ind. Cas. 631; 22 C. W. N. 62, dissented from. *L EAST INDIAN RAILWAY CO. v. FIRM MOHAN LAL PANNA LAL*, (1923) A. I. R. (L.) 432 447

G. P. Land Revenue Act (II of 1917), s. 188 (2) (c)—Village held in partnership—Management by lamibardar—Suit for profits, maintainability of—General suit for accounts, whether necessary—Interest on village profits, when allowable.

A village was held by the members of a Hindu family who were joint at first but became separate in interest afterwards. But they continued to share

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profits of the village, of which they were tenants-in-common, by putting all the profits into a common chest and meeting their expenses from the same chest. This arrangement was subsequently discontinued and the village was managed by the member who was the *lambardar* in his capacity as such *lambardar*. Differences arose with regard to the distribution of profits and a suit was brought for profits for the period during which the village had been managed by the member as *lambardar*. It was urged that the various separated members of the family should be regarded as partners and that a general suit for accounts should be brought:

Held, that the members could not be regarded as trading partners and that the suit as brought was tenable under section 188 (2) (c) of the Central Provinces Land Revenue Act.

No interest can be allowed in a suit for village profits where a co-sharer makes no demand for his share of profits. *N. MAKUNDRAM v. SHRIKRISHNA*, 19 N. L. R. 24 (1923) A. I. R. (N.) 197 142

—s. 212—*Raiyatwari lands whether heritable.*

Under clause (3) of section 212 of the C. P. Land Revenue Act, *raiayatwari* land is not liable to partition except with the consent of the Deputy Commissioner, but all heirs of a deceased *raiayat* are entitled to share in the produce of the land, and any of them may, if so advised, apply to the Deputy Commissioner for partition. *N. RAHMAT BI v. BHURI BI*, 6 N. L. J. 161 959

C. P. Municipal Act (XVI of 1903), ss. 2 (f), 44
—*Tax, essentials of—Lease money for Municipal building, whether tax.*

The essential quality of a tax and of those similar imposts mentioned in section 2 (f) of the C. P. Municipal Act seem to be that the amounts or rates of payments are fixed by levying authority without reference to the payer. In regard to some of them there is the option of making no payment if no benefit is taken but in none of them has the payer any option as to the amount to be paid.

An unpaid balance of lease money in respect of a Municipal market building is not a tax and is not recoverable by the summary procedure under section 44 of the C. P. Municipal Act. *N. YESHWANTRAO PANDE v. SECRETARY, MUNICIPAL COMMITTEE*, 19 N. L. R. 122; (1923) A. I. R. (N.) 264; 24 Cr. L. J. 516 52

C. P. Tenancy Act (XI of 1898), s. 35—Hindu widow—Surrender of holding—Reversioners, position of.

A surrender of an estate by a widow, if not impeachable for fraud or on other like ground, is binding on her husband's reversioners.

Dajiba v. Raghunath, 20 Ind. Cas. 920; 9 N. L. R. 126, relied on. *N. MUKUND v. DIWAKAR* 126

—ss. 47, 95. See LANDLORD AND TENANT 15

C. P. Tenancy Act (I of 1920), ss. 13, 105. See LANDLORD AND TENANT 51

City of Bombay Municipal Act (III of 1888), s. 33
—*Civil Procedure Code (Act V of 1908), s. 115*
—*Election petition, disposal of, by Chief Judge, Bombay Small Cause Court—Revision.*

The Chief Judge of the Court of Small Causes at Bombay, acting under section 33 of the City of Bombay Municipal Act is a *persona designata* and not a Court subordinate to the High Court. Consequently, the High Court has no jurisdiction, under section 115 of the Civil Procedure Code, to interfere with the decision of such Judge on an Election Petition under that section. *B. NAVAIKAR v. SARAJINI NAIDU*, 25 Bom. L. R. 463; (1923) A. I. R. (B.) 421 133

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXVI, rr. 11, 12—Letters Patent (Mad.) cl. 15—Partnership suit—Dispute as to terms of partnership—Reference by Judge of whole suit to Official Referee, validity of—Order, whether appealable—Order, whether can be questioned in same proceeding—Consent of parties, effect of—Functions of Court and Commissioner.

In a suit on the Original Side of the High Court for dissolution of an alleged partnership and accounts, the defendants disputed the terms of partnership. When the suit came on for trial, the Judge referred the whole suit to the Official Referee to determine what share the plaintiff had in the business and then to take a full account of the partnership. The Official Referee without taking accounts submitted a report as to the terms of the partnership, its duration and shares of parties. The consideration of the report came up again before another Judge. On objections being taken to the report:

Held, (1) that the order of the Judge referring the whole suit to the Official Referee was neither a "decree" within the meaning of section 2 (2) of the Code of Civil Procedure, nor a "judgment" within the meaning of clause 15 of the Letters Patent and was, therefore, not appealable;

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. L. J. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1 (F.B.), followed.

(2) that the Official Referee had no power to decide questions as to terms of partnership, its duration or the shares of partners and the adjudication by him of these questions was *ultra vires* and the order of reference by the Judge could not confer jurisdiction on the referee to decide them.

(3) that, however, neither the order of reference nor the report of the Official Referee could be treated as mere nullities and in the same suit and the same proceedings it was not open to the parties to get behind the said order until it were reversed or modified in appeal or review.

Ledgard v. Bull, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. 741; 5 Ind. Dec. (N.S.) 561 (P. C.), *Minakshi Naidu v. Subramanya*, 11 M. 26; 14 I. A. 160; 5 Sar. P. C. 754; 11 Ind. Jur. 393; 4 Ind. Dec. (N.S.) 18 (P. C.), *Eajlakshmi Dasi v. Katayana Dasee*, 12 Ind. Cas. 464; 38 C. 639, *Nusserwanjee Pestonjee v. Mee. Mynooddeen Khan*, 6 M. I. A. 134; 19 E. R. 50, *Raja Har Narain Singh v. Chandhvain Bhagwant Kuar*, 13 A. 300; 18 I. A. 55; 6 Sar. P. C.

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J. 14; 15 Ind. Jur. 283; 7 Ind. Dec. (N.S.) 189 (P. C.), distinguished.

George Henry Hook v. Administrator-General of Bengal, 60 Ind. Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 48 I. A. 147; 25 C. W. N. 915; 14 L. W. 221 (P. C.), *Mungul Pershad Dicit v. Gria Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.), *Sukhnath Rai v. Nehal Chand*, 59 Ind. Cas. 801; 42 A. 661; 18 A. L. J. 644; 2 U. P. L. R. (A.) 240, *Gomathan Alamelu v. Komandur Krishnamachari*, 27 M. 118, *Tuljaram Row v. Gopala Aiyar*, 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. T. 229; 32 M. L. J. 434, *Sashikanta Acharyya v. Raja Sarat Chandra Rai Chaudhuri*, 70 Ind. Cas. 6; 34 C. L. J. 415, *Krishna Behari Roy v. Bunwari Lall Roy*, 2 I. A. 283; 1 C. 144; 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth P. C. J. 213; 1 Ind. Dec. (N.S.) 93 (P. C.), *Beni Ram v. Nanku Mal*, 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138 (P. C.), *Rajeswara Sethupati Avergal [Raja of Ramnad] v. Velusami Tevar*, 59 Ind. Cas. 880; 25 C. W. N. 581; 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 23 Bom. L. R. 701, *Ex parte Manohar Bhivray*, 2 B. H. C. R. 374, and *Sadasiva Pillai v. Ramalinga Pillai*, 15 B. L. R. 383; 24 W. R. 193, relied on.

There is a sharp division between the functions of a Judge disposing of a suit and of a Commissioner like an Official Referee who is merely to aid the Judge in taking accounts rendered necessary for the passing of a final decree. The function of the Court is to determine the substantive rights of parties where they are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts having regard to the declaration of the rights of parties made by the Judge in passing the preliminary decree. His powers to deal with the question are not limited simply to matters of arithmetic but he has, for the purpose of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters ancillary thereto.

The powers of an Official Referee in Madras, limited as they are, must be sought for in the Civil Procedure Code and the Original Side Rules, and, in partnership suits, he is only a permanent Commissioner whose duty it is to take accounts and make enquiries contemplated by the Code and the Rules.

A distinction has to be drawn between cases where a Court having no jurisdiction to try the suit and cases where a Court having jurisdiction, passes an order which it is incompetent to pass.

An order without jurisdiction passed in a suit which the Court has jurisdiction to entertain and try cannot be treated as a nullity by the same Court in subsequent proceedings.

When a Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot, by their mutual consent, convert it into a proper

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judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But, when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

The Rules of Practice and Procedure of the English Courts do not form part of the substantive rules on the Original Side of the Madras High Court. **ABDUL WAHAB v. ROKIA BIBI** 808

ss. 10, 115—Order staying suit—**Revision.**

An order staying a suit under section 10 of the Civil Procedure Code is not a decision of a case within the meaning of section 115 of the Civil Procedure Code and is not open to revision.

In order to come to a finding as to whether the requirements of section 10 of the Civil Procedure Code have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the section, and if it does, it cannot be said that it has acted illegally in the exercise of its jurisdiction or that it has failed to exercise a jurisdiction which was vested in it by law. **L. RAM CHAND-DIWAN CHAND v. PRITHVI CHAND & Co.**, (1923) A. I. R. (L.) 615 237

s. 11—Agra Tenancy Act (II of 1901), s. 199 (1) (b)—Question of title decided by Assistant Collector, Second Class—Subsequent suit for ejectment before Assistant Collector, First Class—Res judicata.

Under ordinary circumstances the decision of an Assistant Collector, Second Class, would not be *res judicata* for a suit only triable by an Assistant Collector of the First Class.

Ram Gobind v. Sri Thakurji Maharaj, 19 Ind. Cas. 126; 11 A. L. J. 231, relied on.

But if an Assistant Collector of the Second Class decides a question of proprietary title under the provisions of section 199, sub-section (1) (b) of the Agra Tenancy Act his decision is one of a Civil Court and would act as *res judicata* in a subsequent suit brought in the Court of the Assistant Collector of the First Class in which such a question is involved.

Shahzade Singh v. Mohammad Mehdi Ali Khan, 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. 8, followed. **A. AMIN-UD-DIN v. ABDUL SHAKOOR**, (1922) A. I. R. (A.) 556 460

s. 11—Findings not necessary for decision of suit—Res judicata.

Findings upon matters which are not necessary for the determination of a suit do not constitute a final decision so as to be binding as *res judicata*. **L. SOHAN SINGH v. JAWALA SINGH**, (1923) A. I. R. (L.) 248 854

s. 11—Partition suit—Res judicata between co-defendants.

Where an adjudication between the co-defendants is necessary to give the appropriate relief

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to plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be conflict of interest between the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group.

Ramchandra Narayan v. Narayan Mahadev, 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142, followed.

Ramchandra v. Abaji, (1886) P. J. 15, explained.

In a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants and a party claiming or resisting partition, whether he is plaintiff or defendant, is bound by the decision of the Court.

Nalin Kanta v. Sarhamoyi Debya, 24 Ind. Cas. 294; 17 Bom. L. R. 1; 27 M. L. J. 75; 1 L. W. 607; 15 M. L. T. 544; (1914) M. W. M. 948; 21 C. L. J. 23; 19 C. W. N. 531 (P. C.); noticed: *B. GANGARAM BAKKRISHNA v. VASUDEO DATTATRAYA*, 23 Bom. L. R. 268; (1923) A. I. R. (B.) 203; 47 B. 534. 812

s. 11—*Res judicata*—Decree against limited heir—Reversioners, when bound.

A decree obtained against a limited female heir will operate as *res judicata* in a subsequent suit by the reversioners after her lifetime, if it is shown that the claim in the prior suit against the limited heir was not against her personally but against the inheritance she represented and that the trial was fairly and honestly conducted.

To ascertain whether a claim was against a limited heir personally or against the estate, the averments, the issues and the findings in the previous suit must be examined and if the contentions raised are those connected with the inheritance and the trial was with reference to them, the limited heir must be deemed to be representing the estate; if not, the litigation must be deemed personal to her and not binding on the reversioners.

Khumi Lal v. Gobind Krishna Narain, 10 Ind. Cas. 477; 38 I. A. 87; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) M. W. M. 432 (P. C.), *Ramsunran Prasad v. Shyam Kumari*, 69 Ind. Cas. 71; 49 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 1751; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751 (P. C.), *Risal Singh v. Balwant Singh*, 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. M. 1551; 36 M. L. J. 597; 21 Bom. L. R. 511; 43 I. A. 168 (P. C.), *Kalama Natchier v. Rajah of Shiwagunga*, 9 M. L. A. 539; 2 W. R. P. C. 31; 1923 P. C. J. 520; 2 Sar P. C. J. 305; 19 E. R. 843.

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Prosunno Kumari Debya v. Golab Chand Baboo, 2 I. A. 14; 14 B. L. R. 450; 3 Sar P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102, relied on.

Subbi Ganpatibhai v. Ramkrishnabhatta, 43 Ind. Cas. 23; 42 B. 63 at 76; 19 Bom. L. R. 919; *Ranchoardas Vandrawandas v. Pravatibai*, 26 I. A. 71; 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J. 54; 12 Ind. Dec. (N. S.) 485 (P. C.), *Braja Lal Sen v. Jiban Krishna Roy*, 26 C. 285; 13 Ind. Dec. (N. S.) 787, *Nalla Tirupatiraju v. Nandikolla Venkayya*, 67 Ind. Cas. 479; 45 M. 504; 15 L. W. 325; 30 M. L. T. 181; 42 M. L. J. 392; (1922) M. W. N. 207; (1922) A. I. R. (M.) 131, distinguished.

Certain disputes between the daughters and nephew of a deceased Hindu were settled by a compromise by which the nephew was given certain lands. In a suit by the nephew for possession of those lands the daughters pleaded that their father was divided and that there was no consideration for the compromise which had been obtained by fraud. The Court, finding against fraud and divided status, held that the plaintiff's claim was *prima facie bona fide* and that the settlement amounted to a compromise of a doubtful claim and decreed the suit. In a later suit by the reversioners against the heirs of the nephew, after the death of the daughters, for possession on the ground that the properties belonged absolutely to the last male holder:

Held, that the suit was barred by *res judicata* by virtue of the decision in the prior suit in which the daughters represented the estate of their father. *M. POTHUKUCHI RAJAGOPALAN v. VALIVETY RAMAMOORTHY*, 18 L. W. 491. 284

s. 11—*Res judicata*—Jurisdiction; absence of, in previous case.

Where a Court has no jurisdiction in law to try a case, its decision therein does not operate as a bar to a consideration in a subsequent suit, of the questions involved in the suit.

The fact that at the time of the decision of the former suit, the case-law was in favour of the Court having jurisdiction, does not make any difference.

Lilabati Misra v. Bishun Chobey, 6 C. L. J. 621, followed.

Panchu Mandal v. Chandra Kanta Saha, 12 Ind. Cas. 9; 14 C. L. J. 220, *Langat Singh v. Radha Kishan*, 7 Ind. Cas. 781 and *Dyal Singh v. Ram Rakha*, 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912, distinguished: *LMAYA DAS v. JINDA RAM*, (1923) A. I. R. (L.) 141. 874

s. 11—Suit dismissed as barred by limitation—*Res judicata*.

For a decision to operate as *res judicata* in a subsequent suit, it must be one on the merits; the dismissal of a suit because it was barred by limitation, without considering the merits, would not operate as *res judicata*. *SHANCHI KHAN v. KARAM CHAND*, (1923) A. I. R. (L.) 150. 705

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s. 11, O. XXXII, r. 2—Non-joinder of parties—Dismissal of suit—Res-judicata.

Dismissal of a suit for non-joinder of parties does not operate as *res judicata* in a subsequent suit between the same parties.

Explanation IV of section 11, Civil Procedure Code, deals with a case tried on the merits and does not apply to cases of dismissal for want of parties, non-payment of Court-fees or the like.

Where by mere inadvertence, no next friend is put in for one of the plaintiffs, who is a minor, but the defect is cured in the Appellate Court, there is no legal objection to the maintainability of the suit under O. XXXII, r. 2, Civil Procedure Code. *M SANKARAN, NAMBI v. DEVAKI ANTHEERJENAM*, 16 I. W. 26; (1922) M. W. N. 428; (1922) A. I. R. (M.) 259; 43 M. I. J. 572 491

s. 11, Expl. IV—Res-judicata—Plea not taken in previous suit—Subject-matter, difference of, effect of.

Defendant obtained a decree against one M. in execution of which he brought to sale and purchased a certain undivided share in a house which was alleged to have belonged to M. Subsequently, defendant brought a suit against B, the nephew of M., for rent of the purchased share. B denied the purchase by defendant but did not put forward the plea that the share purchased had never belong to M. The suit was eventually decreed. B then brought the present suit for possession of the share purchased by the defendant on the ground that M. was not the owner of the share.

Held, (1) that the question of M's ownership of the share purchased by the defendant was *res judicata* between the parties by virtue of Explanation IV to section 11 of the Civil Procedure Code;

(2) that the fact that the subject-matter of the earlier suit was not the same as the subject-matter of the later suit did not make any difference.

Gobind Lal v. Rao Baldeo Singh, 24 Ind. Cas. 93; 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914, followed. *L THAKUR DAS v. BRIJ LAL*, 457

s. 16, proviso—"Defendant," meaning of.

The word "defendant" in the proviso to section 16 of the Civil Procedure Code means "all the defendants" where there are more than one defendant in the suit. *C MOHAMED YASIN v. BIMOLA PROSAD* 405

s. 20—Sale of goods—Offer and acceptance—Delivery and payment—Carrying on business, what amounts to—Cause of action—Place of suing.

Where proposal and acceptance are made by means of letters, the contract must be deemed to have been made at the place where the letter of acceptance is posted.

Defendants, carrying on business at Calcutta, sold goods to plaintiffs who carried on business at Amritsar. They consigned the goods to themselves at Amritsar, and endorsed the Railway receipt in favour of a Bank at Amritsar, instructing the latter to realise the price of the goods from the plaintiffs before handing over the Railway receipt to them and endorsing it in their favour. Plaintiffs

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sued defendants to recover damages for non-delivery of some of the goods and the suit was instituted at Amritsar. It was found that the defendants had a travelling agent at Amritsar who secured orders for them and forwarded them to the Head Office at Calcutta. He had, however, no power to enter into any contracts or to receive any monies on behalf of the defendants.

Held, (1) that it could not be said that the defendants, carried on business at Amritsar, within the meaning of section 20 of the Civil Procedure Code;

(2) that inasmuch as the goods had to be delivered and paid for at Amritsar the Amritsar Courts had jurisdiction to entertain the suit.

Suraj Bhan v. Punjab Cotton Press Co. Ltd., 18 Ind. Cas. 136; 45 P. L. R. 1913; 40 P. W. R. 1913, relied on. *L FIRM HIRA NAND-MURLIDHAR v. FIRM GURMUKH RAI-RADHA KISHEN*, (1923) A. I. R. (L.) 427 205

ss. 22, 23—Transfer of case—Jurisdiction of Court—Convenience of parties.

In sections 22 and 23 of the Civil Procedure Code, the Legislature has left it to the unfettered discretion of the Court to determine upon the circumstances of each case whether or not the venue should be changed from the place where the plaintiff has laid it, and has wisely refrained from attempting to crystallise this discretion into a definite formula.

The jurisdiction conferred upon the Court by these sections is, however, of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown.

The cardinal principle to be observed in such cases is, that the plaintiff, as the *arbitrator litis*, has a right to choose his *forum* and that a Court should be exceedingly reluctant to interfere with this right.

The mere circumstance that the defendant's convenience would be promoted by the transfer cannot be regarded as an adequate ground for depriving the plaintiff of his right to file his suit in any Court allowed by law; but if the defendant establishes a manifest preponderance of convenience in his favour, the Court would be justified in granting his prayer. *L ROOP CHAND v. GOKAL CHAND* 860

s. 24—Plaint returned after recording evidence and hearing arguments—High Court's power of transfer.

Where a Court after recording all the evidence of the parties and hearing arguments on all the issues comes to the conclusion that the land in suit forms part of another district over which it has no jurisdiction and returns the plaint for presentation to some Court in that district, the High Court ought to exercise its powers of transfer and order the case to be sent back to the same Court to hear and determine the same. The jurisdiction of the High Court is wide enough to enable it to dispense with the formality of directing the plaintiff first to take jurisdiction, preliminary to an application to the

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High Court to transfer it back to the file of the First Court. **A SAHU NAND RAM v. HIRA DEVI**, 21 A. L. J. 86; (1923) A. I. R. (A.) 249 **495**

s. 35—Costs—Appellate Court, duty of—Appeal, second, interference by High Court. Under section 35 of the Civil Procedure Code it is the duty of an Appellate Court to award costs or make some direction as to costs, and the failure to make such provision, amounts to a failure to comply with the law, and as such is open to correction in second appeal.

The High Court will, in second appeal, interfere with an order of the lower Appellate Court varying the order of the Trial Court in the matter of costs, when such variation is based on either a wrong view of the law, or on a supposed fact for which there is no evidence whatever. **O RAM KISHAN DAS v. JAGANNATH PRASAD**, 25 O. C. 385; 10 O. L. J. 20; (1923) A. I. R. (O.) 155 **222**

ss. 37 (b), 115—Execution of decree—Transfer of area of residence of judgment-debtor—Jurisdiction to execute decree—Appellate Court erroneously deciding lower Court had no jurisdiction—Revision.

Where the area in which a judgment-debtor lives is transferred from the jurisdiction of the Court which passed the decree to that of another Court, the latter Court has jurisdiction to entertain an application for execution of the decree, and there is no necessity in such a case to obtain a transfer of the decree from the former Court to the latter Court.

See: **Nadan v. Muthuswamy Pillai**, 53 Ind. Cas. 213; 42 M. L. J. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63, followed.

An erroneous order by an Appellate Court dismissing an execution application on the ground that it was made to a Court not having jurisdiction amounts to a refusal to exercise jurisdiction within the meaning of section 115 of the Civil Procedure Code, and is open to revision by the High Court. **M MUTHUKARUPPA CHETTY v. PANJA KAVUNDAN**, (1923) M. W. N. 406; 18 L. W. 17; 45 M. L. J. 210 **956**

s. 47—Decree against father of Hindu joint family—Suit to make son's interest liable, maintainability of—Suit, whether maintainable. See HINDU LAW—JOINT FAMILY **402**

s. 47—Execution of decree—Defendant against whom suit dismissed, whether party to suit—Objection by such defendant to attachment, nature of—Court, duty of.

P. instituted a suit against C. and D, father and son, and obtained a decree against the son D alone. P then applied to attach D's property whereupon C applied to the Court not to execute the decree against the property which he alleged belonged to himself. The Court, after considering affidavits filed by the parties, granted C's application, and referred P to a regular suit to have it declared that the property was the property of his judgment-debtor and was liable to be attached and sold in execution of his decree. On appeal:

Held, (1) that although the suit against C had been dismissed he was still a party to the suit within

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the explanation to section 47 of the Civil Procedure Code, and any question arising between him and P with regard to the execution of the decree would have to be determined by the Court executing the decree and not by a separate suit;

(2) that C's application was premature and ought not to have been entertained, that the application could only be made when the property had actually been attached and the applicant's rights interfered with, and that the question in C's application should be decided upon evidence and not upon affidavits. **B CHUNILAL ASHARAM v. KASHIBHAI NATHABHAI**, 25 Bom. L. R. 440; (1923) A. I. R. (B.) 381 **419**

s. 47—Waste committed after decree—Execution of decree—Court, duty of—Judgment-debtor, liability of.

The question with regard to waste committed by a judgment-debtor after a decree for possession of property has been obtained against him, is a question arising between the parties, relating to the execution, discharge or satisfaction of the decree within section 47 of the Civil Procedure Code, and ought to be determined by the Court executing the decree, and not by a separate suit.

If property in respect of which a decree is made has depreciated in value, or been damaged since the decree, owing to the wilful action of the judgment-debtor the question whether he is liable to make good the loss is a question in execution. **B HARI SHRIDHAR PRABHU DESAI v. SAKHARAM PADMANNA MAGDUM**, 25 Bom. L. R. 449; (1923) A. I. R. (B.) 391 **443**

ss. 47, 96—Execution of decree—Order issuing warrant for arrest of judgment-debtor—Appeal, whether lies.

An order issuing a warrant for the arrest of a judgment-debtor in execution of a decree is an order under section 47 of the Civil Procedure Code and is appealable as a decree under section 96 of the Code.

Ardesirji Framji v. Kalyan Das, 3 Ind. Cas. 46; 32 A. L. J. 912, relied on. **L MEHR CHAND v. RAM LAI**, **766**

ss. 47, 109, 110, [O. XLV, r. 4—Leave to appeal to His Majesty in Council—Precedents, value of—Applicability of s. 47, whether substantial question of law—Consolidation of suits for appeal to Privy Council, when permissible.

Leave to appeal to His Majesty in Council cannot be granted in a case under section 109 (c) of the Civil Procedure Code merely because leave to appeal has already been granted in respect of another case involving the same question. **Makund Sarup v. Richard Ross Skinner**, 5 Ind. Cas. 523, not followed.

A question relating to the effect on a particular case of section 47 of the Civil Procedure Code as debarring the plaintiffs from proceeding by suit instead of in execution of a decree already obtained, is not such a substantial question of law within the meaning of section 109 (2) of the Civil Procedure Code as to entitle a party to leave to appeal to His Majesty in Council.

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Under O. XLV, r. 4 of the Civil Procedure Code, consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment.

Where two suits were determined by two distinct judgments in the Court of first instance and appeals therefrom were originally heard together and decided by one judgment but an application for review in one of them was allowed and another judgment given:

Held, that the judgments in the suits were different and distinct in both the Courts and that the second requirement under O. XLV, r. 4 of the Civil Procedure Code was not fulfilled and consolidation for the purposes of valuation could not be allowed.

Bhagwan Singh v. Bhavani Das-Bhagawan Das, 59 Ind. Cas. 794; 43 A. 223; 18 A. L. J. 1119; 2 U. P. L. R. (A) 411, distinguished. *M. RAJA RAJESWAR SETHUPATHI v. ARUNACHALAM*, 44 M. L. J. 424; (1923) A. I. R. (M) 602 **217**

— **s. 48, O. XX, r. 11—Limitation Act (IX of 1908), Sch. I, Art. 175—Execution of decree—Compromise—Agreement to pay by instalments, effect of—Limitation.**

Where both parties to a decree agree to an order being passed directing the payment of the decree by instalments and act upon it, they are precluded from contending subsequently that the order was an improper one.

Akbar Khan v. Dina Nath, 200 P. R. 1889, followed.

In execution of a decree the parties agreed that the amount of the decree should be paid by certain instalments. The Court accepted the arrangement and dismissed the application for execution which was then pending. Some of the instalments were paid, but default having then been made in the payment of others, the decree-holder again applied for execution:

Held, that the order passed by the Court on the agreement of the parties to pay the decretal amount by instalments was in substance an order under r. 11 of O. XX of the Civil Procedure Code and fell within the purview of clause (2) of section 48 of the Code, thus extending the period of limitation contained in clause (1) of the section. *L. BANARSI DAS v. RAMZAN*, (1923) A. I. R. (I) 381 **671**

— **s. 48 (1) (b)—Execution of decree—Order in execution placing compromise on record, whether order amending decree—Judgment-debtor, whether bound by compromise.**

An order under section 48 (1) (b) of the Civil Procedure Code must be made by the Court which passed the decree and acting as that Court. *Jurawan v. Mahabir Dube*, 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71, relied on.

An order made by an Executing Court placing compromise arrived at between the judgment-debtor and the decree-holder on the record does not fall within the purview of section 48 (1) (b) of the Civil Procedure Code.

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When an arrangement is entered into to pay a decree by instalments and is sanctioned by the Court executing the decree, the arrangement does not alter the original decree which still remains the decree to be executed, so far as the provisions of section 48 of the Civil Procedure Code are concerned:

Nanak Chand v. Anant Ram, 26 P. R. 1894 and *Chajju v. Gulab*, 61 P. R. 1886, followed.

Nawab Zada Muhammad Akbar Khan v. Dya Nath, 200 P. R. 1889, *Mon Mohun Roy v. Durga Churn Goode*, 15 C. 502; 7 Ind. Dec. (N. S.) 919, *Kashiram v. Pandu*, 27 B. 1; 4 Bom. L. R. 688 (F. B.), *Badri Narayan v. Kunj Behari Lal*, 18 Ind. Cas. 731; 11 A. L. J. 224; 35 A. 178, *Nanku v. Jadu Nath*, 57 Ind. Cas. 591, *Muhammad Sulaiman v. Jhukki Lal*, 11 A. 228; A. W. N. (1889) 53; 6 Ind. Dec. (N. S.) 573, *Lodd Govinda Doss v. Rajah of Karvetnagar*, 30 Ind. Cas. 357; 29 M. L. J. 219 and *Lodd Govind Doss v. Krishna Doss v. Ramdoss Vishmadoss*, 28 Ind. Cas. 376; 17 M. L. J. 222; (1915) M. W. N. 225, distinguished. *L. JIWAN BAKHSH v. MUBINAT HUG* **794**

— **s. 53—Hindu Law—Joint family—Survivorship—Nephew, whether liable for debts of uncle.**

Under the Hindu Law there is no obligation upon any co-parcener, except a son or a grandson who has acquired rights by survivorship, to pay the debts of a deceased co-parcener.

It is only a son or a lineal descendant who comes within the scope of section 53 of the Civil Procedure Code.

A nephew who has succeeded to the property of his uncle by survivorship, is not a "descendant" of his uncle in whose hands the property is liable for the debts of the deceased uncle within the meaning of section 53 of the Civil Procedure Code.

Chunilal Harilal v. Bai Mani, 46 Ind. Cas. 745; 42 B. 504; 20 Bom. L. R. 660, relied on. *A. JAGARNATH SINGH v. MOTI LAL*, 21 A. L. J. 353; 45 A. 455; (1923) A. I. R. (A) 539 **958**

— **s. 60 (p)—Punjab Land Revenue Act (XVII of 1887), s. 70—Insolvency—Panchotra paid to Lambardar, whether exempt from attachment.**

The amount of panchotra paid to a Lambardar does not fall within section 60 (p) of the Civil Procedure Code or section 70 of the Punjab Land Revenue Act and is not exempt from attachment on the insolvency of the Lambardar. *L. NAND SINGH v. LACHMI NARAIN SINGH* **928**

— **s. 64—Attachment of decree obtained by Receiver—Leave of Court not obtained, effect of—Bona fide purchaser for value, rights of, whether affected.**

An attachment of a decree obtained by a Receiver in a suit is invalid without the leave of the Court that appointed the Receiver.

An act done without the Court's sanction to proceed against a Receiver can, however, be validated by subsequent sanction.

Karath Parahote Ammukutty v. Manavikraman, 59 Ind. Cas. 568, 43 M. 793; 12 L. W. 331.

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Jangana Sanyasiak v. Mycherla. Peda Atachanna, 70 Ind. Cas. 759; 15 L. W. 289; 42 M. L. J. 379; *Banku Behary Dey v. Harendra Nath Mukherjee*, 8 Ind. Cas. 1115 C. W. N. 54; *Sarat Chandra Banerjee v. Apurba Krishana Roy*, 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L. J. 55, relied on.

But where no steps have been taken to validate an irregular attachment of a decree obtained by a Receiver by the time the Receiver assigns his interest as a decree-holder to an innocent purchaser, the rights of the attaching creditor cannot be allowed to prevail over those of a bona fide transferee for consideration of the decree-holder's interest. *M. KALYANASUNDARAM AIVAR v. NARASIMHA AIVANGAR*, 44 M. L. J. 427; 18 L. W. 280; (1923) A. I. R. (M) 567. 456

s. 86—Auction-purchase by Hindu manager decree-holder with family funds—Properties benami in name of third person—Suit by other members, if barred.

Section 86 of the Code of Civil Procedure does not bar a suit by a member of a joint family for recovering property bought in Court-auction out of joint family money in the name of some third person benami by the managing member who was himself the decree-holder. Such a purchase is not a purchase made "on behalf of" all the members of the family within the meaning of section 66.

Balnath Das v. Bishen Devi, 63 Ind. Cas. 678; 19 A. L. J. 78; 13 U. P. L. R. (A) 147; 43 A. 711 dissented from.

Suraj Narain v. Ratan Lal, 40 Ind. Cas. 988; 40 A. 159; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 685; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 752; 44 I. A. 2; (P. C.) distinguished.

Bodh Singh Doodhoooria v. Ganesh Chunder Sen, 12 B. L. R. 317 (P. C.); 19 W. R. 356; 5 Sar. P. C. J. 253, relied on. *M. NATARAJA MUDALIAR v. RAMASWAMI MUDALIAR*, 16 L. W. 358; 43 M. L. J. 363; (1922) M. W. N. 584; (1922) A. I. R. (M) 481; 48 M. 855. 478

s. 80—Transferee from insolvent prior to adjudication—Objection by Official Assignee to entry of transferee's name in Record of Rights—Suit for declaration of right to possession—Official Assignee, notice to, whether necessary.

The mere fact that the Official Assignee, in whom the estate of an insolvent has vested, objects before the Revenue Authorities to the entry of plaintiff's name in the Record of Rights in respect of property purchased by the latter from the insolvent prior to his adjudication, does not entitle the Official Assignee to notice under section 80 of the Civil Procedure Code prior to a suit for declaration of right to obtain possession. *B. DAMODAR JAGJIVAN v. GOVINDJI JAVABHAI*, 25 Bom. L. R. 378; (1923) A. I. R. (B) 392. 240

s. 91, O. XXII, rr. 4, 9, O. XXVI, r. 9—Suit to establish right of way, nature of Appeal—Abatement—Death of respondent.

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Ignorance of death, whether sufficient cause for setting aside abatement—Judgment based solely on local inspection, legality of.

A suit to enforce the enjoyment of a right of way as an easement does not fall within the purview of section 91 of the Civil Procedure Code and does not, therefore, require the sanction of the Collector.

It cannot be said that an appellant's ignorance of the death of a respondent can in no case be a sufficient cause for setting aside an abatement. A question of this nature cannot be decided on generalities and independently of the circumstances of each particular case before the Court.

A judgment should not be based solely on the result of a personal local inspection made by the Judge.

Ahmad Sahib Shutari v. Magnesite Syndicate Ltd., 29 Ind. Cas. 90; 39 M. 151; 2 L. W. 466; 17 M. L. J. 387; 23 M. L. J. 598; *Kessowji Issur v. G. I. P. Railway Company*, 31 B. 138; 6 C. L. J. 11; 11 C. W. N. 721; 17 M. L. J. 317; 4 A. L. J. 461; 9 Bom. L. R. 671; 2 M. L. T. 435; 34 I. A. 115 (P. C.), relied on. *L. TIRATH RAM v. MUHAMMAD ABDUL RAHIM SHAH*, (1923) A. I. R. (I) 545. 616

s. 92—"Interest," what is—Trust for benefit of widows and orphans of Khatri—Khatri, whether interested in trust.

It is wholly impossible to define, with any degree of accuracy, what exactly constitutes an "interest" as contemplated in section 92 of the Civil Procedure Code. There is no doubt, however, that the interest contemplated by that section need not be a direct interest, in the sense that only a beneficiary can institute a suit, but it must be a real, substantial and existing interest.

Ramachandra Iyer v. Parameswaran Munbu, 50 Ind. Cas. 693; 42 M. 36; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370, relied on.

Where a trust is created for the benefit of the widows and orphans of the Khatri of a particular locality, the male members of the Khatri community of that locality have a sufficient interest in the trust to enable them to bring a suit under section 92 of the Civil Procedure Code for the enforcement of the trust. *L. MURLI DHAR v. SULTAN SINGH*, (1923) A. I. R. (I) 518. 302

s. 92—Scheme—suit—Trustee, non-existence of, effect of—Person in possession, whether proper party—Construction of document—Will—Bequest for spread of Sanskrit language, validity of—Bequest for spread of Hindu religion, validity of—Alternative objects, bequest for—One object void—Whole gift, whether bad—Hindu Law—Adoption by widow in pursuance of authority to adopt in Will—Adopted son, whether entitled to repudiate dispositions of ancestral property in same Will.

Where there is a trust created by a Will for public purposes of a charitable or religious nature, a suit will lie under section 92 of the Code of Civil Procedure for settling a scheme if the direction of the Court is deemed necessary for the administration of such trust, whether

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or not there is a *de facto* or *de jure* trustee in existence on the date of suit. The heir at law in possession of the property has an interest in it and is a proper party to such a suit.

Nett Rama Jogiah v. Venkatecharlu, 26 M. 450 and *Budh Singh Budhuria v. Niradbaran Roy*, 2 C. L. J. 431, followed.

Ashraf Ali v. Mahammad Nurajjama, 49 Ind. Cas. 355; 23 C. W. N. 115. *Annavarapu Nacharamma v. Malladi Venkatapayya*, 70 Ind. Cas. 903; 31 M. L. T. 63; 16 L. W. 922 and *Official Assignee v. Abdul. Hussein*, 28 Ind. Cas. 116, distinguished.

A bequest for the spread of the Hindu religion is void for uncertainty.

Scott v. Brownrigg, (1881) 9 L. R. Ir. 246; *Dunne v. Byrne*, (1912) A. C. 407; 81 L. J. P. C. 202; 106 L. T. 394; 56 S. J. 324; 28 T. L. R. 257. *Ghandi Charan Mitra v. Haribola Das*, 51 Ind. Cas. 215; 46 C. 951; 29 C. L. J. 366; 23 C. W. N. 645, followed.

A bequest for the spread of the Sanskrit language is a valid charitable bequest.

Whicker v. Hume, (1858) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N.S.) 933; 11 E. R. 50; 31 L. T. (O. S.) 319; 6 W. N. 813; 115 R. R. 70 and *Attorney-General v. Flood*, (1816), Hay & J. App. xxi; Hayes 611, followed.

In the case of a bequest for alternative objects, where the trustees have been given an absolute discretion to spend the whole fund on one or other object or on both, if one of the objects is void for uncertainty, the whole gift is bad, for the testator having left the application of the fund entirely to the trustees it would be open to that body to apply the whole amount to the uncertain object, leaving nothing for the other.

In re Macduff, *Macduff v. Macduff*, (1896) 2 Ch. 451; 65 L. J. Ch. 700; 74 L. T. 706; 45 W. R. 154. *Houston v. Burns*, (1918) App. Cas. 337; 87 L. J. P. C. 99; 18 L. T. 462; 34 T. L. R. 319; *Blair v. Duncan*, (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 157; 18 T. L. R. 4194 and *Leavers v. Clayton*, (1878) 8 Ch. D. 584; 47 L. J. Ch. 675; 39 L. T. 89; 26 W. R. 907, relied on.

A person who has been adopted by a widow on the authority of her husband contained in a Will is not entitled to repudiate the other dispositions of property in the same Will. *Ganapathi Ayyan v. Savithri Ammal*, 21 M. 19; 7 Ind. Dec. (N. S.) 364, followed.

Bhyri Appamma v. Byri Chinnamm, 58 Ind. Cas. 511; 12 L. W. 17 and *Balkrishna Motiram Gujar v. Shri Uttar Narayander*, 50 Ind. Cas. 912; 43 B. 542; 21 Bom. L. R. 225, distinguished.

Per *Spencer, J.*—Where a testator's meaning is so vague that the execution of his purpose would practically amount to making a new Will for him, the Court will not recognise the trust as one capable of execution.

Muthukrishna Naicken v. Ramchandra Naicken, 47 Ind. Cas. 611; 37 M. L. J. 489. *Blair v. Duncan*, (1902) A. C. 37; 71 L. J. P. C. 22; 50

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W. R. 369; 86 L. T. 157; 18 T. L. R. 193 and *Grimond v. Grimond*, (1905) A. C. 124; 74 L. J. P. C. 35; 92 L. T. 477; 21 T. L. R. 323, followed.

In construing a Will, it is open to the Courts to take into account the sympathies of the testator with certain objects and his connection with certain institutions.

Clode v. Andrews, (1907) 97 L. T. 130 and *Attorney-General v. Stepney*, (1804) 32 E. R. 751; 10 Ves. 22; 7 R. R. 325, followed.

Per *Devadoss, J.*—A Court will uphold a bequest if its purpose is definite though the objects of the charity are not definite.

Gordhan Das v. Chunni Lal, 30 A. 111 at p. 114; 5 A. L. J. 23; A. W. N. (1908) 34, relied on. *M. VENKATANARASIMHA RAO v. SUBBA RAO*, 17 L. W. 51; (1923) M. W. N. 111; (1923) A. I. R. (M) 376; 46 M. 300

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s. 92—Sui by trustee to enforce his right to possession of trust properties, nature of—Sui against trespasser—Sanction of Collector, whether necessary.

A suit by a trustee to enforce his right as trustee to the possession of trust properties does not fall within the purview of section 92 of the Civil Procedure Code.

Budree Das Mukim v. Choont Lal Johurry, 33 C. 789 at p. 808; 10 C. W. N. 581, relied on.

Section 92 of the Civil Procedure Code does not apply to a suit brought against trespassers. *L. GANGA PURI v. MOHAN LAL*, 4 L. 295

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s. 104 (f), Sch. II, para. 21—Arbitration—“Order filing award”—what is Appeal.

An “order filing an award” within the meaning of section 104 (f) of the Civil Procedure Code, does not mean the order by which the arbitrators are directed to send their award or bring it to Court before any objections have been lodged or disposed of. It means the order passed after the objections have been disposed of, and against this order an appeal lies under section 104 (f) of the Code, notwithstanding the provisions of paragraph 21 (2) of Schedule II to the Code.

Ram Dilli v. Amar Singh, 101 Ind. Cas. 512; 123 P. R. 1912; 103 P. W. R. 1911; 172 P. L. R. 1911, followed. *L. GHULAM MUSTAFA v. GHULAM SADIQ*

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s. 109 (c)—Leave to appeal to Privy Council—Important questions of law.

In order that leave to appeal to the Privy Council should be granted the questions involved in the appeal must generally be important in the way that the decision of them will affect a large number of persons. *N. MOHAN LAL BALBHADRA v. BISSESSARDAS DAGA*, (1923) A. I. R. (N.) 272

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s. 110—Construction of document—Substantial question of law.

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial questions of law within the meaning of section 110 of the Civil Procedure Code.

Babu Udairaj Singh v. Raja Bhagwan Bahsh Singh, 10 O. C. 308, relied on. *O SANSURI PRASAD v. BHISHAM ALI*, (1922) A. I. R. (O.) 214

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Civil Procedure Code—1908—contd.**s. 114—Change of law after passing of decree—Review.**

The grounds for a review must be something which exist at the time of the decree sought to be reviewed: a review cannot be granted because of the happening of a subsequent event. Consequently, where there has been a change in the law subsequently to the passing of a decree, that is not a sufficient ground for review. **N SARFARAJ KHAN v. RAMCHANDRA** 4

s. 115—Interlocutory order—Revision.

The High Court will not interfere in revision with an interlocutory order unless some irreparable injury is caused to any party thereby. **PAT RAMJAS AGARWALA v. MESSRS. LINTON MOLESWORTH & CO., LD., (1923) A. I. R. (Pat.) 411** 71

s. 115—Order refusing to pass decree in terms of award—Interlocutory order—Revision.

An order refusing to pass a decree in terms of an award made in the course of the suit, and directing the hearing of the suit to proceed is an interlocutory order, and is not open to revision by the High Court under section 115, Civil Procedure Code. **B CHIMANBHAI KALAYANBHAI v. KESHAVLAL BULAKHIDAS**, 25 Bom. L. R. 443; (1923) A. I. R. (B.) 4021, 7 B. 721 464

s. 115—Revision—Interference, when justified.

A petitioner who invokes the revisional power of a High Court must come into Court with clean hands and must show that he has been unjustly treated.

A High Court will not exercise its revisional jurisdiction when the finding of the Court below has resulted in substantial justice, even where that finding has proceeded upon a wrong determination of a question of law.

Ghasita v. Sultan, 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 228 P. L. R. 1911, relied on.

The Judicial Commissioner will not in the exercise of his revisional jurisdiction interfere with even a wrong decision come to by an Appellate Court so long as the latter had jurisdiction to determine the question and actually did determine it, except where the wrong decision is of a vitally important description and where it cannot possibly, in the interests of justice, be allowed to stand. **Pesh RAM DAS v. RAM LAL** 873

s. 115—Suit, disposal of, on point not raised by parties—Substantial error or defect of procedure—Revision—Limitation Act (IX of 1908); Sch. I, Art. 142—Suit for possession—Gift, set up by defendant—Failure to establish gift—Possession of defendant, adverse or permissive.

Where a Court disposes of a suit on a point not raised by the parties and to which evidence has not been directed, there is a substantial error or defect of procedure and a revision against the decision is competent.

Shtababawa v. Sangappa, 29 B. 1; 1 A. I. J. 637; 8 C. W. N. 865; 6 Bom. L. R. 770; 8 Sar. P. J. C. 720; 31 I. A. 154 (P. C.) relied on.

Civil Procedure Code—1908—contd.

In a suit for recovery of possession of a certain plot of land, if the defendant bases his possession on a deed of gift which he fails to prove, the conclusion is, not that his possession is permissive but that it is that of a trespasser. Such a suit is governed by Art. 142 of Schedule I to the Limitation Act, and the plaintiff must prove possession within 12 years.

Sambu Hanmanta Koba v. Namanarayan Naikde, 12 Ind. Cas. 362; 35 B. 438; 13 Bom. L. R. 857, relied on. **PAT GAYANI SAHU v. BALCHAND SAHU** 41

s. 115—Wrong decision on point of law or fact—Illegality or material irregularity—Revision.

A Court which comes to a wrong conclusion on a point of law or fact, in deciding a question which it had jurisdiction to decide, cannot be said to have acted illegally or with material irregularity so as to justify interference in revision by the High Court, under section 115 of the Civil Procedure Code. **L SHRO NATH v. BEG RAJ**, (1923) A. I. R. (L.) 194 558

ss. 115, 151, O. XLI, rr. 23, 24, 25—Remand, when permitted—S. 151, object of—Appeal, when may be treated as revision.

The Code of Civil Procedure permits a remand by an Appellate Court not only in the particular case set forth in O. XLI, r. 23, but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision of the case, provided that the procedure under O. XLI, rr. 24 and 25 does not meet the cases.

An order of remand cannot be made under r. 23 of O. XLI of the Code, unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end.

Section 151 of the Code of Civil Procedure can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give a Court jurisdiction, if it does not possess it otherwise.

Where no appeal lies, an appeal to the High Court may be treated as an application for revision.

Ramji Das v. v. Bhagwan Das, 43 Ind. Cas. 180, not followed.

Section 115 of the Civil Procedure Code is intended merely to rule out revision of interlocutory orders. An order of remand is not an interlocutory order. **O FARZAND ALI v. EKADASHI**, 26 O. C. 10; 9 O. & A. L. R. 352; 10 O. L. J. 36; (1923) A. I. R. (O.) 177 591

s. 115, O. VII, r. 10, O. XLIII, r. 1 (a)—Order directing return of plaint confirmed on appeal—Revision.

Where a Trial Court holds that it has no jurisdiction to entertain a suit and its order is upheld on appeal, the order of the Appellate Court is open to revision by the High Court. **L DWARKA DAS v. RAHIM BAKHSH**, (1923) A. I. R. (L.) 524 755

s. 115, O. IX, rr. 8, 9, O. XII, rr. 2, 3, O. XLIII, r. 1 (c)—Dismissal of suit for default—Remedy—Procedure—Revision.

Civil Procedure Code—1908—contd.

Where a suit is dismissed under r. 2, O. XVII of the Civil Procedure Code, the plaintiff's remedy is by way of an application to set aside the dismissal under O. IX, r. 9 of the Code, and if that application is dismissed he has a right of appeal against the order of dismissal under O. XLIII, r. 1 (c) of the Code. When a suit is dismissed under r. 3 of O. XVII, of the Code the plaintiff has a right of appeal against the decree passed in the case.

In neither case does a revision lie against the order of dismissal. *PAT BAKAR HUSAIN v. HUSSAIN MIRZA*, 4 P. L. T. 46; (1923) A. I. R. (Pat.) 223 **373**

s. 141, O. IX, r. 9, O. XLIII, r. 1 (c)—*Suit dismissed for default—Application for restoration dismissed for default—Application for restoration of dismissed application, whether lies—Appeal.*

Where an application for restoration of a suit dismissed in default is itself dismissed in default, an application lies under O. IX, r. 9 of the Civil Procedure Code for restoration of the dismissed application. If, however, this second application is rejected, no appeal lies against the order of rejection.

Under O. XLIII, r. 1 (c) of the Civil Procedure Code an appeal lies from an order under O. IX, r. 9, of the Code rejecting an application for an order to set aside the dismissal of a suit. This cannot be interpreted to mean that an appeal lies from an order under r. 9, O. IX rejecting an application for an order to set aside the dismissal of an application. *L. LOK NATH v. SATTAN BAI*, (1923) A. I. R. (L.) 392 **821**

s. 144—Landlord and tenant—Ejectment—Possession obtained by landlord—Compensation, amount of, enhanced on appeal—Mesne profits—Interest.

A landlord obtained possession of a tenant's holding in execution of a decree for ejectment obtained by him under the provisions of the Malabar Compensation for Tenants' Improvements Act. On appeal, the amount of compensation awarded by the Trial Court was enhanced:

Held, that under the provisions of section 144 of the Civil Procedure Code, the defendant was entitled to interest at a sufficient rate on the additional sum awarded by the Appellate Court from the date on which the landlord took delivery till the date on which the defendant became aware that the landlord had deposited the additional amount, in lieu of mesne profits.

Kalyan Das v. Maqbul Ahmad, 45 Ind. Cas. 548; 35 M. L. J. 169 at p. 176; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 24 M. L. T. 110 25 Bom. L. J. 864; 40 A. 497; (P. C.), *Manian v. Kuthiruvattah*, 62 Ind. Cas. 724; 41 M. L. J. 15; 13 L. W. 449. *Manakal Murthi Sankaran v. Areekara Aihath Sankaran Nair*, 66 Ind. Cas. 129; 44 M. 960; (1922) M. W. N. 470; (1922) A. I. R. (M.) 347, followed. *M. NEELAKHANDAN NAMBUDDRI v. VASUDEVAN NAMBUDDRI*, 18 L. W. 301 (1923) M. W. N. 508; 45 M. L. J. 323; 33 M. L. T. 45 **1041**

Civil Procedure Code—1908—contd.

s. 144—Property attached in execution—Suit by third party regarding title to property—Property handed to Receiver in second suit—Second suit, dismissal of—Application under s. 144 by decree-holder in first suit, whether maintainable.

If a decree-holder in execution of his decree attaches certain property, but on a third party bringing a suit to establish his title to that property, the property is placed in charge of a Receiver in proceedings in the second suit; it is not competent to the decree-holder in the first suit, on failure of the second suit, to claim the recovery of the property from the Receiver, by an application under section 144, Civil Procedure Code, in the execution proceedings in the first suit. *A CHHUTAN v. JWALA PRASAD* **602**

s. 148, applicability of, to pre-emption decrees. See PRE-EMPTION **891**

s. 148—Ex parte decree set aside conditionally on payment of costs by certain date—Failure to make payment within time—Extension of time—Power of Court.

Where an application to set aside a decree, *ex parte* is allowed conditionally on the applicant paying a certain sum by a certain date to the plaintiff as damages and payment is not made by due date, the Court has jurisdiction under section 148 of the Civil Procedure Code to extend the time fixed.

Jagarnath Sahl v. Kamta Prashad, 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38, relied on. *L. FIRI GOBIND SAHAI-RUP LAL v. GURDAS MAL* **648**

ss. 148, 149—Decree conditional on payment of additional Court-fees by certain date—Extension of time—Power of Court.

Where a decree is passed in favour of a plaintiff conditionally on his paying additional Court-fees by a certain date and the condition is entered in the decree, the Court passing the decree has no jurisdiction to extend the time fixed for the payment except on a review of judgment. The remedy of the plaintiff is either by way of review or by way of appeal.

Sajjadi Begam v. Dilawar Hussain, 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625, relied on. *L. DIWAN CHAND v. RAM LABHAYA MAL*, (1923) A. I. R. (L.) 372 **922**

s. 151—Inherent power of Court—Reconstruction of destroyed record—Appellate Court, power of—Procedure.

There is inherent power in every Court to re-construct its own records, and there is inherent power in an Appellate Court to re-construct the records of the Court from which an appeal lies to it.

Where the records of a case are destroyed subsequent to the decree, the party appealing from the decree can ask the Appellate Court to re-construct the record. It may be that in re-constructing the records, the Court will have to go very near to re-hearing; but the Court will always have to apply its mind to ascertain not what the rights of the

Civil Procedure Code—1908—contd.

parties were, but what the destroyed record of the suit was and on that record, when re-constructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. Affidavits, counter-affidavits, hearing of witnesses, admission of copies are methods which can be properly allowed. It will also be open to the Court to call for a finding from the Court of first instance on what the record was, as also, in a proper case, to direct the First Court to do the re-constructing and to send down the case for the recording of evidence and a finding as to what the record consisted of. The judgment of the First Court would probably be the best evidence of what took place in that Court.

Where, however, the Appellate Court comes to the conclusion that no amount of re-constructing of the record would assist the appellant in his appeal, the Court has not got to have the case re-heard. The respondent in that event is entitled to the benefit of having the judgment which he has got in his favour at the original hearing, because the onus is on the appellant in an appeal to establish his grounds of appeal. *M. MARAKKA-KUTTI v. VEERAN KUTTY*, 44 M. L. J. 673; 32 M. L. T. 382; 18 L. W. 21; (1923) M. W. N. 471; 46 M. 679; (1923) A. I. R. (M.) 647 1050

s. 151—Inherent powers of Court—
Decree, setting aside of.

A Court has no jurisdiction under section 151, Civil Procedure Code, on its motion to set aside its own decree, to set aside which the plaintiff, if he so desired, could move the Court. Section 151 is intended only for exceptional cases for which there is no other remedy except the use of the Court's inherent powers. *A. MAHADRO v. KALLO*, 21 A. L. J. 447 494

ss. 151, 152—Amendment of decree—
Error in decree following error in plaint—Court,
jurisdiction of, to amend decree—Inherent power.

Where an error in a decree is due to following a similar error in the plaint, a Court has jurisdiction under section 152 of the Civil Procedure Code to amend the decree, as such error is one arising by accidental slip or omission. Apart from section 152, section 151 enables a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. *L. SA SINGH v. JAGJIT SINGH*, (1923) A. I. R. (L.) 147 679

s. 151, O. IX, r. 13—Ex parte decree,
setting aside of—Mistake as to date of hearing.

A Court has no jurisdiction, apart from O. IX, r. 13 of the Civil Procedure Code, to set aside an *ex parte* decree made by itself. The mere fact that the Court thinks it possible that the defendant might have made a mistake about the date of hearing of the suit is not sufficient. *L. JAGAN NATH v. ABDUL HAKIM*, (1923) A. I. R. (L.) 147 680

s. 151, O. XXXIX, rr. 1, 2—Temporary
injunction, grant of—Inherent jurisdiction.

A Court can issue a temporary injunction staying execution of a decree in a proper case even

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though no ground, such as is mentioned in O. XXXIX, r. 1 or r. 2, of the Civil Procedure Code, has been alleged or proved. *L. KANSHI RAO v. SHARAF DIN*, (1923) A. I. R. (L.) 141 909

s. 151, O. XLI, r. 20—Appeal—Court,
power of, to add stranger as party—Inherent
power, when to be exercised.

The powers of an Appellate Court to implead parties to an appeal are circumscribed by the provisions of r. 20 of O. XLI of the Civil Procedure Code, and it is only in exceptional circumstances that the inherent powers of the Court under section 151 of the Code should be invoked.

Under O. XLI, r. 20 of the Civil Procedure Code, an Appellate Court has power to implead only such persons as parties to the appeal as were parties in the Trial Court and were not made parties to the appeal, but not those who are complete strangers to the suit.

Mihir Lal v. Imtiaz Ali, 18 A. 332 at p. 333; A. W. N. (1896) 91; 8 Ind. Dec. (N. S.) 927, relied on.

Hemanigini Debi v. Haridas Banerjee 46 Ind. Cas. 398; 3 P. L. J. 409; (1918) Pat. 276; 5 P. L. W. 216, distinguished. *L. HALIMAN v. NUR MUHAMMAD KHAN*, (1923) A. I. R. (L.) 497 136

s. 151, O. XLI, r. 23, O. XLIII, r. 1 (4)—
Remand for re-decision after amendment of plaint—
Appeal, whether lies.

Order XLI, r. 23 of the Civil Procedure Code applies only when the case has been decided by the First Court on a preliminary point.

An Appellate Court has power to make an order of remand under section 151 of the Civil Procedure Code, when O. XLI, r. 23 of the Code does not apply.

Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Limited, 41 Ind. Cas. 598; 44 C. 929; 26 C. L. J. 49; 21 C. W. N. 877, relied on.

An order of remand made under section 151 of the Civil Procedure Code is not appealable.

An Appellate Court holding that on the plaint as it stood any decree which might be passed in favour of the plaintiff would be incapable of execution owing to vagueness, remanded the case to the Trial Court for a fresh decision after amendment of the plaint:

Held, that the order of remand was not one under O. XLI, r. 23 of the Civil Procedure Code, not being on a preliminary point, and was not, therefore, appealable. *L. MAHMUD SHAH v. TALAB HUSSAIN SHAH* 915

s. 151, O. XLVII, r. 7—Review, grant of
—Grounds not sufficient—Order under s. 151—
Appeal.

An appeal does not lie from an order granting an application for review of judgment, even although there were not sufficient reasons for entertaining the application, as the grounds on which such an appeal may be entertained are restricted by the provisions of O. XLVII, r. 7 of the Civil Procedure Code.

Civil Procedure Code—1908—contd.

An appeal does not lie from an order passed under section 151 of the Civil Procedure Code. **C BASANTA KUMARI GUPTA v. ABHOY SANKAR SEN.** 37 C. L. J. 99; (1923) A. I. R. (C) 450 306

— **O. I, rr. 1, 3, O. II, r. 3—Misjoinder of parties and causes of action.**

Defendants second party agreed to sell certain land to plaintiff No. 1. They subsequently sold the land to defendants first party and plaintiff No. 2 in certain shares. Plaintiffs Nos. 1 and 2 sued the defendants for specific performance of the agreement in favour of plaintiff No. 1, for possession of the entire land and for damages and mesne profits and in the alternative for partition of the share sold to plaintiff No. 2 and for accounts and profits of that share.

Held, (1) that the right to the reliefs claimed by the plaintiffs did not arise out of the same act or transaction or series of acts or transactions;

(2) that there was no common question of law or fact arising out of the separate claims of the plaintiffs;

(3) that the joinder of the plaintiffs and their causes of action in one case was not authorised by any provision of the Civil Procedure Code;

(4) that, therefore, the suit was bad for misjoinder of parties and causes of action.

Fakirapa v. Rudrapa, 16 B. 119; 8 Ind. Dec. (N. S.) 555, **Pinapati Mrutyumjaya v. Pinapati Janakamma**, 26 M. 647 (F. B.) distinguished. **PAT RAM JAS AGARWALA v. MESSRS. LINTON MOLESWORTH AND CO., LD.**, (1923) A. I. R. (Pat) 411 71

— **O. II, r. 2—Mortgage of three plots of land—Suit to redeem two plots—Consent decree—Subsequent suit to redeem third plot, whether maintainable:**

P. mortgaged three plots of land to D. He brought a suit to redeem two of the plots only and this resulted in a consent decree giving him possession on payment of a certain sum. He then brought a suit to recover possession of the third plot:

Held, that under O. II, r. 2, of the Code of Civil Procedure, the suit was not maintainable as by omitting to sue in respect of the third plot in the first suit the plaintiff must be deemed to have relinquished his claim to it. **B BHAI DAJI KHADE v. PATLU MALU SABLE**, 24 Bcm. L. R. 1157; (1923) A. I. R. (B.) 63 862

— **O. II, r. 2—Tenancy-in-common—Suit for profits—Subsequent suit for partition, maintainability of.**

Where there is a tenancy-in-common, there is always a constantly recurring right for each tenant to demand partition from the other. Therefore, it is always open at any time, as long as the tenancy-in-common continues, for one tenant to file a suit for partition irrespective of any suit or suits which may have been filed for a share of the profits previously.

The fact, therefore, that in a suit by a joint tenant for a share of his profits he did not sue for partition, would not bar a subsequent suit

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for partition, as the causes of action not being the same O. II, r. 2, Civil Procedure Code, would not apply. **B TIMMAPPA ANNAYA v. MANJAYA JATTAYA**, 25 Bom. L. R. 491, (1923) A. I. R. (B.) 449 424

— **O. II, rr. 3 (1), 6—Pre-emption suit—Joinder of several causes of action against vendee—Discretion of Court.**

A pre-emption suit is really direct against the vendee, the vendor not being a necessary party thereto.

Under the provisions of r. 3 (1), O. II, of the Civil Procedure Code a plaintiff in a pre-emption suit is entitled to claim to pre-empt in a single suit several sales effected by different vendors in favour of the same vendee.

Where a Trial Court does not think fit to take action under r. 6 of O. II of the Civil Procedure Code, against a joinder of several causes of action in the same suit an Appellate Court should not interfere with the exercise of its discretion. **L PAIRA RAM v. KESHO NATH** 892

— **O. V, r. 17—Service of summons—Substituted service, when to be made—Ex parte decrees, application to set aside—Limitation—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art. 164.**

The mere temporary absence of the defendant from his house does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used.

Defendant, against whom an *ex parte* decree had been passed applied to set it aside. The application was made on the 37th day after the decree had been passed. The defendant led evidence to show that a summons was never sent to be served on him and there was no rebuttal.

Held, that under the circumstances the *onus* was upon the plaintiff to show that the defendant had knowledge of the decree more than thirty days before the date of his application. **L NIHALA v. KHAZAN SINGH** 84

— **O. VI, r. 17—Civil Procedure Code (Act XIV of 1882), s. 53—Amendment of plaint, when to be allowed—Adverse possession—Co-sharers—Overt act—Joint property included in self-acquired property—Partition—Possession, whether to be upheld.**

Under O. VI, r. 17 of the Civil Procedure Code the powers of a Court in allowing an amendment of a plaint are far wider than was the case under the Code of 1882, and there is in the present Code no provision corresponding to the proviso to section 53 of the Code of 1882.

An amendment will not, however, be allowed if it converts the suit into one which is not only different from, but is inconsistent with, the plaint as originally lodged, and when the defendant is prejudiced by the amendment.

The main test in such cases is whether the amendment meets the ends of justice by allowing the whole question in dispute to be decided

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between the parties and to ensure a final decision and to avoid unnecessary litigation.

The possession of one co-sharer cannot become adverse to that of other co-sharers, unless he overtly asserts an exclusive title as against the others.

One of several co-sharers, if he includes a portion of the property in which he has a joint title in other property in which he has an exclusive title, may reasonably anticipate that he will not necessarily be disturbed or be put to unjustifiable expense when partition eventually takes place. Such action on his part, therefore, does not amount to an overt assertion of an exclusive title to that portion of the joint property as against the others. *Pesh GULAM HAIDAR KHAN v. SARDAR ALI KHAN* 748

— **O. VI, r. 17, Appendix A—Suit against Railway Company—Misdescription—Amendment.**

In a suit against a Railway Company the plaintiff described the defendant as "The Agent A. B. Railway Company, Ltd." The Company, however, was aware that the suit was brought against itself and not against the Agent:

Held, that the fact that the word "Agent" preceded the name of the Railway Company in the description of the defendant was merely a misdescription and little more than a clerical error which could be amended at any time without prejudice to the opposite party.

Sinoh Ram Behari Lall v. Agent, East Indian Railway Company, 64 Ind. Cas. 125; 2 P. L. T. 679, dissented from.

Per Macleod, C. J.—If it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought, in the interests of justice, to be allowed, if otherwise the rights of the parties would be prejudiced.

If a Company is a party to a suit it should be described either as "The A. B. Company, Ltd., having its registered office at—" or as "A. B., a public officer of the C. D. Company." *B SARASPUR MANUFACTURING COMPANY v. B. B. & C. I. RAILWAY COMPANY*, 25 Bom. L. R. 513; 47 B. 785. 1027

— **O. IX, applicability of, to execution proceedings—Application for execution dismissed in default—Remedy, proper—Order refusing to restore application for execution dismissed in default, whether appealable.**

The provisions of O. IX, of the Civil Procedure Code have no application to execution proceedings. Where, therefore, an application for execution of a decree is dismissed in default, the proper remedy of the decree-holder is to make a fresh application for execution of his decree.

An order refusing to restore an application for execution of a decree dismissed in default of prosecution is not open to appeal. *A BHARAT INDU v. ASGHAR ALI KHAN*, 21 A. L. J. 135; 45 A. 148; (1923) A. I. R. (A.) 460 453

— **O. IX, r. 2, 8—Specific Relief Act (I of 1877), s. 42—Suit for declaration—Admission by one defendant—Date fixed for appearance**

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of guardian ad litem of minor defendant—Dismissal for default—Form of order.

In a suit for declaration one of the several defendants who disclaimed all interest in the property in dispute, appeared and admitted the claim. There was some difficulty in serving the guardian ad litem of one of the minor defendants, and a date was fixed for his appearance. On that date the guardian filed a written statement and then absented himself. When the suit was called on none of the parties were present and the suit was dismissed for default under O. IX, r. 2, of the Civil Procedure Code. It was urged that the suit should not have been dismissed and that at any rate the dismissal should have been under O. IX, r. 8 of the Code:

Held, (1) that the fact that one of the defendants had admitted the plaintiff's claim did not entitle the latter to have the suit decreed against that defendant and dismissed as against the rest under O. IX, r. 8 of the Civil Procedure Code, inasmuch as the provisions of that rule must be read with section 42 of the Specific Relief Act which makes the grant of a declaratory decree discretionary and the discretion would obviously have been wrongly exercised in this case by granting a decree against one defendant only and that the least important defendant who had disclaimed all interest in the property in dispute;

(2) that the mere filing of a written statement by the guardian ad litem of the minor defendant before the case was called on did not amount to an appearance within the meaning of O. IX, r. 8, of the Civil Procedure Code;

(3) that, however, the date on which the suit was dismissed having been fixed only for the appearance of the guardian ad litem of the minor defendant, the Court should not have dismissed the suit on that date, owing to the absence of the plaintiff but should have fixed a further date for the hearing of the suit. *PAT THAKUR PATHAK v. RAGHO PATHAK* 559

— **O. IX, r. 8, XXII, r. 3, 9, O. XLIII, r. 1 (k)—Suit dismissed in default in ignorance of death of plaintiff—Refusal to set aside dismissal—Procedure.**

An order under O. IX, r. 8 of the Civil Procedure Code dismissing a suit for default of prosecution on a date when the plaintiff was dead, in ignorance of such death, is a nullity.

An order under r. 3, O. XXII of the Civil Procedure Code dismissing an application to set aside an order such as the above is not appealable; the proper remedy of the party affected is an application to the Court under r. 9 of O. XXII, to set aside the abatement, and if this application is also dismissed, the order of dismissal is appealable under r. 1 (k) of O. XLIII of the Code. *O TIRLOCHAN PRASAD SINGH v. BHAGWATI*, 9 O. & A. L. R. 70 230

— **O. IX, r. 9, application of—Execution application, dismissal of—Restoration.**

O. IX, r. 9 of the Civil Procedure Code has no application to execution proceedings. Execution applications are practically never restored, the

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reason is, that fresh applications can be filed.
O NAGESHWAR PRASAD v. JAI NARAYAN, (1922)
 A. I. R. (O. 201 73

— **O. XVII, rr. 2, 3—Dismissal of suit in presence of plaintiff's Pleader—Order, nature of—Remedy—Appeal—Revision.**

Where on the day of hearing of a suit the plaintiff is represented by a Pleader who asks for an adjournment which is refused, the Court cannot dismiss the suit for default under O. XVII, r. 2 of the Civil Procedure Code but must proceed to dispose of it on the merits under r. 3 of that Order.

Obiter:—The remedy of the aggrieved party in such a case is by way of appeal against the decree and not by way of revision against an order refusing restoration of the suit.

Patinhare Tayhatt Rama Mannadi v. Vellur Krishnan Menon, 26 M. 267, **Vatguntathammal v. Valliammal Ammal**, 41 Ind. Cas. 719; 41 M. 256; 6 L. W. 337; (1917) M. W. N. 743, followed.
M VISWANATHA ASARI v. SAMI ASARI, 18 L. W. 209; (1923) M. W. N. 802 982

— **O. XIX, r. 3, } O. XXXVIII r. 5—Affidavit, form of—Responsibility for making affidavit—Attachment before judgment—Principles applicable.**

Where an affidavit states that the information deposed to is true to the best of the deponent's knowledge, information and belief, it is imperative that the deponent should state how much of the affidavit is sworn to from his own knowledge and how much is merely sworn to from information which he believes to be true.

Padmabati Dasi v. Rasik Lal Dhar, 6 Ind. Cas. 666; 37 C. 259, relied on.

An affidavit in support of an interlocutory application may be confined to facts which the deponent is able to depose to of his own knowledge, or it may be one in which statements of his belief may also be admitted if the grounds of his belief are given. But if the affidavit swears to certain facts as true and does not state that the facts deposed to are merely within the belief of the deponent, then it must be taken that the statements, in so far as they are statements of facts, are matters within his own knowledge and not merely matters of belief only and it will be no excuse, if those facts should turn out to be untrue, to say that he did not intend it to be taken that he was swearing things within his own knowledge and that he merely intended to state what had been stated to him.

The power given to the Courts, by r. 5 of O. XXXVIII of the Civil Procedure Code, to attach a defendant's property before judgment is not meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit which may eventually prove to have been entirely de-

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void of merit. This power should be exercised only when the Court is satisfied, not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff if successful, of the fruits of victory.

Once the Court accept the view that the defendant has no intention of alienating his property, there is no longer any power in the Court to grant an order for attachment before judgment, because in such a case it is quite obvious that the essential condition laid down in r. 5 of O. XXXVIII of the Civil Procedure Code has not been fulfilled.
Pat Chandrika Prashad Singh v. Hira Lal 721

— **O. XXI, rr. 22, 23—Execution of decree—Attachment, issue of, before service of notice—Attachment, reasons for issue of, not recorded, effect of.**

The issue of an attachment before the service of the notice issued under r. 22, O. XXI of the Civil Procedure Code, is a mere irregularity, and does not invalidate the execution proceedings. Although the reasons for the issue of such an attachment should be recorded at the time, a failure to do so will not *per se* render the attachment invalid. **O GIRWAR SAHAI v. MANGAL**, 9 O. & A. I. R. 92; 26 O. C. 288 241

— **O. XXI, r. 30—Decree directing sale of property on failure of payment—Attachment, whether necessary before sale.**

The procedure laid down in O. XXI, r. 30 of the Civil Procedure Code is only applicable in the case of a decree for the payment of money, that is to say, where there is no decree which affects any specific immoveable property. In such a case before any specific immoveable property belonging to the judgment-debtor can be the subject of sale in satisfaction of the decree, it is necessary that the property should first be attached.

Where, however, a decree itself gives effect to a charge on specific immoveable property and directs the property to be sold in the event of the decretal amount not being paid, the decree is in fact something more than a decree for the payment of money and it is altogether unnecessary that the procedure laid down in O. XXI, r. 30, of the Civil Procedure Code should be carried out before the property is sold. **Pat Jagannath Sao v. Debi Prasad** 598

— **O. XXI, r. 33—Restitution of conjugal rights, decree for—Direction about wife not being sent to jail in execution—Marriage during minority—Enmity.**

The tendency of modern legislation is against sending women to jail in civil matters, and the power of sending women to jail in civil matters should, therefore, be sparingly exercised.

A woman who disobeys a decree for the restitution of conjugal rights loses her right to claim maintenance from her husband and this ought ordinarily, to be considered sufficient punishment for her disobedience.

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Bai Parvati v. Mansukh Jettha, 59 Ind. Cas. 361; 44 B. 972; 22 Bom. L. R. 1097, relied on.

Where it was found that a woman against whom a decree had been passed for restitution of conjugal rights had been married while she was still a minor, that her husband had neglected to maintain her for 18 or 19 years, and that there was bitter enmity between the parties:

Held, that this was a fit case in which the Court ought to exercise the power vested in it by O. XXI, r. 33 of the Civil Procedure Code by directing that the wife shall not be sent to jail in execution of the decree. *L. AMIR BIBI v. NUR MUHAMMAD* 716

O. XXI, r. 36—*Pre-emption decree—Vendee not in possession of property—Payment of pre-emption money—Formal possession, whether necessary—Trusts Act (I. of 1882), s. 82—Pre-emption decree—Pre-empted property under mortgage—Redemption with money paid by pre-emptor—Possession of vendee, nature of.* In a pre-emption suit, if the pre-empted property is in the possession of a mortgagee, the vendee being only the owner of the equity of redemption, it is not necessary for the pre-emptor, after he has paid the pre-emptive price, to apply for formal possession of the property. His title is complete on payment of the price. Order XXI, r. 36, Civil Procedure Code, has no application to such a case.

Sita Ram Pande v. Madho Pande, 23 Ind. Cas. 876; 12 A. L. J. 521, relied on.

Where in the case of pre-emption of sale of property subject to a mortgage, the vendee, on being paid the pre-emption money, redeems the mortgage and takes possession of the property, he will, on the analogy of section 82 of the Trusts Act, be considered to hold the property on behalf of the pre-emptor. *A RAGHUBIR SINGH v. JODHA SINGH*, 21 A. L. J. 417; 45 A. 482; (1923) A. I. R. (A.) 507 646

O. XXI, rr. 58, 63—*Property sold in execution of money-decree—Attachment under mortgage-decree—Objection by prior purchaser allowed—Sale under mortgage decree, effect of—Order on objection, whether final.*

Certain property belonging to S was mortgaged to L. K. and S to recover a certain sum of money and obtained an order for attachment before judgment of the property. The suit was subsequently decreed. L then obtained a decree on his mortgage and attached the mortgage property. K brought the property to sale under his money-decree and purchased it himself. He then filed an objection against the attachment and sale of the property in execution of L's mortgage-decree. This objection was allowed and the property was exempted from sale under L's decree. K then obtained possession of the property. Several years later, L's representatives brought the property to sale under L's mortgage-decree and purchased it themselves. Thereupon they brought a suit for possession and mesne profits against K.

Held, that the order on K's objection having become final and binding on L and his represen-

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tatives, the sale of the property under L's mortgage-decree was ineffective as against K and he could not, therefore, be evicted from the property. *P C SARJU PRASAD MISSIR v. MAKSUDHAN CHADHURY*, (1922) M. W. N. 793; (1922) A. I. R. (P. C.) 341; 21 A. L. J. 195; 27 C. W. N. 275; 31 M. L. T. 219 882

O. XXI, rr. 66, 90—*Execution of decree—Sale proclamation—Valuation, alternative, whether can be entered.*

The insertion of any valuation in a sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and should not be permitted.

Beni Prasad v. Eadal Singh, 49 Ind. Cas. 195; 4 P. L. J. 37, followed. *PAT DAMRUPAT SINGH v. RAMESHWAR SINGH*, (1923) Pat. 2c8; (1923) A. I. R. (Pat.) 445 317

O. XXI, r. 89—*Sale-proceeds, payment of, into Court—Money received by decree-holder.*

The payment of sale-proceeds into Court is not sufficient to constitute them money received by the decree-holder within the meaning of r. 89, O. XXI of the Civil Procedure Code. *B TOTARAM CHUNILAL v. CHHOTURAM MOTIRAM*, 25 Bom. L. R. 446; (1923) A. I. R. (B.) 299 454

O. XXI, r. 96—*Execution of decree—Sale—Property in possession of tenants—Formal possession, delivery of, effect of—Possession, suit for—Limitation.*

Zemindari property which is let out to tenants for cultivation is not property of a nature of which actual possession can be obtained by an auction-purchaser. Therefore, in the case of such property the delivery of formal possession to the auction-purchaser under the provisions of O. XXI, r. 96, Civil Procedure Code, gives a fresh start of limitation.

Jang Bahadur Singh v. Hunwant Singh, 63 Ind. Cas. 212; 19 A. L. J. 469; 43 A. 520 (F. B.), distinguished. *A RAM-LALLAN SINGH v. HARAKH NARAIN RAI*, 20 A. L. J. 641; (1922) A. I. R. (A.) 463 920

O. XXII, r. 4 (2)—*Legal representative—Pleading, repudiation of.*

O. XXII, r. 4 clause (2) of the Civil Procedure Code does not entitle the legal representative of a party to the suit to take up an attitude contrary to that taken up by his predecessor in the pleadings.

Birendra Kishore Manikya Bahadur v. Akram Ali, 13 Ind. Cas. 513; 15 C. L. J. 194; 39 C. 439; 16 C. W. N. 304, *Rangasami Gounden v. Nachappa Gounden*, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 L. A. 72 (P. C.), followed. *M KOZHICKOT PATINHARE KOVILAGATHI THAMBATTI THAMBURATHI v. SANKARAMENON* 376

O. XXII, r. 9—*Limitation Act (IX of 1908), s. 5, application of—Legal representative of deceased party—Delay in applying for substitution—Minority of representative—Succession Certificate, obtaining of—Delay, whether excusable;*

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Where there is delay in presenting an application for substitution of the representatives of a deceased party, due to the representatives being minors and to the fact that they had to obtain a Succession Certificate, there is sufficient reason to excuse the delay within the meaning of section 5 of the Limitation Act, read with O. XXII, r. 9 of the Civil Procedure Code. *O AKHTAR HUSAIN v. QUDRAT ALI*, 9 O. & A. L. R. 267; 26 O. C. 206 & 244 215

— O. XXIII, r. 3, O. XLIII, r. 1 (m)—Order holding that no compromise has been proved—Appeal, whether lies.

Rule 3 of O. XXIII of the Civil Procedure Code applies only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise or satisfaction.

Therefore, an order holding that there has been no compromise is not an order under r. 3 of O. XXIII of the Civil Procedure Code and is not appealable under r. 1 (m) of O. XLIII of the Code which pre-supposes the existence of an agreement, compromise or satisfaction.

Mahamat Idris Meah v. Mahamad Esahah, 42 Ind. Cas. 192 distinguished. *L SHANTI SARUP v. JAHANGIR MAI, BANSI MAI*, 177

— O. XXVI, r. 1—Commission to examine witness—Court, duty of—Pleadings—Fraud, allegation of—Evidence required.

Evidence taken on commission should only be used when the witness is proved to be too ill to give evidence in Court, or is absent, for other sufficient reason.

Charges of fraud and collusion should be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspensions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unrevell'd and cleared up and made plain before a verdict can be properly found against him. *P C SATISH CHANDRA CHATTERJI v. KUMAR SATISH KANTHA ROY*, (1923) A. I. R. (P. C.) 73; 45 M. L. J. 363 (P. C.) 391

— O. XXVI, r. 4—Commission to examine defendant as his own witness, when may be issued.

Defendant, who was residing in the territory of a Native State, more than 200 miles from the Court in which the suit was pending, and who was the only witness on his own behalf, applied for a commission for his examination as a witness. The application was rejected and an *ex parte* decree was passed against him. On revision:

Held, that this was a fit case in which a commission ought to have issued for the examination of the defendant as his own witness; and

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that the *ex parte* decree must be set aside and the suit decided afresh after the examination of the defendant on commission. *L. ELVERS v. AMERICAN MOTOR COMPANY* 923

— O. XXXII, rr. 3, 4—Suit against minor—Guardian ad litem, appointment of—Officer of Court, when can be appointed—Notice to minor and natural guardian—Failure of guardian to produce evidence—Decree, whether binding on minor.

In respect of the appointment of a guardian for a minor defendant, O. XXXII, r. 4, of the Civil Procedure Code does not impose an obligation on the Court to insist on the plaintiff to produce an affidavit to the effect that there is no other person fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendant before appointing an officer of the Court.

Under O. XXXII, r. 4, of the Civil Procedure Code an officer of the Court can be appointed guardian when there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of each case.

Order XXXII, r. 3, (4) of the Civil Procedure Code does not require any notice of the proceedings to the minor; nor is separate notice of a proposal to appoint a Court guardian necessary to the father or other person in whose care the minor is, when such father, guardian or other person is a party to the proceedings and is aware of the proposal. The absence of such notice is, in any case, a mere irregularity, which does not affect the validity of the proceedings, in the absence of proof of fraud or gross negligence on the part of the person appointed.

Munnu Lal v. Ghulam Abbas, 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 20 M. L. J. 591; 37 I. A. 77; 13 O. C. 123 (P. C.), followed.

Rashid-un-nisa v. Muhammad Ismail Khan, 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 163 (P. C.), distinguished.

A decision obtained against a minor represented by a guardian cannot be set aside in the light of fresh evidence which was not produced at the previous trial unless it can be shown that the failure to produce such evidence was the result of gross negligence or fraud on the part of the guardian ad litem. *M RAMASWAMI CHETTY v. DORAISWAMI*, 44 M. L. J. 293; 17 L. W. 638; (1923) A. I. R. (M.) 463 409

— O. XXXIII, r. 5—Application for leave to sue as pauper—Evidence on plaintiffs' title, whether can be taken.

In an application for leave to sue as a pauper the Court is not entitled, before deciding whether to grant or refuse the application, to take evidence from the parties upon the question of the plaintiff's title, with a view to find out whether the plaintiff has a cause of action. Taking such evidence

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amounts to exercising a jurisdiction not vested by law.

Jogendra Narayan Ray v. Durga Charan Guha, 52 Ind. Cas. 610, 46 C. 651, relied on.

Charu Sita Das v. Haran Chandra Mukherjee, 50 Ind. Cas. 520; (1919) Pat. 232, dissented from.

Kamrakh Nath v. Sundar Nath, 20 A. 299; A. W. N. (1898) 36; 9 Ind. Dec. (N. S.) 552 and *Chaterpal Singh v. Raja Rau*, 7 A. 651 (F. B.); A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854, distinguished. *A SHAURAN BIBI v. ABDUS SAMAD*, 21 A. L. J. 441; 45 A. 548 538

O. XXXIII, r. 5 (d)—Pauper petition—Cause of action—Extraneous evidence, admissibility of.

In an application for permission to sue in formal pauperis, in order to ascertain if the plaintiff discloses a cause of action under O. XXXIII, r. 5, of the Civil Procedure Code, it is not competent to the Court to go beyond the allegations in the plaint and on extraneous evidence to find whether the plaintiff is likely to succeed on the cause of action alleged.

Govindasami Pillai v. Municipal Council, Kumbakonam, 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399, followed. *M. BOLIMATI MURIGADU v. NALLA BAPADU*, (1923) M. W. N. 412; 18 L. W. 53 946

O. XXXIII, rr. 7, 15—Application for leave to sue as pauper, dismissal of, for want of prosecution—Fresh application, whether barred.

The rejection of an application for leave to sue as a pauper for failure of the applicant to press it, is a bar to a subsequent application for leave to sue as a pauper in respect of the same right.

Ranchod Morar v. Bezantji Edulji, 20 B. 86; 10 Ind. Dec. (N. S.) 616, *Naraini Kuar v. Mahkan Lal*, 17 A. 526; A. W. N. (1895) 106; 8 Ind. Dec. (N. S.) 636, relied on. *L. BEGUM v. JAFAR HASSAN* 897

O. XXXIV, r. 1. See TRANSFER OF PROPERTY ACT, s. 91 (f) 8

O. XXXIV, r. 4—Mortgage suit—Preliminary decree—Application to make decree final—Limitation, operation of. See LIMITATION ACT (IX of 1908), SCH. I, ART. 182 187

O. XXXIV, rr. 4, 10—Mortgage suit—Preliminary decree—Costs in appeal, whether recoverable personally—Practice.

In an appeal against a preliminary decree in a mortgage suit, it is open to the Appellate Court to direct that costs awarded against the unsuccessful appellant be recovered from him personally. But in the absence of such express direction the costs sanctioned by O. XXXIV, rr. 4 and 10, Civil Procedure Code, are added to the mortgage-money and are in the first instance recoverable from the mortgaged property after the decree is made final.

Damber Singh v. Kalyan Singh, 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 914 and *Sadiq Husain Khan v. Ummatul Fatima Begum*, 48 Ind. Cas. 329, followed.

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Amina Bibi v. Rama Shankar Misar, 50 Ind. Cas. 730; 17 A. L. J. 582; 41 A. 473, distinguished. *A MUHAMMAD IFTIKHARULLAH v. BANKE LAL* 950

O. XXXIV, r. 5—Final decree, application for—Notice to judgment-debtor, necessity of.

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree-holder, but in practice it is given on the principle that it is just and proper to hear the opposite party.

Where a notice of an application by a decree-holder to make his decree final is duly served on the judgment-debtor but he fails to appear to show cause on the date fixed for the hearing, it may be reasonably inferred that he has nothing to say in answer to the application. If the first application is subsequently dismissed in default and the decree-holder applies again, a second notice is not required under the circumstances. *N. BABOOJI v. RAMGOPAL*, 19 N. L. R. 124 32

O. XXXIV, r. 5—Preliminary decree—Execution, application for, whether can be treated as application for final decree.

When the holder of a preliminary decree, instead of applying for a final decree being passed, applies for the execution of the decree, the Court has no jurisdiction to treat the latter application as an application to make the decree final. *S. SAKER CHAND NARSIDAS v. YACOOB*, (1923) A. I. R. (S.) 14 311

O. XXXIX, r. 1—Temporary injunction, grant of.

An *ad interim* injunction ought not to be given when permanent relief is not obtainable. *PAT BISHUN PRASHAD v. SASHI BHUSAN*, (1923) A. I. R. (Pat.) 193 294

O. XL, r. 1—Declaratory suit—Receiver, appointment of—Agricultural land—Appointment of Receiver to collect rent—Jurisdiction of Civil Court.

The question that a Court has to consider in dealing with an application for the appointment of a Receiver is whether, in the circumstances of the case, the appointment of a Receiver is just and convenient, the object merely being to preserve the property.

A Court is not debarred from appointing a Receiver of property forming the subject-matter of a declaratory suit in which possession of the property is not to be awarded to one party or the other.

Dan Prasad v. Gopi Kishen, 22 Ind. Cas. 59; 36 A. 19; 11 A. L. J. 973, *Amar Nath v. Tehal Kaur*, 67 Ind. Cas. 383; 4 U. P. L. R. (L) 71; (1922) A. I. R. (L) 444, relied on.

A Civil Court has jurisdiction to appoint a Receiver to collect the rents of agricultural land.

Raghubir Singh-Jaswant Singh v. Narinjan Singh, 72 Ind. Cas. 569; (1923) A. I. R. (L) 48, distinguished. *L. DHUMI v. MUHAMMAD SAJJAD ALI KHAN*, (1923) A. I. R. (L) 623 600

O. XLI, r. 22—Appeal barred by time—Cross-objections, whether can be heard.

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An appeal must be properly before the Court in order that cross-objections may be heard.

Where an appeal is barred by time neither the appeal nor the cross-objections are properly before the Court, and the Court has no power to proceed with either. *L. JAIGOPAL SINGH v. MUNA LAL*, 4 L. 140; 5 L. J. 345. 655

— O. XLI, r. 23, O. XLIII, r. 1 (4)—Order of remand involving question of custom—Appeal, whether lies.

There can be no appeal from an order of remand passed under O. XLI, r. 23, of the Civil Procedure Code where the question involved is one of custom.

Sawan Singh v. Mothu, 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914, followed. *L. CHANDO v. MIRAN BAKSHI*, (1923) A. I. R. (L.) 525. 650

— O. XLI, r. 23, O. XLIII, r. 1 (u)—Appeal against order of remand—Finding of fact based on misappreciation of case—High Court, interference by.

In an appeal from an order of remand findings of fact cannot be examined in second appeal, but where it appears that the first Appellate Court has failed to appreciate the real question in controversy between the parties, the High Court will interfere and direct a re-hearing of the appeal. *L. QADIR BAKSHI v. SHAMAS DIN*, (1923) A. I. R. (L.) 206. 756

— O. XLI, r. 27—Evidence fresh in appeal—Document filed after close of arguments, whether admissible.

Where a document is filed by a party in the Appellate Court after arguments have been finished on both sides and judgment is reserved; it ought not to be admitted in evidence without giving the other party an opportunity to raise any objection which he might have to its admissibility in evidence. *C. MANJURI DASSI v. KHETRAMANI DASSI*. 96

— O. XLVII, r. 1—Second appeal, disposal of—Discovery of fresh evidence—Review.

An application for review based on the ground of discovery of fresh documentary evidence cannot be entertained after the disposal of a second appeal.

Nandkishore v. Anwar Hussain, 4 Ind. Cas. 809; 32 A. 71; 6 A. L. J. 979, followed. *A. MARIAM-UN-NISSA BIBI v. BABU RAM*, 21 A. L. J. 377; 45 A. 451; (1923) A. I. R. (A.) 541. 1016

— O. XLVII, r. 4, 5—Review, application for—Appeal, filing of, effect of—Procedure.

If an application for review is made in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal. That power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be prosecuted. On the other hand, if the application for review is successful and the

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judgment is vacated, the appeal directed against that judgment can no longer proceed. When a final decree is made after the review has been admitted that decree is, however, liable to be challenged in accordance with law.

Birjbasi Lal v. Salig Ram, 14 Ind. Cas. 472; 34 A. 282; A. L. J. 183. *Kankalya Lal v. Baldeo Prasad*, 28 A. 240; A. W. N. (1905) 265. *Vadilal v. Fulchand*, 30 B. 56; 7 Bom. L. R. 664. *Nanhe v. Mangat Rai*, 20 Ind. Cas. 647. *Arayalpurath v. Cheekiladen Ahmad*, 2 Ind. Cas. 294. *Gour Sundar Bhoumik v. Rakhal Raj Bhoumik*, 34 Ind. Cas. 592; 27 C. L. J. 326; 20 C. W. N. 1165. *Maksud Mali v. Secretary of State*, 9 Ind. Cas. 532. *Pyari Mohan Kundu v. Kalu Khan*, 41 Ind. Cas. 497; 44 C. 1011 and *Bhurut Chunder Mojomdar v. Ram Gunga Sein*, B. L. R. Sup. Vol. 362; 5 W. R. 59, relied on.

The Court is competent to determine whether when a review is granted the case should be re-opened in part or in its entirety. When, however, on the grant of an application for review, no reservation is made, it may fairly be assumed that the entire case is intended to be re-opened.

Gour Sundar Bhoumik v. Rakhal Raj Bhoumik, 34 Ind. Cas. 592; 27 C. L. J. 326; 20 C. W. N. 1165. *Bhubaneswari Koer v. Ajodhya Singh*, 11 Ind. Cas. 102; 15 C. L. J. 349. *Sadar-ud-Din v. Ekram-ud-Din*, 20 Ind. Cas. 670; 19 C. L. J. 225; 18 C. W. N. 22 and *Janaki Nath v. Prabhesini Dasi*, 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 96; 43 C. 178, relied on.

A review proceeding ordinarily commences with an *ex parte* application. The Court may then, either reject the application at once, or may grant a Rule calling on the other side to show cause why the review should not be granted. In the second stage, the Rule may be either admitted or rejected and it is obvious that the hearing of this Rule may involve to some extent an investigation into the merits. If the Rule is discharged, then the case ends. If, on the other hand, the Rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the Rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case the parties are relegated to and still rest on the old decree. Consequently, the order appropriate to a discharge of the Rule is the rejection of the application, an order so made terminates the second stage of the proceedings and there is no third stage for the re-hearing of the case.

Vadilal v. Fulchand, 30 B. 56; 7 Bom. L. R. 664 and *Nanhe v. Mangat Rai*, 20 Ind. Cas. 647, relied on.

Where an application for review is presented under O. XLVII, r. 5 of the Civil Procedure Code, in respect of a decree made by two Judges, if one of them is absent from the Court, the remaining Judge may deal with the matter in the first two

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stages, as mentioned above but not in the third.
O' GOUR KRISHNA SIRCAR v. NILMADHAB SAHA,
 35 C. L. J. 484; (1923) A. I. R. (C.) 113 34

Sch. II, para. 1—Arbitration—“All parties interested”—Parties who have failed to appear, whether necessary parties to reference.

From the mere fact that a certain party to a case does not put in an appearance and the case proceeds *ex parte* so far as he is concerned, it cannot be assumed that he is not an interested party within the meaning of paragraph 1 of Schedule II to the Civil Procedure Code.

Polita Pavana Panda v. Nayasinga Panda, 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538 and **Laduram Nathmal v. Nandalal Karuri**, 55 Ind. Cas. 747; 47 C. 555; 31 C. L. J. 156, relied upon.
M. PASUMARTI BHAGAVANULU v. BOLLAN SETHA RAMASWAMI, 41 M. L. J. 359; 17 L. W. 424; (1923) M. W. N. 296; 32 M. L. T. 298; (1923) A. I. R. (M.) 572 202

Sch. II, para. 15—Arbitration—Arbitrator acting on private information—Misconduct—Award, whether valid—Guardian and minor—Minor, whether bound by guardian's admission—Reference by guardian waiving right to object to award, whether binding on minor.

An arbitrator is not entitled to examine witnesses in the absence of parties or institute private enquiries behind their back and an award based on such information or knowledge is invalid, unless a power is expressly vested in the arbitrator by agreement of parties where they are *sui juris*.

In re Gregson and Armstrong, (1894) 70 L. T. 106; 10 R. 408; **Harvey v. Shelton**, (1844) 7 Beav. 455; 49 E. R. 1141; 13 L. J. Ch. 466; 64 R. R. 116; **Dobson v. Groves**, (1844) 6 Q. B. 637; 115 E. R. 239; 14 C. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509; **Daya Kishen v. Dharan Das**, 4 A. L. J. 159; A. W. N. (1907) 75; **Lachmi Narain v. Sheo Nath Pandey**, 54 Ind. Cas. 443; 42 A. 185; 18 A. L. J. 78; 1 U.P. L. R. (A.) 177; **Ganesh Narain Singh v. Malda Koer**, 10 Ind. Cas. 456; 13 C. L. J. 399 and **Hari Singh v. Kankinarah Co. Limited**, 66 Ind. Cas. 389; 34 C. L. J. 39, relied on.

Where, on a reference to arbitration by a guardian on behalf of a minor agreeing to be bound by the decision of the arbitrator, either on his own information, or on examination of witnesses, and undertaking not to dispute the validity of the award on any ground, an award was passed based on private inquiries and information not accessible to the parties:

Held, that the guardian's conduct in waiving the minor's right to object to irregular procedure was grossly negligent and that the minor was not bound either by the reference or by the award.

Swamirao v. Collector of Dharwar, 17 B. 299; 9 Ind. Dec. (N. S.) 195; **Rhodes v. Spithenbank**, (1883) 2 Q. B. 577; 58 L. J. Q. B. 287; 60 L. T. 856; 37 W. R. 457; **Lakshminarayana Taniri v. Ramachandra Taniri**, 45 Ind. Cas. 763; 34 M. L. J. 71; 23 M. L. T. 89 and **Chunduru Punnayyah v. Rajam Viramma**, 70 Ind. Cas. 668; 42 M. L. J. 429; 15 L. W. 427; (1922) M. W. N. 213; 45 M. 425; (1922) A. I. R. (M.) 273, followed.

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Venkalasubba Rao, J.—A statement in the nature of an admission by a guardian is not as such conclusive against a minor.

If once it is found that evidence has been improperly admitted, the question whether such evidence had or had not an effect on the arbitrator's mind is immaterial and the award cannot be supported.

Dobson v. Groves, (1844) 6 Q. 637; 115 E. R. 239; 14 L. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509; **Walker v. Forbisher**, (1801) 6 Ves. 70; 31 E. R. 943; 5 R. R. 223, relied on. **M. CHINTALAPUDI SANYASI v. CHINTALAPUDI VENKATA RAO**, 17 L. W. 71; (1923) M. W. N. 7; 44 M. L. J. 263; (1923) A. I. R. (M.) 301 470

Committee—Temple Committee—Meeting—Quorum, want of—Adjournment—Notice.

Where a duly notified meeting of the members of a Temple Committee cannot be held owing to there being no *quorum*, such meeting cannot be adjourned to, and held at, a later hour, without notice of such adjournment having been previously given to all the members of the Committee; an adjourned meeting held without such notice, and all business transacted thereat are invalid. **B. NILKANTH DEVRAO NADKARNI v. MURARI GOVIND MHALE**, 25 Bom. L. R. 315; (1923) A. I. R. (B.) 272 178

Companies Act (VI of 1882), s. 169—Appeal, delay in presenting—Extension of time—Sufficient cause—Negligence.

Appeals under the Companies Act ought to be filed with such promptitude as to render service of notice upon the respondent possible within the three weeks prescribed by section 169 of the Act. The Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court.

Daulat Ram v. Woollen Mills Co., 95 P. R. 1908; 165 P. W. R. 1908; **Ghisu Mal v. Porter**, 10 Ind. Cas. 908; 33 A. 641; 8 A. L. J. 719; **Ramanappa v. Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company**, 22 M. 291; 8 Ind. Dec. (N. S.) 207, relied on.

The carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by section 169 of the Companies Act and the Court should not show leniency in such matters without sufficient cause.

Hira Lal v. Himalaya Glass Works Co., 10 Ind. Cas. 433; 176 P. L. R. 1911; 100 P. W. R. 1911, followed. **I. NARINDRA NATH v. KISHEN LAL**, 211

Construction of contract—Contract for sale of goods—Arbitration clause—Claim for damages for non-delivery, whether claim arising out of contract.

A contract for the sale of goods contained a clause providing that any claim or dispute of any sort whatever arising in connection with the contract, unless amicably settled, must be referred to arbitration. Plaintiff sued to recover damages

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for non-delivery of a portion of the goods contracted for :

Held, that the plaintiff's claim being for damages arising out of the failure of the defendant to fulfil his contract to supply the goods, was covered by the arbitration clause and his suit was not, therefore, maintainable.

Ganesh Das-Ishar Das v. Durga Dat-Jagan-Nath, 60 Ind. Cas 776; 2 L. 19; 3 L. L. J. 61; (1922) A. I. R. (L.) 97, followed *L. GHAMANDI LAL-NARAIN DAS v. CHURANJI LAL-POKHAN MAILL*, 5 L. L. J. 146; 4 L. 168; (1923) A. I. R. (L.) 453 459

—*Sale of goods—C. I. F. contract, incidents of—Purchaser, whether can refuse payment except on delivery.*

One of the clauses in a contract for the sale of goods provided that the vendor shall draw upon the purchaser through any Bank in sterling for the total amount of the invoice at 60 days' sight, the Bills of Lading and shipping documents to be handed to the purchaser on payment of the draft. The purchaser further bound himself to accept such drafts for presentation and pay at maturity notwithstanding any objection he may have on account of any variation whatever from the terms of the indent, such objections, if any, to be settled privately or by arbitration. The purchaser also agreed not to raise any claim in respect of the transaction unless he had accepted and retired the draft or drafts:

Held, that on a true construction of the agreement the purchaser was bound to accept the drafts upon presentation: on tender of the Bills of Lading and shipping documents, and no claim could be raised by him, nor arbitration invoked until such payment had been made.

When goods have been sold upon C. I. F. terms, the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must be tendered within a reasonable time from the time agreed upon for shipment of the goods which they represent. If the contract of sale provides that payment is to be made by draft drawn on the buyer, the latter is bound to accept the draft on tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the Bill of Lading, Charter-party, Invoice and Policy of Insurance. Upon payment he can, upon arrival of the ship demand the goods themselves, and should these not be forthcoming, or, when forthcoming, not be of the nature contracted for, all his remedies at law are then open to him.

Clemens Horst Co. v. Biddell Brothers, (1912) A. C. 718; 81 L. J. K. B. 42; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 81; 56 S. J. 50; 28 T. L. R. 42, relied on. *L. BUBBY MURRY & Co. v. HERTZ & Co.*, (1923) A. I. R. (L.) 541; 4 L. 215 421

Construction of document—Admission of executant, value of.

The admission of the executant of a document cannot be utilised to contradict the document. Evidence cannot be admitted to show the intention of the executant which is not disclosed by the authorised channel, namely, the words which he himself selected.

Great Western Railway v. Bristol Corporation, (1918) 87 L. J. Ch. 414; 16 L. G. R. 393, relied on. *O. MONMOTHA NATH v. PROBODH CHANDRA*; 37 C. L. J. 52; (1923) A. I. R. (C) 102 416

—*"Auladdar aulad," meaning of.*

The expression *auladdar aulad* in a document includes descendants whether male or females except descendants through females.

Abdul Ganne Kasam v. Hussien Miya Rahim-tulla, 10 B. H. C. R. 7, followed. *B. SAVAD MIKA SAHEB SAHAJI MIA RAPI v. BAI CHHOTI BEGAM* 427

—*Document making mention of executant's heir—Intention to convey title.*

A Hindu lady who had an absolute estate in certain property executed a *mukhtarnama* in favour of one G, her son-in-law, which contained the following clause: "My daughter's son R is my heir, but he is now a minor and is unable to manage the village and Court affairs personally. I, the executant, am a *parda nashin* lady, and it is impossible for me to manage the village and Court affairs unless I appoint a general agent. Therefore, of my own accord, and free will I have appointed G, as my general agent. This *mukhtarnama* shall remain in force until my grandson R attains his majority. On attaining his majority he shall either look after his affairs personally or appoint a *mukhtar*."

Held, (1) that the whole object of the power-of-attorney was simply to arrange that as R, whom the executant believed to be her heir was a minor, and as she herself was unable to manage her affairs personally, G, who was R's father, should look after the estate until the latter attained his majority;

(2) that the expression "my daughter's son R is my heir" was merely a statement of belief and was not intended to convey title;

(3) that the expression "on attaining his majority he should either look after his affairs personally or appoint a *mukhtar*" did not, and was not intended definitely to, confer any right, but was merely a statement of what would take place in normal course on the assumption that in law R was the executant's heir;

(4) that, therefore, the clause in the power-of-attorney was not a Will of a disposition of property in any sense, nor could it be regarded in any way as a declaration of trust conveying any definite rights. *PAT RAM BAHADUR SEN v. GANESH BHAGAT* 542

—*Substantial question of law. See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 110* 407

—*Wajib-ul-arz—Hindu widow—Adoption.*

A group of villages was owned by Hindus belonging to the same caste. In the *wajib-ul-arz* of some villages it was stated that widows could adopt sons to their deceased husbands without

Construction of document—contd.

having an authority from them to that effect. In the *wajib-ul-arz* of the other villages it was simply stated that the widows could adopt:

Held, that the statements were not inconsistent and amounted to the same thing that the widows could adopt without an authority to that effect from their deceased husbands. **P O BISWA NATH SINGH v. JUGAL KISHORE**, (1923) A. I. R. (P. C.) 90; 18 L. W. 88; 45 M. L. J. 215; 9 O. & A. L. R. (P. C.) 563; (1923) M. W. N. 620; 26 O. C. 228; 38 C. L. J. 299; 33 M. L. T. 289 (P. C.) 244

————— **Wajib-ul-arz—Record of custom or contract.**

A village confiscated by the Government during the Mutiny was re-granted to a single individual. At a subsequent Settlement a record was made in the *wajib-ul-arz*, purporting to be a record of a custom of pre-emption in the village:

Held, that having regard to the history of the village there could not have been a custom of pre-emption in existence at the time of the regrant and that the record must be deemed to be a record of contract and not of custom. **A SHIB DRI v. KANIZ FATIMA**, 21 A. L. J. 99; (1923) A. I. R. (A) 282 538

————— **Will or gift—Invalidity of one clause, whether affects whole Will—Muhammadian Law—Rule against perpetuities, applicability of.**

In dealing with the internal evidence of a document which purports to be a Will upon its own character, neither the reservation of property to the testator nor the alleged delivery of possession to the legatees are in themselves sufficient to destroy the apparent character of the document.

Actual delivery of possession to a beneficiary is not fatal to the character of a testamentary bequest. It is evidence against the disposition being testamentary but it is not a fact which *per se* annuls its testamentary character. As evidence it can be rebutted by other evidence.

It is a natural and intelligible position that a testator may wish to put his legatees in immediate possession to test the success of the disposition, to avoid disputes as to the interpretation of the Will and to familiarise the beneficiaries with their eventual properties. Courts must necessarily recognise such temporary possession as not incompatible with a Will, provided that the disposition to which such possession gives effect is unmistakably revocable and that possession is not intended to confer a permanent title during the testator's lifetime.

The essential of a gift is that the donor should intend immediately to divest himself of the property.

The rule against perpetuities does not rest solely on the religious laws of Hindus or Muhammadans but on general considerations of public policy.

With the exception of a *wakf*, or a charitable devise, the Muhammadan Law does not favour a perpetuity.

A testator directed by his Will that certain property should always be held by the senior member in his line of descent provided he possessed certain

Construction of document—contd.

qualifications, and that the property should not be the subject of an alienation:

Held, that the devise offended against the rule against perpetuities and was invalid.

The invalidity of one clause in a Will does not invalidate the whole, if that clause does not affect other provisions of the Will. **Pesh YUSAF KHAN v. MISAL KHAN** 99

————— **Construction of Statutes—Legislative recognition of judicial construction.**

The Legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular Statutes.

Where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction. **MAHAMMAD MAZAHARAI AHAD v. MAHAMMAD AZIMUDDIN**, 37 C. L. J. 108; 27 C. W. N. 210; (1923) A. I. R. (C.) 507 17

————— **Contract—Breach of promise—Cause of action.**

If there is a contract binding upon the co-sharers of a village, by the terms of which one of them is not to sell any share in the village to a stranger without offering the other co-sharers an opportunity of purchasing at the same price and a co-sharer does in fact sell a share in the village to a stranger in contravention of the terms of that contract, the circumstance that the period for which the contract was to run, came to an end before another co-sharer could institute a suit to enforce his right, will not deprive the latter of his right to maintain the suit upon the cause of action which had already arisen. **A RAM BHAROSE v. CHANDRA SHEKHAR DAT**, (1923) A. I. R. (A.) 135 295

————— **Contract Act (IX of 1872), s. 23—Public policy—Consideration for stifling prosecution in non-compoundable offence, whether recoverable.**

Where an offence which is non-compoundable is compounded, the complainant cannot recover by civil action anything that the accused has undertaken to pay, such an agreement being void as opposed to public policy.

Shah Rahman v. Ismail Khan, 82 P. R. 1904, **Ghulam Mohi-ud-din v. Deoki Nand**, 22 Ind. Cas. 393; 39 P. R. 1914; 54 P. L. R. 1914; 57 P. W. R. 1914, **Nujebar Rahmam v. Mukhtashed Husain**, 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854, relied on.

Where during the investigation of a case of theft a panchayat was held and some of the persons who were suspected of the theft agreed to pay a certain sum of money to the complainant, as a consequence of which the investigation was dropped:

Held, that the agreement by the suspected persons to pay a sum of money to the complainant was unlawful as being opposed to public policy and the complainant, therefore, could not recover the money. **L NAZAR v. PARAS** 668

Contract Act—contd.

ss. 23, 25—Unlawful consideration—Debt incurred when borrower under Court of Wards—Inadequacy of consideration.

A debt unenforceable at law because of its having been incurred by a ward of the Court of Wards is not an unlawful consideration, within the meaning of section 23 of the Contract Act, for a bond executed after the estate is released by the Court of Wards.

A consideration for a bond is not inadequate within the meaning of Explanation II of section 25 of the Indian Contract Act, if a portion of it consists of a debt which was unenforceable because of its having been incurred at a time when the debtor was a ward of the Court of Wards. *A. BINDESHRI PRASAD v. SARJU SINGH*, 21 A. L. J. 446 458

s. 25 (3)—Stamp Act (I I of 1899), s. 2 (5), Sch. I, Art. 15—Written promise to pay barred debt, requisites of—Promise, whether bond.

A document sufficiently complies with the provisions of section 25 (3) of the Contract Act, if it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a promise.

Appa Rao v. Suryaprasada Rao, 23 M. 94; 9 M. L. J. 330; 8 Ind. Dec. (N. S.) 459, relied on.

A written promise to pay a barred debt is not a bond within the meaning of the Stamp Act and is not required by any of the provisions of the Act to be stamped.

Defendant pleaded in answer to a suit on a promissory note that the suit was barred by time. Plaintiff produced certain letters written by the defendant containing a clear promise to pay the debt. The suit was within limitation from the date of these letters, although the debt had become barred before the letters were written:

Held, that having regard to the provisions of section 25 (3) of the Contract Act the suit must be held to be within limitation. *L. DAVID SUTHERLAND CLARK v. MRS. ROSE GRIMSHAW*, (1923) A. I. R. (L) 481 652

s. 30—Wagering contract—Collateral contract, whether enforceable.

Section 30 of the Contract Act does not prevent a person who is employed as agent in connection with wagering contracts from recovering sums due to him by his principal.

Shibho Mal v. Lachman Das, 23 A. 165; A. W. N. (1901) 33 and *Jagat Narain v. Sri Kishan Das*, 8 Ind. Cas. 783; 33 A. 219; 7 A. L. J. 1146, followed. *A. BIDHI CHAND v. KACHHU MAL*, 45 A. 503 477

ss. 38, 45—Mortgages—Redemption—Payment to one co-mortgagee, whether discharges mortgage—Specification of shares, effect of—Presumption.

Courts in India have always recognised that equity demands that the redemption of mortgages shall be facilitated.

Contract Act—contd.

It has always been regarded as a matter of public policy that the restoration of land to its original owner and the release of land from the burden of incumbrances are in themselves desirable, and an insistence on the proposition that a mortgagor is obliged to satisfy separately every one of a number of co-mortgagees, may operate to effect a clog on the equity of redemption. It would in many cases have the effect of forcing a mortgagor into Court as his only means of ensuring redemption.

At the same time the least fraud between the mortgagor and one of several co-mortgagees with the intention of defeating the rights of the latter would deprive the mortgagor of his right to obtain release by a single payment. This would be a question of fact in each case, and it must be accepted that a principle of equity which allows one of several co-mortgagees to give a valid discharge must be qualified throughout by the equally equitable condition that there has been no attempt to defeat or prejudice the rights of other persons.

The mere specification of shares among the mortgagees themselves does not necessarily affect the mortgagor. For the mortgagor to be affected it must be shown not only that the shares of the mortgagees have been specified, but that the essence of the contract between them and the mortgagor was that he should redeem according to those shares. In the absence of a direct contract to this effect, it must be assumed that the liability of the mortgagor is joint and not several as regards the whole body of co-mortgagees.

Section 38 of the Contract Act applies to an offer which has been accepted as well as to an offer which has been refused; but whether section 38 of the Contract Act applies to payment to one of several joint mortgagees or not, the rule of equity applicable to India is that, in the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee, discharges the mortgagor. The mere specification of the shares held by the mortgagees in a Revenue Record is not sufficient in itself to warrant the assumption that the mortgagor is bound by the division of those shares, and it lies upon the mortgagees to show that a definite contract subsisted between the parties which recognised this division.

Barbar Maran v. Ramana Goundan, 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327 and *Mannava Annappuramma v. Uppala Akkayyao*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 263; (1913) M. W. N. 328; 24 M. L. J. 333 (F. B.), approved of. *Mathra Das v. Nizam Din*, 41 Ind. Cas. 921; 68 P. R. 1917; 107 P. L. R. 1917; 81 P. W. R. 1917 (F. B.) dissented from.

Jagat Tarini Dasi v. Nabo Gopal Chakr, 34 C. 3051; 5 C. L. J. 270, *Sitaram v. Shridhar*, 27 B. 292; 5 Bom. L. R. 91, *Parbhu Ram Pandey v. Jhalo Kuer*, 42 Ind. Cas. 408; 2 P. L. J. 520; (1917) Pat. 258; 4 P. L. W. 57 and *Ram Chandra v. Goswami Rajjan Lal*, 5 Ind. Cas. 129; 32 B. 164; 7 A. L. J. 99, considered. *Pesh GULMIRAN v. ABDUL RAHIM KHAN*, 682

s. 62—Contract, novation of—Non-performance—Original contract, reversion to.

Contract Act—contd.

Where, although the defendant is, by virtue of a contract entered into with the plaintiff, under a liability to the latter, both the parties agree to have their rights determined by an arbitrator and the arbitrator does determine the defendant's liability, it is not open to the plaintiff. On failure of the defendant to satisfy his claim in accordance with the award, to revert to the original contract and bring a claim in violation of the terms of the award and based upon the original contract.

Manohur Koyal v. Thakur Das Naskar, 15 C. 319; 7 Ind. Dec. (N. S.) 796, dissented from.

K. M. P. R. N. M., Firm v. P. T. Theperumal Chetty, 67 Ind. Cas. 905; 45 M. 180; 14 L. W. 660; (1921) M. W. N. 861; 42 M. L. J. 236; (1922) A. I. R. (M.) 314; 31 M. L. T. 478, relied upon. *A RAM NATH v. MANNU LAL*, 21 A. I. J. 380; 45 A. 472; (1923) A. I. R. (A.) 518 615

s. 91—Railways Act (IX of 1890), s. 72 (3)—Delivery of goods by seller to Railway for consignment to buyer—Property in goods—Seller's right to sue for damages.

Where a seller delivers goods to a Railway Company for consignment to the buyer, the property in the goods passes to the buyer under section 91 of the Contract Act and the latter alone can sue the Railway Company for damages caused by non-delivery.

Dawes v. Peck, (1799) 8 T. R. 330; 8 Esp. 12; 101 E. R. 1417, followed. *M. M. & S. M. Ry. Co. v. K. RANGASWAMY CHETTY* 537

s. 133—Principal and surety—Variance in contract—Discharge of surety.

A suit to recover a sum of money was compromised on the terms that the amount in suit should be paid by the defendant by certain instalments and that meanwhile an attachment order made against the property of the defendant in the course of the suit should remain in force until the terms of the compromise had been complied with. One F became surety for the performance of the terms by the defendants. Subsequently, the Court, without the knowledge or consent of the surety, gave the defendant liberty to sell the attached property privately on certain conditions. The surety, thereupon, applied to the Court to be discharged from his obligation:

Held, (1), that the attachment order itself carried with it power in the Court to order a sale of the property attached, and that, therefore, the order giving liberty to the defendant to sell did not amount to a variance of the contract between the principal and the creditor;

(2), that in any case the order giving the defendant liberty to sell not having been acted upon, amounted at most to an agreement to vary the contract and did not amount to an actual variance of its terms;

(3), that, therefore, on neither ground could the surety claim to be discharged from his obligation. *L. DASHAN RAM-GANESH DAS v. KHAN DUN-ALLAH BAKESH* 3

Contract Act—concl.

s. 200—Kovilagam property—Previous mortgage—Grant of melcharth by unauthorised person—Ratification.

The grant of a *melcharth* in Kovilagam properties itself does not of itself terminate the interest of a previous mortgagee. That interest is terminated not solely on account of the grant of the *melcharth* but only if and when the *melcharthdar* also finds money for redemption and pays it to the previous mortgagee. Therefore, where a *melcharth* is granted in property previously mortgaged by a person who has not the authority to do so, there is no bar to the same being ratified under section 200 of the Contract Act by the person who is really competent to grant the *melcharth*. *M KOZHICKOT PATINHARE KOVILAGATH THAMBATTI THAMBU-RATHI v. SANKARA MENON* 376

s. 230—Principal and agent—Contract with foreign merchant—Personal liability of agent—Presumption.

Under section 230 of the Contract Act an agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist when the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad. But this presumption is not applicable where the contract is entered into directly with the foreign merchant, the agent acting merely as a sort of post office and undertaking no sort of responsibility.

Tulika Basavaraju v. Parry & Co., 27 M. 315, *Arunachalam Chettiar v. Kasi Nevenda Pillai*, 24 Ind. Cas. 1007, *Puran Chand v. Tara Singh*, 138 P. L. R. 1905, *Bharagava & Co. v. B. Koltayashi*, 65 Ind. Cas. 468; 2 L. L. J. 374; 18 P. W. R. 1922, relied on.

Fazal Ilahi v. Imperial Chemical Co., Delhi, 67 Ind. Cas. 157, distinguished. *L. FIRM DEOKI NANDAN v. RAM LAL AULAK*, (1923) A. I. R. (L.) 295 885

Costs—Discretion—High Court, interference by.

The High Court will not interfere with the reasonable exercise of discretion by an Appellate Court in the matter of costs. *O. RAJENDRA NARAYAN v. GHAFOR KHAN*, 9 O. & A. L. R. 77 307

Court-fees—Partition suit—Appeal—Deficiency in Court-fees—Extension of time—Limitation Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), s. 149.

A plaint or a memorandum of appeal in a suit for partition must bear *ad valorem* Court-fees on the value of the share claimed by the plaintiff whether the latter is out of possession or is in joint possession of the property in dispute.

Tara Chand Mukherji v. Afzal Beg, 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329, *Harcharan Das v. Sukhraj Das*, 62 Ind. Cas. 979, dissented from.

As a general principle, it is always advisable in the interests of justice that an appeal should be heard on its merits in preference to being rejected on any technical points of law.

Court-fees—concl'd.

Where there could have been no misapprehension as to the amount of Court-fees payable on a memorandum of appeal, and the memorandum is nevertheless deficiently stamped, the appellant cannot get any indulgence by way of extension of time under section 5 of the Limitation Act or section 149 of the Civil Procedure Code. **Pesh MURLI MAL v. VAISHNO DITTA** 788

Court-Fees Act (VII of 1870), ss. 5, 7, (iv) (c)

—*Suit for declaration and confirmation of possession, nature of—Consequential relief—Valuation—Court-fees—Taxing Officer, decision of—High Court, whether can interfere.*

In a suit falling under section 7 (iv) (c) of the Court-Fees Act it is not open to the plaintiff to put an arbitrary and incorrect valuation on the relief sought. In such a case the valuation for the purposes of Court-fees must, in the first instance, be made by the plaintiff but is finally determinable by the Court. The valuation must be fixed with reference to the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiff apprehends.

A prayer for confirmation of possession includes a prayer for recovery of possession if the Court thinks the plaintiff is out of possession and amounts to consequential relief within the meaning of section 7 (iv) (c) of the Court Fees Act.

Bokuronnissa Bibee v. Kureemmoonissa Khatoon, 19 W. R. 18, **Jhumak Karti v. Debu Lal Singh**, 16 Ind. Cas. 898, 22 C. L. J. 415, **Dina Nath Das v. Rama Nath Das**, 34 Ind. Cas. 702; 23 C. L. J. 561, followed.

A suit for declaration and confirmation of possession must, therefore, be valued for purposes of Court-fees according to the value of the land in dispute.

Under section 5 of the Court Fees Act the Taxing Officer has jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellant on the relief sought is incorrect he has jurisdiction to correct it. His decision as to the amount of fee payable is final, and the High Court has no jurisdiction to interfere with it, even if he has done something which the law does not allow him to do.

Balharan Rai v. Gobind Nath Tewari, 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831, **Karan Singh v. Gopal Rai**, 4 Ind. Cas. 123; 32 A. 59; 6 A. L. J. 972, **Lagan Baral Kuar v. Khakhan Singh**, 43 Ind. Cas. 521; 3 P. L. J. 92, **Chanderbati Kuer v. Gorey Lal Singh**, 52 Ind. Cas. 508; 4 P. L. J. 700, followed. **PAT RAMSEKHAR PRASAD SINGH v. SHEONANDAN DUBEY**, 4 P. L. T. 71; 1 P. L. R. 25; (1923) A. I. R. (Pat.) 137; 2 Pat. 198 43

—**s. 7 (iv) (c), Sch. II, Art. 17 (iii)—Suit for declaration that certain property is wakf and that a decree obtained in respect of it shall not affect it, nature of—Court-fee payable.**

Certain trust property was mortgaged by the trustee to the defendant who obtained a decree on his mortgage and obtained possession of the property. Plaintiffs, who were not parties to the decree, brought a suit for a declaration that the property was public property, that the trustee had no right to mortgage it, and that the decree

Court-Fees Act—cont'd.

for possession obtained in respect of it by the defendant was void and inoperative and not liable to execution:

Held, (1) that the suit was in its essence one for a declaration only and that the plaint did not disclose any claim for a consequential relief;

(2) that the plaintiffs not being parties to the decree obtained by the defendant on his mortgage, it was not incumbent on them to ask for an injunction prohibiting the defendant from executing the decree;

(3) that, therefore, the suit fell under Art. 17 of Schedule II to the Court Fees Act and not under section 7 (iv) (c) of the Act.

Amin Chand v. Sant Murli Dhar, 19 Ind. Cas. 219; 18 P. R. 1913; 151 P. W. R. 1913; 211 P. L. R. 1913, followed. **L NIHAL DEVI v. CHUNI LAL**, (1923) A. I. R. (L.) 373; 5 L. L. J. 357 767

—**s. 7 (v) (d)—Suit for possession by usufructuary mortgagee—Court-fee payable—“Market-value”, meaning of.**

In a suit for possession as usufructuary mortgagee, the Court-fee payable is on the market-value of the mortgagee interest in the property, i.e., the mortgage-money, on payment of which the property can, at any time, be redeemed.

The expression “market-value,” in section 7 (v) (d) of the Court Fees Act, means the market-value of the subject-matter of the suit. **O MAHDI v. GAJADHAR**, 9 O. & A. L. R. 85 244

—**s. 7 (x) (a)—Contract of sale—Contract of exchange—Suit for specific performance—Court-fee payable.**

Defendant agreed to transfer certain land to the plaintiff in return for certain land belonging to the plaintiff and Rs. 600 in cash. The defendant failed to carry out the agreement and plaintiff sued for specific performance of the contract or in the alternative for return of the money paid by him to the defendant with interest:

Held, (1) that the contract between the parties was one of sale inasmuch as part of the consideration to be paid by the plaintiff was a sum of money;

(2) that the suit fell within section 7 (x) (a) of the Court Fees Act and Court-fees were payable on the land, plus Rs. 600, which the plaintiff had agreed to pay to the defendant in exchange for the defendant's land.

Semle:—A suit for the specific performance of a contract of exchange falls under section (x) (a) of the Court Fees Act. **L KUNDAN LAL v. ANAND SARUP**, (1923) A. I. R. (L.) 456 709

Criminal breach of trust—Property in possession of third person—Order directing detention of property, legality of.

In a case of a criminal breach of trust in respect of a motor car which, it appeared, had been sold by the accused to a third person the Magistrate made an order directing that the car should remain in Court until further orders:

Held, that as regards the purchaser of the car there was a gross abuse of the process of a Criminal Court by utilising criminal proceedings to which he was not a party for the detention of property which he had bought and of which he

Criminal breach of trust—concl'd.

was in possession, whether or not the seller had a right to sell it to him. **C KEDAR NATH DEY v. MOHAMMED SIDIK** 807

Criminal Procedure Code (Act V of 1898), ss. 10, 195 (1) (a)—Police Act (V of 1861), s. 4, District Magistrate acting under, whether Court—Jurisdiction of Sessions Judge to interfere—Revision whether competent—Superintendent of Police whether subordinate to District Magistrate.

Where a District Magistrate has authority to grant and does grant, contrary to the opinion of the Superintendent of Police, sanction to prosecute a person on the allegation that he had committed contempt of the lawful authority of an officer in-charge of a Police station, he does so by virtue of the provisions of section 4 of the Police Act. He is, however, not acting as the Presiding Officer of the Court of a District Magistrate, constituted under the Criminal Procedure Code and consequently a Sessions Judge has no jurisdiction to interfere with his order. His order, not being that of a Court of Justice, is not subject to the revisional jurisdiction of a High Court.

The Superintendent of Police of a District is subject to the Magistrate of that district within the meaning of section 195 (1) (a) of the Criminal Procedure Code.

Emperor v. Shib Singh, 27 A. 292; 1 A. L. J. 597; A. W. N. (1904) 231; 1 Cr. L. J. 899, relied on.

Emperor v. Sarada Prosad Chatterjee, 32 C. 80; 2 Cr. L. J. 171, not followed. **A CHHOTAY LAL v. CHHEDI LAL**, (1923) A. I. R. (A.) 149; 45 A. 1351; 24 Cr. L. J. 597 341

s. 89—Proceedings against absconder—Sale—Application for restoration allowed, effect of—Properly, whether can be restored.

Where an application under section 89 of the Criminal Procedure Code is allowed after the property has been sold, the successful applicant is not entitled to restoration of the property but only to the nett proceeds of the sale of the property. **EMPEROR v. FAZAL DAD**, 24 Cr. L. J. 573. 269

ss. 107, 125—Security for keeping peace—Appeal, right of—Jurisdiction of District Magistrate to take executive action.

No appeal lies from an order under section 107 of the Criminal Procedure Code, but where a person bound down under that section applies to the District Magistrate to consider the case under section 125 of the Criminal Procedure Code and cancel the bond, the latter is within his jurisdiction to take executive action for the settlement of the dispute and direct the applicant to be discharged from his security, that is, cancel the bond, if he comes to a finding that there was no real danger of a breach of the peace.

Durga Singh v. Amar Dayal Singh, 66 Ind. Cas. 425; 3 P. L. T. 103; 23 Cr. L. J. 281; (1922) A. I. R. (Pat.) 334, distinguished. **PAT MONMOHAN DASS v. BABU LAL**, (1922) A. I. R. (Pat.) 420; 24 Cr. L. J. 627 515

ss. 107, 125, 435 (4)—Jurisdiction of District Magistrate under s. 125, nature of.

Criminal Procedure Code—cont'd.

—Proceeding under s. 107—District Magistrate not moved—Jurisdiction of Sessions Judge to refer to High Court—District Magistrate's Court, whether subordinate to that of Sessions Judge.

The jurisdiction of a District Magistrate under section 125 of the Criminal Procedure Code is neither appellate nor revisional, it is merely confined to examining the record to satisfy himself whether it is no longer necessary to keep the parties under the bond.

Panarsi Das v. Partab Singh, 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63 and **Sheo Singh v. Emperor**, 26 Ind. Cas. 169; 1 O. L. J. 541; 15 Cr. L. J. 721, relied on.

A Sessions Judge has jurisdiction to refer a proceeding under section 107 of the Criminal Procedure Code to the High Court even where no application has first been made to the District Magistrate under section 125 of the Code.

Sita Ram v. Emperor, 39 Ind. Cas. 998; 39 A. 466; 15 A. L. J. 469; 18 Cr. L. J. 630, relied on.

Lalji v. Emperor, 43 Ind. Cas. 604; 16 A. L. J. 39; 40 A. 140; 19 Cr. L. J. 188, dissented from.

As a Court of Revision, the Court of District Magistrate is not inferior to that of the Sessions Judge. But when a District Magistrate passes an order as a Court of original jurisdiction, that Court is subordinate to the Court of Sessions Judge which can exercise revisional powers. **O EMPEROR v. BALWAT SINGH**, 9 O. & A. L. R. 344; 24 Cr. L. J. 616 504

ss. 107, 145—Proceedings under s. 107—District Magistrate, power of, to interfere—Direction to Subordinate Magistrate, to initiate proceedings under s. 145—District Magistrate, jurisdiction of.

A District Magistrate has no power to set aside an order made under section 107 of the Criminal Procedure Code by a Magistrate subordinate to him. If he finds that an improper order has been made, all he can do is to submit the case to the High Court for the exercise of its revisional powers.

A District Magistrate has no jurisdiction to direct a Magistrate subordinate to him to take proceedings under section 145 of the Criminal Procedure Code. **PAT BANSIDHAR MARWARI v. INDAR NARAYAN SINGH**, 1 P. L. R. 93 Cr.; (1923) A. I. R. (Pat.) 438; 24 Cr. L. J. 545 161

s. 108—Accused required to furnish security—Subsequent conviction of substantive offence—Security withdrawn—Commitment to Jail—Date from which substantive sentence to commence.

Accused was, on 23rd May 1921, ordered to furnish security under section 108, Criminal Procedure Code, for one year, or undergo imprisonment for that period. On 31st July 1921 he was convicted of a substantive offence under section 500, Penal Code, and sentenced to undergo three months' simple imprisonment, but he remained on bail till 23rd November 1921, when the bail-bond was cancelled. In the meanwhile, on the 16th October 1921, he withdrew his security and on 23rd November 1921 was committed to Jail under

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section 108, Criminal Procedure Code: The question was whether the substantive sentence of three months should commence on the date the bail-bond was cancelled, or on the expiry of the period of one year under section 108:

Held, that the sentence of imprisonment under section 500, Penal Code, took effect on 23rd November 1921 when accused's bail-bond was cancelled, as on the date on which that sentence was imposed, he was not undergoing a sentence of imprisonment. **O GANESH SHANKAR VIDYARTHI v. EMPEROR**, 25 O. C. 249; (1923) A. I. R. (O.) 56; 24 Cr. L. J. 577 **321**

s. 110—Evidence of instances in which accused suspected, value of—Corroboration.

Evidence of instances in which the accused has been suspected, is not evidence of general repute, nor evidence on which the Court can bind the accused over under section 110 of the Criminal Procedure Code, but such evidence may be admissible as corroborating independent evidence given of accused's reputation. **O SANKU v. EMPEROR**, 9 O. & A. L. R. 269; 24 Cr. L. J. 608 **352**

s. 110, proceedings under, resulting in discharge of accused—Fresh proceedings started after short interval—Court, duty of—Definite offence alleged—Procedure.

Where proceedings against an accused person under section 110 of the Criminal Procedure Code result in his discharge, and within a very short time thereafter fresh proceedings are started against him, it is the duty of the Court to see that there is sufficient evidence of his conduct after the conclusion of the previous proceedings to justify the fresh proceedings. If the allegation against him is of a definite offence, he ought to be prosecuted for that offence, without having resort to second hand evidence of that offence to prejudice the case against him under section 110, Criminal Procedure Code. **O SHAKUR v. EMPEROR**, 9 O. & A. L. R. 90; 26 O. C. 242; 24 Cr. L. J. 565 **261**

ss. 110, 118, 121, 514—Security for good behaviour—Forfeiture, grounds for—Offence, commission of before making of order—Commission of offence, proof of.

The period for which a person is bound over to be of good behaviour begins from the date on which he is bound over.

Therefore, where security is given for good behaviour neither the principal nor the surety can be made liable for an offence which occurred before the security was given.

A conviction is ordinarily considered necessary to establish that an offence has been committed but the commission of an offence, within the meaning of section 121 of the Criminal Procedure Code may be proved otherwise than by a conviction, for instance, by evidence recorded under section 512 of the Code.

The flight of a person accused of dacoity to Independent Afridi territory raises a strong presumption of the intention of the absconder to join a band of dacoits. In such a case a bond for good behaviour given under section 118 of the Criminal

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Procedure Code, on proceedings taken under section 110 of the Code is liable to forfeiture, provided evidence is produced to show either that the person bound committed an offence in British India prior to his absconding and during the currency of the bond, or that during the same period he committed an offence during his outlawry punishable with imprisonment. **PESH MANSUR v. EMPEROR**, 24 Cr. L. J. 588 **332**

ss. 110, 435—Sessions Judge, powers of, in cases under s. 110—Private inquiries influencing judicial decision, effect of.

A Sessions Judge has power, under section 435 of the Criminal Procedure Code, to call for the record of proceedings under section 110 of that Code, before an inferior Criminal Court within his jurisdiction, and to refer the matter to the High Court.

Where a Magistrate has made private inquiries, and has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, his order is liable to be quashed as being vitiated by the admission of such information. **A SHIQ ALI v. EMPEROR**, 21 A. L. J. 513; 24 Cr. L. J. 593 **337**

s. 118—Burma Habitual Offenders Restriction Act (II of 1919), s. 7—Surety-bond plus restriction order, legality of.

A Magistrate has no jurisdiction to direct an accused person to furnish securities for good behaviour under section 118 of the Criminal Procedure Code and at the same time to pass an order under section 7 of the Burma Habitual Offenders Restriction Act, restricting the movement of the accused. **L B PAN ZYAW v. EMPEROR**, (1923) A. I. R. (R.) 1341 24 Cr. L. J. 735 **975**

s. 122—Surety for good behaviour—Surety offered, fitness of.

Where a person is directed to furnish sureties for his good behaviour, the fact that a surety offered by him has already become surety for another is no ground for not accepting him. **O GHISA v. EMPEROR**, 9 O. & A. L. R. 40; 24 Cr. L. J. 517 **53**

s. 133—Public nuisance—Obstruction to public path—Bona fide claim of right—Jurisdiction—Magistrate issuing rule whether competent to make it absolute on report of another Magistrate.

In a proceeding under section 133 of the Criminal Procedure Code for the purpose of compelling the removal of an obstruction from a public way, where a *bona fide* question as to the way being public is raised, there is no jurisdiction to make an order under the section, and the question should be left for determination by the Civil Court. To have this effect, however, the claim must be *bona fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim is *bona fide* or not.

Queen-Empress v. Bisseessur Sahu, 17 C. 962; 8 Ind. Dec. (N.S.) 914, relied on:

A Magistrate who issues a conditional Rule under section 133 of the Criminal Procedure Code

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is competent to make the Rule absolute upon the evidence recorded and report submitted to him by another Magistrate to whom he had referred the matter under the last paragraph of clause (1) of section 133.

In re Narasimha, 9 M. 291; 10 Ind. Jur. 185; 2 Weir 60; 3 Ind. Dec. (N. S.) 537, relied on. **PAT CHANDRIKA KOERI v. BUDHU DUSADH**, 24 Cr. L. J. 690

— ss. 133, 135, 141—Obstruction—Jury, appointment of—Failure to return verdict—Procedure.

Where a person against whom a conditional order is made under section 133 of the Criminal Procedure Code obtains the appointment of a jury, but the jury, for any reason, does not return a verdict within the time fixed by the Magistrate the latter must inquire into the matter before he passes a final order.

Raimohan Karmohar v. Emperor, 35 Ind. Cas. 969; 44 C. 61; 20 C. W. N. 1171; 17 Cr. L. J. 409, relied on. **PAT AJODHYA TEWARI v. EMPEROR**, 4 P. L. T. 13; 1 P. L. R. 22 Cr.; (1923 A. I. R. (Pat) 131; 24 Cr. L. J. 583

— ss. 133, 137—Nuisance—Inquiry—Procedure—Order based on oral inquiry, legality of.

The procedure to be followed in an inquiry under Chapter XI of the Criminal Procedure Code is that provided for a summons-case, and the Magistrate is bound to record the evidence produced by the parties.

Sita Ram v. Emperor, 41 Ind. Cas. 1000; 32 P. R. 197 Cr.; 18 Cr. L. J. 888; 43 P. W. R. 1917 Cr., *Hingu v. Emperor*, 3 Ind. Cas. 482; 31 A. 453; 6 A. L. J. 685; 10 Cr. L. J. 297, *Srinath Roy v. Ainadd Halder*, 24 C. 395; 1 C. W. N. 217; 12 Ind. Dec. (N. S.) 930, relied on.

An order under that Chapter based on an oral inquiry is illegal and liable to be set aside. **L. MAM CHAND v. EMPEROR**, 24 Cr. L. J. 615

— s. 137—Title, dispute as to—Conditional order, propriety of.

Where there is a genuine dispute as to title suitable for decision by the Civil Court, that is a sufficient ground within the meaning of section 137 of the Criminal Procedure Code for holding that a conditional order under section 137 is not reasonable and proper. **O. BHAGWAN DAS v. EMPEROR**, 9 O. & A. L. R. 35; (1923) A. I. R. (O.) 1521 24 Cr. L. J. 635

— ss. 144, 435, 439—Penal Code (Act XLV of 1860), s. 188—Order under s. 144—Extension of period by Local Government, limits on—Reasons for extension—Disobedience of order—Offence—Revision—Ground, new, whether can be urged before High Court.

The Local Government when extending the period during which an order under section 144 of the Criminal Procedure Code is to remain in force, is not concerned with the reasons given by the Magistrate for the order, but with the actual order passed by him, and if the Local Government considers that there is danger to human life, health or safety or a likelihood of a riot or an affray in allowing the act which has been prohibited by

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the Magistrate, it is perfectly competent under clause (5) of section 144 to extend the period of the order.

The Legislature has not seen fit to limit the time for which the force of an order under section 144 of the Criminal Procedure Code may be extended by the Local Government under clause (5) of the section, and under the terms of the clause it is competent to the Local Government to extend the order so long as the danger which it apprehends continues to exist.

There is nothing in clause (5) of section 144 of the Criminal Procedure Code which requires the Local Government to state its reasons for extending the period of the order or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends and it is not open to the High Court to add to the section a condition not imposed by the Legislature.

Under section 188 of the Penal Code, if the Court finds that the order, disobedience of which is sought to be punished, was a legal order, it has only to see whether the accused disobeyed the order, and, if so, whether such disobedience caused or tended to cause the effects specified in the second and third paragraphs of the section.

The object of requiring an application for revision to be presented first to the District Magistrate or to the Sessions Judge is, that the High Court in dealing with the matter may have before it a reasoned opinion of the two Courts on the points at issue, and this object will be largely defeated if applicants are allowed to take in the High Court points which they did not press before the lower Appellate Court. **A BHURE MAL v. EMPEROR**, 45 A. 526; 24 Cr. L. J. 689

— s. 145—Final order—Finding of apprehension of breach of peace, whether necessary.

In making a final order under section 145 of the Criminal Procedure Code, it is not necessary for the Magistrate to record a finding that there is an apprehension of a breach of the peace, such a finding is necessary only for the purpose of the preliminary order when the Magistrate assumes jurisdiction under that section. **L. GANGA RAM v. MURAD SHAH**, (1923) A. I. R. (L.) 253; 24 Cr. L. J. 631

— s. 145, proceeding under—Decree of Civil Court, awarding possession, effect of—Possession, mode of delivery of, whether material.

A Magistrate, in declaring possession in a proceeding under section 145, Criminal Procedure Code, cannot go behind a decision of a Civil Court in the matter. It is not for him to question the validity of the decree on the ground that it was passed without jurisdiction.

When a decree such as the above is *inter partes* it is immaterial whether the delivery of possession under it was symbolical or not. **O. AKHOY MONDAL v. BASU RAI**, 27 C. W. N. 267; 37 C. L. J. 256; (1923) A. I. R. (C) 176; 24 Cr. L. J. 517

— s. 145, proceeding under—Procedure.

The object of section 145 of the Criminal Procedure Code is to prevent a breach of the peace by a summary decision as to the possession of the con-

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tending parties, leaving them to decide their title and right to possession in a competent Civil Court where, naturally, the proceeding has to be a protracted one. It is, therefore, incumbent upon Magistrates to dispose of proceedings under section 145 of the Code as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section. The procedure for the trial of a case under this section is that laid down for the trial of summons-cases. *PAT MOTI SINGH v. DEANUKDHARI SINGH*, (1923) A. I. R. (Pat) 53; 24 Cr. L. J. 595

— **s. 145, proceeding under—Written statement, failure of one party to file, effect of—Jurisdiction of, Magistrate—Transfer of case to another Magistrate, when can be made.**

The basis of a proceeding under section 145 of the Criminal Procedure Code is not the written statement of the parties but the Police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace.

When a Magistrate is so satisfied he should make a note stating the grounds of his being so satisfied, and require the parties to attend and put in written statements of their respective claims.

If a party fails to put in a written statement that would not take away the jurisdiction of the Magistrate to proceed with the case. The proceeding having been properly initiated it is incumbent on the Magistrate to make the enquiry and to take such evidence as the parties offer irrespective of the fact that one or other of them has failed to put in a written statement.

In re Goluck Chunder Mylee, 11 W. R. 9 Cr. relied on.

Section 145 of the Criminal Procedure Code requires the Magistrate who draws up a proceeding under the section to call upon the parties concerned to attend his Court and to file written statements of their respective claims. He cannot direct them to appear before another Magistrate. But after the parties have attended and are ready to proceed with the case, it may be validly transferred to another Magistrate competent to try it.

Misri Chaudhury v. Narsingh Prasad Tewari, 62 Ind. Cas. 139; 2 P. L. T. 180; 22 C. L. J. 43, distinguished. *PAT RAMJHARIA v. PIAR KOERI*, 4 P. L. T. 308; (1923) A. I. R. (Pat) 309; 24 Cr. L. J. 557

— **s. 145, proceedings under—Evidence, necessity of.**

A Magistrate has no jurisdiction to make an order under section 145 of the Criminal Procedure Code without any evidence being adduced before him. *G HATEMALI CHAPRASI v. OSIM-ADDY*, 24 Cr. L. J. 702

— **ss. 145, 350—Proceeding under s. 145—Change of Magistrates—Accused, right of, to re-summon witnesses.**

In a proceeding under section 145 of the Criminal Procedure Code where the Magistrate is succeeded by another, the succeeding Magistrate is not compelled under the proviso to section 350 of the

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Code to start the enquiry *de novo*, if an application to that effect is made on behalf of the accused.

The intention of the Legislature was to limit the application of proviso (a) to section 350 of the Criminal Procedure Code to criminal trials and not to extend that proviso to enquiries which are also covered by the first portion of the section. *G SADEK REZA v. SACHINDRA NATH ROY*, 37 C. L. J. 128; (1923) A. I. R. (C) 483; 24 Cr. L. J. 569

— **s. 146—Order as to possession—Brevity—Revision.**

It is impossible to lay down a hard and fast rule when a High Court should interfere on the ground of the brevity of an order passed in a proceeding under section 146 of the Criminal Procedure Code.

Where a Magistrate passes an order under section 146 of the Criminal Procedure Code but omits to write at length the reasons for such order, it may be good ground for remand. But a High Court will not interfere if the Magistrate passed the order after giving full consideration to the evidence in the case. *G KANAI LAL v. HYDER ALI*, 37 C. L. J. 127; (1923) A. I. R. (C) 483; 24 Cr. L. J. 575

— **s. 154—First Information Report consisting of confession, admissibility of—Conviction for murder on plea of guilty, legality of.**

A First Information Report is not admissible in evidence if it is a confession by the accused to the Police of his guilt.

A conviction merely on a plea of guilty in a murder case is not illegal though in each case the circumstances must be examined to see whether the plea of guilty is one which should be acted on. *N MANJOO v. EMPEROR*, (1923) A. I. R. (N) 251; 24 Cr. L. J. 570

— **ss. 154, 162, 283—Information of cognizable offence, what is—Written statement obtained from witness during investigation, admissibility of, as evidence—Statement made before Committing Magistrate transferred to Sessions record, whether can be used as substantive evidence.**

The information referred to in section 154 of the Criminal Procedure Code is something in the nature of a complaint or accusation, or at least information of a crime, given with the object of putting the Police in motion in order to investigate, as distinguished from information obtained by the Police when actively investigating a crime.

Circumstances may arise in which information is given to the Police of such a vague and indefinite character that it cannot be treated as coming under section 154 of the Code, so as to make it incumbent upon the officer in charge of the Police Station to start an investigation and he may reasonably require more direct information before doing so, and such further information given to him in such circumstances might not come under the provisions of section 162 of the Criminal Procedure Code. Or the information referred to in section 154 may come from more sources than one, and more than one such information may be recorded at or about the same time.

But once definite information has reached the Police relating to the commission of a cognisable

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offence under section 154 of the Criminal Procedure Code, and the Police have taken active steps to investigate, whether the information has been taken down in the book kept for that purpose as provided in section 154 or not, all further statements taken from the witnesses are taken in the course of a Police investigation and are inadmissible in evidence under section 162 of the Code.

Under section 288 of the Criminal Procedure Code a Sessions Court is not restricted to admitting the evidence of a witness duly taken before the Committing Magistrate merely for the purpose of contradicting that witness when giving evidence in the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge.

Queen-Empress v. Dorasami Ayyar, 24 M. 414 at p. 416; 2 Weir 377, *Maruti Joti Shinde v. Emperor*, 63 Ind. Cas. 332; 23 Bom. L. R. 820; 22 Cr. L. J. 636; 46 B. 971 (1922) A. I. R. (B.) 108, relied on.

It is, however, a matter for the discretion of the Judge whether he thinks that such evidence should be used in the interest of justice, for many cases may arise in which it would be dangerous to rely upon such evidence where witnesses have proved themselves before the Sessions Judge altogether unworthy of credit.

Per *Mullick, J.*—Information, within the meaning of section 154 of the Criminal Procedure Code, is an allegation in the nature of a complaint, made to a Police Officer with a view to his taking action, and when such an allegation is made the Police Officer must record it as an information under the section, and the writing will attract the provisions of section 35 of the Evidence Act; and if the Police Officer should record more than one information relating to a cognisable offence they will all share the privilege of being exempt from the disability imposed by section 162 of the Criminal Procedure Code. In every case it is for the Court to decide whether the communication is an information in this technical sense and whether and when the Police investigation had in fact begun. *Pat GANSA ORAON v. EMPEROR*, 4 P. L. T. 462; 1 P. L. R. 178 Cr.; 2 Pat. 517; 24 Cr. L. J. 641

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s. 164—Confession, recording of—Failure to make enquiry, effect of.

The failure of a Magistrate, before recording a confession, to question the person making the confession as to whether he is making it voluntarily, is a fatal defect which renders the confession inadmissible in evidence.

Farid v. Emperor, 65, Ind. Cas. 6131 2 L. 325; 5 P. W. R. 1922 Cr.; 23 Cr. L. J. 149; 4 U. P. L. R. (L.) 33; (1922) A. I. R. (L.) 237, followed. *LACHHI RAM v. EMPEROR*, (1923) A. I. R. (L.) 330; 24 Cr. L. J. 564

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s. 164—Statements by accused before trial, record of—Magistrate, power of—Evidence Act (I of 1872), ss. 9, 11, 21, 133—Statements by accused before trial, admissibility of—Accomplice, statement of—Corroboration.

There is nothing in section 164 or any other sections of the Criminal Procedure Code which

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forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement, if proved to be voluntary, is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt.

Queen-Empress v. Bhairab Chunder Chuckerbutty, 2 C. W. N. 702 and *Queen-Empress v. Viray*, 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553, dissented from.

Emperor v. Kangal Mali, 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 713, cited.

Sections 9 and 11, read with section 21, of the Evidence Act amply justify a Court in admitting into evidence all previous statements made by an accused which have a bearing upon the question of his guilt and whether the previous statement is made to a Police Officer, to a Judicial Officer, or to a third party is immaterial, if the statement is relevant to the fact in issue, namely, the accused's guilt.

Queen-Empress v. Bhairab Chunder Chuckerbutty, 2 C. W. N. 702, explained.

Under section 133 of the Evidence Act the evidence of an accomplice by itself would be sufficient for the purpose of a conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particular. Failure to raise that presumption is an error of law.

Phillip Jacobs, 1 Cr. App. R. 215, noticed. *PAT MADAN GURU v. EMPEROR*, 4 P. L. T. 381; 24 Cr. L. J. 723

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ss. 164, 286, 342—Sessions trial—Confession retracted—Plea of not guilty—Procedure.

Accused, in a murder case, made a confession which was duly recorded under section 164, Criminal Procedure Code. Before the Committing Magistrate also they pleaded "guilty," but in the Court of Session they pleaded "not guilty." Upon this the Sessions Judge proceeded to take in evidence, before the examination of any witness, the previous statements made by the accused, not only before the Committing Magistrate but prior to the commencement of proceedings in the Magistrate's Court. He then examined, and almost cross-examined the accused upon their confessions, and thereafter recorded the prosecution evidence:

Held, that, the Sessions Judge had acted in contravention of the provisions of section 286, Criminal Procedure Code; that, although under section 342 of that Code the power given to the Court to examine an accused person is one which may be exercised at any stage of the trial in the discretion of the Court, this provision does not in any way supersede the clear directions contained in section 286 as to the manner in which a Sessions trial should be commenced.

When an accused is on his trial on a capital charge, it is not expedient that the Sessions Court should convict him even upon a plea of guilty entered before the Trial Court itself. As a matter of practice, the Court should, in its discretion, put such

Criminal Procedure Code—contd.

a plea on one side and proceed to record and consider the evidence, in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same.

Where a confession of guilt is retracted, the proper time for taking into consideration such confession is after the Court is in possession of the entire prosecution evidence and can estimate what the effect of that evidence would be, considered apart from any statement which the accused person may from time to time have made. *A SUKHIA v. EMPEROR*, 20 A. L. J. 669; (1922) A. I. R. (A.) 266; 24 Cr. L. J. 609 497

— s. 164 (3)—*Confession, mode of recording—Magistrate, duty of, to put questions.*

All that section 164 (3) of the Criminal Procedure Code requires is that a Magistrate recording a confession on questioning the person making the confession must have reason to believe that it is being made voluntarily. No express form of questions is prescribed, and the extent to which the Magistrate should question the person making the confession must largely depend upon the particular facts of each case. Whilst it is clearly desirable that he should always put such questions as may be necessary to enable him to determine whether the confession is voluntary, no particular form of questioning can be laid down as necessary.

Where the circumstances under which a confession is made are not such as to create any suspicion in the mind of the Magistrate and he is satisfied from the demeanour of the person making the statement as well as the questions put and the manner in which the statement is made that it is voluntary, the statement cannot be objected to on the ground that the provisions of section 164 of the Criminal Procedure Code were not complied with.

A Court which is called upon to accept a confession must in each case satisfy itself that the Magistrate recording the confession honestly believed, and took steps to ascertain, that the confession was a voluntary one. *PAT THIRU BHOGTA v. EMPEROR*, 4 P. L. T. 279; (1923) A. I. R. (Pat) 356; 24 Cr. L. J. 649 589

— ss. 164 (3), 533—*Confession, mode of recording—Certificate of voluntariness, absence of—Enquiry failure to make, effect of.*

The failure of a Magistrate recording a confession to append the certificate prescribed by section 164 (3) of the Criminal Procedure Code to the statement recorded by him can be cured by the evidence of the Magistrate, but his failure to make any enquiry as to the state of mind of the confessor at the time the confession was recorded is fatal and renders the confession inadmissible in evidence. *L JHANA v. EMPEROR*, (1923) A. I. R. (L) 345; 24 Cr. L. J. 618 508

— ss. 179, 183, *applicability of—Offence committed during journey in foreign territory and British India—Offence, whether triable in British India—"Consequence" in s. 179, meaning of.*

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Section 183 of the Criminal Procedure Code applies only to cases where the offence is committed in British India and not in foreign territory. This section is part of a Code of Procedure for the trial of offences committed in British India; it extends to the whole of British India, but cannot give the Courts jurisdiction over offences committed beyond the limits of British India. The word "journey" used in the section does not include a journey in foreign territory, but is confined in its meaning to a journey within the territories of British India.

Babu Baldi v. Queen, 5 M. 23; 1 Weir 1; 2 Ind. Dec. (N. S.) 17, relied on.

Where an offence is committed in the course of a journey part of which lay through foreign territory and it is doubtful whether the offence was committed in foreign territory or in British India, section 183 of the Criminal Procedure Code is not applicable to the case and it is not triable in British India.

Semble:—The "consequence" contemplated by section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form any part of that offence.

In re Rambilas, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175; *Krishnamachari, v. Shaw Wallace and Co.* 29 Ind. Cas. 331; 29 M. L. J. 178; 18 M. L. T. 25; (1915) M. W. N. 418; 39 M. 576; 16 Cr. L. J. 491 and *Gokal Chana v. Phul Chand*, 5 Ind. Cas. 830; 7 P. R. 1910 Cr. 7. P. W. R. 1910 Cr.; 172 P. L. R. 1910; 11 Cr. L. J. 253, relied on. *L NADAR v. EMPEROR*, (1923) A. I. R. (L) 487; 24 Cr. L. J. 579 323

— ss. 190 (1) (b), 351—*Cognizance of offence on Police report—Witness, prosecution of, with other accused—Magistrate, jurisdiction of.*

Where after some evidence for the prosecution had been led in a case in which the prosecution was initiated on a Police report, the Magistrate ordered the prosecution of one of the witnesses jointly with another accused and commenced the trial *de novo*:

Held, Per *Robinson, C. J.* and *Macgregor, J.*, that the Magistrate had full jurisdiction to act, that section 351 of the Criminal Procedure Code applied to the case, and that the Magistrate, so far as section 190 was applicable, if it was applicable at all, had acted under section 190 (1) (b) of the Code.

Per *Maung Kin, J.*—That section 190 (1) (b) applied to the facts of the case. *L B NGA CHAN THA v. EMPEROR*, 11 L. B. R. 398; (1923) A. I. R. (R.) 31; 24 Cr. L. J. 519 55

— ss. 190 (1) (c), 191—*Cognizance of offence by Magistrate—Omission to inform accused of his right to have case transferred—Illegality.*

When a Magistrate takes cognizance himself of an offence under section 190 (1) (c) of the Criminal Procedure Code, the accused has a right under section 191 to have the case tried by another Magistrate and to be told by the Magistrate that he has such a right. An omission to inform

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the accused and the Magistrate's refusal to transfer the case when asked to do so are fatal to the legality of the trial. The accused, in order to save time and trouble of a further hearing may waive his right. But he can do so only when he is distinctly told by the Magistrate in accordance with the provisions of the Criminal Procedure Code that he has the right to decline to be tried by him. **A CHANDER SEN v. EMPEROR**, 21 A. L. J. 89; (1923) A. I. R. (A) 383; 24 Cr. L. J. 656 **576**

ss. 195, 439—*Penal Code (Act XLV of 1860), s. 182—Sanction for prosecution—Application to Appellate Court—Revision—Offence under s. 182—District Magistrate, power of, to grant sanction.*

Where an application under clause (6) of section 195 of the Criminal Procedure Code is made to an Appellate Court against the order of the First Court refusing or granting a sanction to prosecute, the order of the Appellate Court is open to revision under section 439 of the Code.

Bishen Singh v. Amritsaria, 5 P. R. 1908 Cr.; 7 P. W. R. 1908 Cr.; 103 P. L. R. 1908; 7 Cr. L. J. 281, (F. B.) followed.

Sarat Chandra Mandal v. Ram Sashi Roy, 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265; (1923) A. I. R. (C) 45; 23 Cr. L. J. 665, dissented from.

Although Police Officers in a district are generally subordinate to the District Magistrate, that is not the subordination contemplated by clause (a) of sub-section (1) of section 195 of the Criminal Procedure Code. That clause contemplates subordination to some superior Officer of Police.

Ramaswamy Lall v. Queen-Empress, 27 C. 452; 4 C. W. N. 594; 14 Ind. Dec. (N. S.) 297, relied on.

A District Magistrate has, therefore, no power to grant sanction for prosecution under section 195 (1) (a) of the Criminal Procedure Code in respect of an offence under section 182 of the Penal Code for giving false information to the Police. **L KHAZAN SINGH v. KIRPA SINGH**, (1923) A. I. R. (L) 341; 4 L. 130; 5 L. L. J. 372; 24 Cr. L. J. 683 **779**

ss. 198, 537—*Order under s. 196 sanctioning prosecution—Omission to address Magistrate concerned—Irregularity.*

An order of the Government sanctioning, under section 196 of the Criminal Procedure Code, the prosecution of a person for a political offence did not say in its body to whom the order was given but the District Magistrate, the Special Magistrate and the Public Prosecutor concerned were designated below it. It was objected that the order was open to objection on the ground that it was not given to any determinate person:

Held, (1) that the order must be taken as addressed to the persons designated below who were the persons concerned in the holding of the trial;

(2) that even if the objection was valid, the omission was a mere irregularity covered by section 537 of the Criminal Procedure Code. **M MANDAYAPURATH ERESAKUTTY, In re**, 17 L. W. 100; 44 M. L. J. 166; (1923) A. I. R. (M) 328; 24 Cr. L. J. 539 **155**

Criminal Procedure Code—contd.

s. 235—*Penal Code (Act XLV of 1860), ss. 215, 420 offences under—Conviction for more serious offence, whether permissible.*

When the facts proved in a case constitute two or more offences, the Court should convict of, and punish for, the most serious offence that is established, provided the accused has been charged with, and has had an opportunity of meeting the charge of that offence.

Where, therefore, a person takes a ransom for the restoration of stolen property, and fails to return that property to the person who paid him the ransom and the facts show an offence under section 420 of the Penal Code, though they also establish an offence under section 215, he can be convicted under section 420 provided he was duly charged with it. **L B NGA SHAN v. EMPEROR**, 11 L. B. R. 422; (1923) A. I. R. (R) 37; 24 Cr. L. J. 529 **145**

s. 247—*Acquittal—Revival of proceedings—Jurisdiction of Magistrate.*

An order of acquittal passed under section 247 of the Criminal Procedure Code, so long as it is not set aside by a competent Court is a bar to fresh proceedings in respect of the same offence.

A Magistrate has no jurisdiction to revise proceedings in a case which has terminated in an order of acquittal under section 247 of the Criminal Procedure Code. **C NITYANANDA KOER v. RAKHAHARI MISRA**, 38 C. L. J. 196; 24 Cr. L. J. 716 **940**

s. 250—*Complaint, vexatious, to Village Magistrate—Compensation.*

A person who makes a complaint to a Village Magistrate of a bailable offence, knowing that the latter must, in the ordinary course of his duty, report the substance of the complaint to the Police, gives information to a Police Officer within the meaning of section 250 of the Criminal Procedure Code just as effectively as if he went in person to the Police Station, and where the complaint is ultimately found to be frivolous or vexatious, an order directing the complainant to pay compensation is perfectly legal.

Nachimuthu Chetty v. Muthuswami Chetty, 24 Ind. Cas. 167; 39 M. 1006; (1914) M. W. N. 804; 27 M. L. J. 37; 15 Cr. L. J. 431, **Margasahaya Chetty v. Gandala Nadiabba**, 36 Ind. Cas. 843; 32 M. L. J. 78; 18 Cr. L. J. 11; (1917) M. W. N. 86; 5 L. W. 290 and **Thonokadavath Awalla v. Amman Mannil Kuttilal**, 36 Ind. Cas. 471; (1917) M. W. N. 155; 4 L. W. 73; 17 Cr. L. J. 503, followed.

King-Emperor v. Thammana Reddi, 25 M. 667; 2 Wei 318, **In re Arulanatham Pillai**, 13 Ind. Cas. 221; 22 M. L. J. 138; (1911) 2 M. W. N. 558; 10 M. L. T. 550; 13 Cr. L. J. 29, followed. **M KALYAPERUMAL NAIDU v. BAVAJI SAHIB**, (1923) M. W. N. 421; 18 L. W. 32; 45 M. L. J. 255; 24 Cr. L. J. 717 **941**

s. 250—*Frivolous and vexatious prosecution—Compensation—Formal notice to show cause, whether essential.*

Section 250 of the Code of Criminal Procedure does not require that in the case of a complaint being found frivolous or vexatious, the complainant must be 'called upon to show cause' why he should

Criminal Procedure Code—contd.

not be made to pay compensation; it only requires any objection which is urged to be recorded and considered. The section is not intended to multiply the proceedings but to be applied in a summary manner.

A party who has the right to make a formal objection and have it recorded can waive that right by his acquiescence.

Gulzari Lal v. Gunga Ram, 14 Ind. Cas. 652; 9 A. L. J. 170; 13 Cr. L. J. 268, distinguished.

Pandurang Narayan v. Laxman Babaji, 3 Bom. L. R. 777 and *Suchandi Kolitani v. Dom Kolita*, 5 C. W. N. 214, not followed. *A PANCHAM v. EMPEROR*, 21 A. L. J. 369; 45 A. 474; (1923) A. I. R. (A.) 548; 24 Cr. L. J. 719

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ss. 254, 256, 342, 537—*Examination of accused—Cross-examination of prosecution witnesses under s. 256—Fresh examination of accused, whether obligatory.*

Section 342 of the Criminal Procedure Code which requires that the accused shall be examined generally in the case after the examination of the prosecution witnesses and before the accused is called on for his defence, is mandatory and not discretionary and failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can be cured under section 537 of the Code.

Per Curiam (Venkatasubba Rao, J. dissenting):—The mere fact that in a warrant-case after the framing of a charge under section 254 of the Criminal Procedure Code, the prosecution witnesses are recalled and cross-examined under section 256 of the Code, does not render a fresh examination of the accused obligatory and the omission to question the accused again at this stage does not amount to a non-compliance with the provisions of section 342 of the Code and does not vitiate the trial.

In re Marudath Mathu Vannian, 71 Ind. Cas. 252; 43 M. L. J. 402; 16 L. W. 420; (1922) M. W. N. 601; 44 M. 820; (1922) A. I. R. (M) 512; 24 Cr. L. J. 124, overruled.

The expression "after the prosecution witnesses has been examined" in section 342, Criminal Procedure Code, means when the prosecution has finished calling evidence. Cross-examination of the prosecution witnesses under section 256 is not part of the examination of the prosecution witnesses within the meaning of section 342, nor does such re-examination generally amount to giving fresh evidence for the prosecution, but is merely explanatory of the cross-examination. If new and material matter in support of the prosecution is elicited in cross-examination or re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and if fresh evidence on material matters in support of the prosecution case is elicited in re-examination it would be obligatory on the Court to question the accused on that.

M. VARMA ROWTHEN, In re, 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; 46 M. 449; (1923) M. W. N. 477; (1923) A. I. R. (M) 609; 24 Cr. L. J.

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Criminal Procedure Code—contd.

s. 257—*Discretion of Magistrate to refuse to summon witnesses, extent of—Order directing deposit of expenses of witnesses, legality of.*

The language of section 257 of the Criminal Procedure Code is imperative, and a Magistrate has no discretion to refuse to issue process to compel the attendance of any witness merely because he thinks that no useful purpose will be served by summoning him as a witness to attend the Court. The person who applies for their attendance is the best judge of the matter and it is not for the Magistrate to say which witnesses shall and which shall not be of any use to him. The only grounds upon which an application for the summoning of witnesses can be refused are those enumerated in clause (1) of section 257 and a Magistrate is not entitled to refuse the application on any other ground.

Section 257 (2) of the Criminal Procedure Code fully empowers a Magistrate trying a case to order that the reasonable expenses required for the attendance of a witness shall be deposited in Court by the person applying for his attendance before the witness is summoned.

Qadu v. Queen-Empress, 7 P. R. 1898 Cr., dis-sented from. *L. GANPAT RAI v. EMPEROR*, (1923) A. I. R. (L) 420; 24 Cr. L. J. 686

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s. 291—*Defence witness, discharged—Accused, right of, to examine.*

The fact that a witness cited by an accused person is discharged before his examination, is no bar to his being examined as a witness if he is in attendance, and the accused insists on his evidence being recorded. *O NAGESHWAR v. EMPEROR*, 9 O. & A. L. R. 46; (1923) A. I. R. (O.) 142; 24 Cr. L. J. 518

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s. 307—*Trial on several charges—Acquittal by jury—Magistrate agreeing in respect of graver charges—Reference on minor charges, propriety of.*

There is nothing to prevent a Judge who has accepted the findings of the Jury in favour of the innocence of the accused in respect of certain graver charges, from making a reference under section 307 of the Criminal Procedure Code with the object of having some of the accused convicted on minor charges, where the prosecution has failed not because of the evidence happening to be false but because of the facts alleged being insufficient to support the graver charges. *O EMPEROR v. HARI DAS MITRA*, 37 C. L. J. 34; (1923) A. I. R. (C.) 108; 24 Cr. L. J. 674

770

s. 308—*Jury trial—Discharge of Jury—Misconduct—Inherent power of Court—Code, whether exhaustive.*

So far as it deals with any point specifically, the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court has not the power to make such order as the ends of justice require.

Criminal Procedure Code—contd.

Where the question of misconduct on the part of the Jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the Jury and empanel another.

The Criminal Procedure Code does not provide for such circumstances, but the presumption that Jurors will discharge their duties without impropriety may explain the omission.

The power to discharge a Jury on such grounds is discretionary, but must not be exercised lightly, nor until the Judge has satisfied himself by such form of enquiry as, in the circumstances, he can adopt that reasonable grounds exist for exercising the power. *G RAHIM (SHEIKH) v. EMPEROR*, 37 C. L. J. 595; 24 Cr. L. J. 677 773

ss. 328, 337, 338—*Pardon tendered by Sessions Judge—Examination of approver as witness by him whether legal—Approver, whether must be one charged with offence triable exclusively by Sessions Court—Evidence Act (I of 1872), s. 14—Previous conduct, admissibility of—Accomplice, evidence of—Corroboration.*

If under section 328 of the Criminal Procedure Code a Sessions Judge himself tenders pardon to an accused who accepts it, he can at once examine him as a witness and it is not necessary that such accused should be sent to the Committing Magistrate for his statement to be recorded on oath.

Under sections 337, 338 of the Criminal Procedure Code it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session, all that is required is that the person to whom pardon is tendered, who need not even be an accused, should be supposed to have been directly or indirectly concerned in or privy to an offence triable exclusively by the Court of Session with which another person is charged.

Before the evidence of an accomplice can be accepted it is necessary to be satisfied that the accomplice himself took part in the crime to the extent that he says and that he is in a position to give true evidence as to what occurred. It is also necessary that the accomplice's evidence should be corroborated to prove that it was the accused person and no one else who committed the crime. *N KASHIRAM v. EMPEROR*, 6 N. L. J. 1441 (1923) A. I. R. (N.) 248; 24 Cr. L. J. 566 282

ss. 337, 494—*Approver—Discharged accomplice—Corroboration of evidence—Penal Code (Act XLV of 1860), s. 400—Association for habitually committing dacoity—Evidence of accomplice.*

An accomplice witness against whom the case has been withdrawn under section 494 of the Criminal Procedure Code is less reliable than one to whom a pardon has been tendered under section 337 of the Code. The latter is pardoned conditionally and has before him, as an inducement to stick to the truth, the constant apprehension that his statement may be used against him in a trial hereafter if he is proved to have

Criminal Procedure Code—contd.

given false evidence on any point. Moreover, there is at least one previous statement by which his veracity can be tested. On the other hand, the accomplice witness, who has not received a conditional pardon, is a freer man in the witness-box since he is not pinned down to a previous statement which may be based on tutored material, by the fear of prosecution for perjury if his deposition in Court does not correspond exactly with that previous statement.

In any case, the evidence of an accomplice must be regarded as tainted, particularly of an accomplice who has been discharged under section 494 of the Criminal Procedure Code, and it must be corroborated in material particulars before it can be acted upon.

When persons are charged with belonging to a gang associated for purposes of habitually committing offences, the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasions, but the man who gives evidence of habitual association for a particular purpose must almost inevitably be an accomplice. *L CHHAPROLIA v. EMPEROR*, 24 Cr. L. J. 696 808

s. 342—*Failure to examine accused—Grave irregularity—Re-trial.*

The failure by a Magistrate to examine an accused person for the purpose of section 342 of the Criminal Procedure Code is a grave irregularity and might, in a suitable case, be in itself a sufficient ground for setting aside a conviction. The fact that the accused was examined and cross-examined as a prosecution witness in a cross-case would not relieve the Magistrate of the duty imposed on him by the above section or lessen the gravity of the irregularity. Where, however, the irregularity is not such as to prevent the Magistrate from arriving at a correct view of the facts and the accused has said all he has had to say in the capacity of a prosecution witness, and no unfair use has been made of any admission made by him as a witness, the High Court will not order a re-trial. *O NAGESHAR PRASAD v. EMPEROR*, 9 O. & A. L. R. 218; 24 Cr. L. J. 661 693

s. 345—*Penal Code (Act XLV of 1860), s. 342—Wrongful confinement of complainant and another—Complainant, power of, to compound offence.*

Where a person is charged under section 342 of the Penal Code with wrongfully confining the complainant and another person, the complainant has authority to compound the offence as against himself but he has no authority to compound it as against that other person. *O SHIB CHANDRA v. RABBANI MONDAL*, 27 C. W. N. 168; 37 C. L. J. 254; (1923) A. I. R. (C.) 168; 24 Cr. L. J. 578 322

s. 345—*Penal Code (Act XLV of 1860), s. 498, offence under—Composition at revision stage.*

A High Court in revision may allow an offence under section 498, Penal Code, to be compounded.

Criminal Procedure Code—contd.

Lalla v. Emperor, 24 Ind. Cas. 975; 17 O. C. 92; 15 C. L. J. 567, followed. *O CHHOTAI SINGH v. Emperor*, 9 O. & A. L. R. 776; 24 Cr. L. J. 590
834

— s. 367—*Judgment in criminal case, contents of—Failure to consider essential points.*

Accused was convicted of offences under sections 426 and 447 of the Penal Code. It did not appear from the judgment that the Magistrate had considered the knowledge or the intention with which the accused had done the act complained of as constituting mischief, or that he had come to any conclusion as to whether the accused entered into or upon property in the possession of the complainant or what his intention was, if he did so:

Held, that the judgment was bad and could not be allowed to stand.

Though a Magistrate is at liberty to refer to the evidence in a criminal proceeding in a manner equally appropriate to civil proceedings he should not lose sight of the fact that he is dealing with a criminal matter and should ultimately dispose of the case purely from the standpoint of the Criminal law. *C BHABANI PRASAD MOITRA v. HARI CHARAN BHATTACHARJEE*, 38 C. L. J. 7; 24 Cr. L. J. 714
838

— ss. 367, 537—*Judgment, place of, in criminal trial—Non-compliance with provisions of s. 367 of Act V of 1898 whether mere irregularity.*

The delivery of judgment and the passing of sentence is an integral part of a criminal trial. It is not a mere formality and, consequently, where a judgment is signed and dated before delivery and is translated to the accused by the Court Interpreter, the Judge himself being absent, it amounts to a breach of the provisions of section 367 of the Criminal Procedure Code and cannot be treated as a mere irregularity to be cured by section 537 of the Code. *L B RAMBIT v. EMPEROR*, (1923) A. I. R. (R.) 44; 24 Cr. L. J. 584
828

— s. 403—*Penal Code (Act XLV of 1860), s. 411—Stolen property, several articles of, found in possession of accused—Trial in respect of some—Acquittal—Subsequent trial in respect of remaining articles, legality of.*

Several articles of property stolen from different persons were found in possession of the accused. He was tried in respect of some of the articles upon a charge under section 411 of the Penal Code and was acquitted. He was subsequently prosecuted under the same section in respect of the other properties found in his possession on the same date, but there was no evidence that the articles were received at different times:

Held, that under section 403 of the Criminal Procedure Code the second trial was illegal.

Queen-Empress v. Makhan, 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 919 and *Ishan Muchi v. Queen-Empress*, 15 A. 514; 7 Ind. Dec. (N. S.) 925, followed. *C GANESH SAHU v. EMPEROR*, 37 C. L. J. 326; 27 C. W. N. 554; (1923) A. I. R. (C.) 557; 50 C. 594; 24 Cr. L. J. 707
981

Criminal Procedure Code—contd.

— s. 403—*Trial in Native State—Trial for same offence in British India, legality of.*

A dacoity was committed in British India and the accused were shortly after caught in a Native State with the stolen property. They were tried and convicted by the State Court of an offence under section 411 of the Penal Code. After serving out their sentence they were tried in British India on a charge under section 395 of the Penal Code, but the evidence only established an offence under section 411 of the Code against them:

Held, that their trial by the State Court barred their trial by the Court in British India on the same facts and for the same offence, by virtue of the provisions of section 403 of the Criminal Procedure Code. *L TEJA SINGH v. EMPEROR*, 24 Cr. L. J. 715
989

— ss. 407, 422—*S. 407, appeal under, hearing of—Notice to officer appointed by Local Government not given—Illegality.*

Where an appeal under section 407, Criminal Procedure Code, is heard by a Magistrate specially empowered to hear such appeals, it is incumbent on the Magistrate to give notice of such hearing under section 422 of the Code, to the officer appointed by the Local Government in that behalf and an omission to give such notice before hearing the appeal cannot be treated as an irregularity. The disposal of such an appeal without notice to the officer is not a legal disposal of the appeal. *B EMPEROR v. SHIVLINGAPPA*, 24 Bom. L. R. 1150; (1923) A. I. R. (B.) 74; 24 Cr. L. J. 700
812

— s. 413—*Joint trial—Appealable and non-appealable sentences—Appeal whether lies against non-appealable sentence.*

Where several persons are tried jointly and convicted at one trial, some of them receiving appealable and the others non-appealable sentences the latter do not obtain a right of appeal merely owing to the fact of their joint trial with the others.

Hussain Khan v. Emperor, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546 and *Bhola v. Emperor*, 40 Ind. Cas. 332; 39 A. 549; 15 A. L. J. 574; 18 Cr. L. J. 684, followed. *A JHAGRU v. EMPEROR*, 24 Cr. L. J. 679; (1923) A. I. R. (A.) 609
775

— s. 435—*Revision—Pending case—Interference by High Court—Penal Code (Act XLV of 1860), s. 405—Pleader retaining fees, the recovery of which is time-barred—Offence.*

It is inadvisable for a High Court to interfere in revision in a pending case unless there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress.

Jagat Chandra Mozumdar v. Queen-Empress, 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103, relied on.

A Pleader retaining fees, the legal recovery of which is time-barred, is not guilty of criminal breach of trust. *N KRISHNARAO v. EMPEROR*, 6 N. L. J. 119; 24 Cr. L. J. 591
835

— ss. 437, 503—*Further inquiry—Notice to accused, necessity of—Additional District Magistrate, power of, to issue commission for examination of witness within jurisdiction—Penal Code (Act XLV of 1860), ss. 362, 365*

Criminal Procedure Code—contd.

— *Abduction, what constitutes—Woman, confinement of, pending negotiations for her release—Offence.*

An order under section 437 of the Criminal Procedure Code for further inquiry should not be passed without notice to the person accused, and then only if the order of discharge was manifestly perverse or occasioned a grave miscarriage of justice. But an order for further inquiry passed without such notice is not illegal.

An officer appointed as Additional District Magistrate and authorised to exercise all the powers of a District Magistrate as contained in Sch. III, part V. (18) of the Criminal Procedure Code is empowered to issue a commission under section 503 of the Code for the examination of a witness within his own jurisdiction.

R. J., a young woman, was abducted and taken to *D. K.* from where she, after a few days, made her escape, and was proceeding to a Police Station; on her way she met accused who represented himself to be a Police constable and offered to take her to the Police Station, but instead of doing this he took her to his house where he confined her and negotiated with her relatives who agreed to pay him for her release :

Held, that the action of the accused in falsely representing himself to be a Police constable and the inducement held out by him that he would take the woman to the Police Station amounted to abduction as defined in section 362 of the Penal Code.

Held, further, that in wrongfully confining the woman while he negotiated with her relative for the payment of a sum of money which was practically her ransom, his act fell under section 365 of the Penal Code. *L. BAHADUR ALI v. EMPEROR*, (1923) A. I. R. (L.) 158; 24 Cr. L. J. 622

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— *s. 438, 439—Revision—District Magistrate, whether can make reference against order of Sessions Judge—Procedure.*

It is not the practice of the High Courts in India to take action under section 439 of the Code of Criminal Procedure on a report by a District Magistrate which has for its object interference with a decision by a Court of Session.

Queen-Empress v. Korauddi, 23 C. 250; 12 Ind. Dec. (N. S. 167), *Emperor v. Jamna Bai*, 28 A. 91; 2 A. L. J. 589; A. W. N. (1905) 198; 2 Cr. L. J. 515, *Emperor v. John Francis Lobo*, 36 Ind. Cas. 577; 41 B. 47; 18 Bom. L. R. 795; 17 Cr. L. J. 529 *In re Angamuthu Vanathrian*, 16 Ind. Cas. 522; 1 M. L. T. 170; (1912) M. W. N. 812; 23 M. L. J. 732; 13 Cr. L. J. 714, relied on.

The proper procedure for District Magistrate, who considers an order of the Sessions Judge illegal, is to move the Public Prosecutor to bring the matter before the High Court.

In re Angamuthu Vanathrian, 16 Ind. Cas. 522; 12 M. L. T. 170; (1912) M. W. N. 812; 23 M. L. J. 732; 13 Cr. L. J. 714, relied on. *L. EMPEROR v. FAZAL DAD*, 24 Cr. L. J. 572

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— *ss. 438, 523—Enquiry under s. 523, nature of—Revision.*

Criminal Procedure Code—contd.

It is not incumbent upon the Magistrate to hold a judicial enquiry upon oath, for the purpose of passing an order under section 523 of the Criminal Procedure Code. The section itself does not make any magisterial enquiry imperative. The Magistrate has to satisfy himself, on such material as is before him, who is entitled to possession of the property concerned, and can pass an order on Police reports and papers alone.

A High Court has jurisdiction to revise orders passed under section 523, Criminal Procedure Code, where a proper case is made out.

Ma Thein Nu v. Ma The Hmit, 57, Ind. Cas. 81; 12 Bur. L. T. 266; 10 L. B. R. 156; 21 Cr. L. J. 561, followed. *L. CHUNI LAL v. ISHAR DAS*, 4 L. 38; 24 Cr. L. J. 670

702

— *s. 439—Acquittal—Revision.*

Per Macleod, C. J.—If the Local Government do not exercise their right of asking the High Court to admit an appeal from an order of acquittal passed by a Sessions Judge sitting with assessors, it is difficult to imagine any circumstances which would justify the High Court in interfering with the order in revision at the instance of the complainant.

Per Crump, J.—After a regular trial in the Sessions Court, it would be only in the most exceptional cases that the High Court would be justified in interfering, under section 439 of the Criminal Procedure Code, with an order of acquittal, when there is no appeal by the Local Government under section 417 of the Code. *B. JOITA BECHAR v. PARSHOTTAM SANKALCHAND*, 25 Bom. L. R. 488; 24 Cr. L. J. 734

974

— *s. 439—Acquittal—Revision—High Court, when will interfere.*

Although the High Court will not, under section 439 of the Criminal Procedure Code, ordinarily interfere with an order of acquittal, it will do so where such an order is invalid, as where it is passed in an appeal under section 407 of the Code of the hearing of which the officer appointed by the Local Government in that behalf had no notice. *B. EMPEROR v. SHIVILINGAPPA BASAPPA*, 24 Bom. L. R. 1150; (1923) A. I. R. (B.) 74; 24 Cr. L. J. 709

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— *ss. 439, 476—Magistrate ordering prosecution under s. 476—Revision by District Magistrate—Jurisdiction.*

Where an order to prosecute a person is passed by a Magistrate under section 476, Criminal Procedure Code, the District Magistrate has no jurisdiction to interfere, it is only when sanction to prosecute has been granted under section 195, that the District Magistrate has such powers. *A. SITA RAM v. EMPEROR*, 24 Cr. L. J. 652; (1923) A. I. R. (A.) 597

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— *s. 476, proceeding under—Notice, whether necessary.*

In a proceeding under section 476 of the Criminal Procedure Code it is not invariably necessary that the person to be proceeded against should receive notice to show cause against the proposed action against him. *L. B. GURA v. DISTRICT JUDGE, AKYAB*, (1923) A. I. R. (L. B.) 79; Cr. L. J. 736

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s. 488—Order of maintenance—Subsequent civil suit negating relationship—Stay of maintenance order.

Where the relationship, on which a maintenance order under section 488, Criminal Procedure Code, is based, has been declared by the final decree of a competent Civil Court not to exist, the person adversely affected is entitled to ask the Magistrate to abstain from giving any further effect to his order of maintenance.

Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba, 14 C. 276; 11 Ind. Jur. 296; 7 Ind. Dec. (N. S.) 183, *Illath Narayanan Moosad v. Kathil Itlicherry Amma*, 42 Ind. Cas. 331; 33 M. L. J. 449; 22 M. L. T. 293; 6 L. W. 536; 18 Cr. L. J. 971; (1918) M. W. N. 65, followed. *M. MADDU VENKAYYA v. MADOU PAIDAMMA*, 32 M. L. T. 345; (1923) M. W. N. 421; 18 L. W. 132; 45 M. L. J. 104; 46 M. 721; 21 Cr. L. J. 720 944

s. 488, scope of—Maintenance of son during period of study.

The rights conferred by section 488 of the Criminal Procedure Code are very restrictive. Under the provisions of the section, a father is bound to maintain his child, if the latter is not able to maintain himself. But where he is able to maintain himself, but wants to prosecute his studies in order to better his prospects, he has no right to force his father to comply with his wishes. *L B ABDUL RAHIM v. MA SHWE MAY*, (1923) A. I. R. (R.) 45; 24 Cr. L. J. 590 334

ss. 517, 520—Application for restoration of property—Limitation—Power of Court.

No period of limitation is prescribed for an application under section 517 or 520 of the Criminal Procedure Code, and such an application can always be made within a reasonable time of the termination of the proceedings in which the property in dispute was produced.

The words "make any further orders that may be just" in section 520 of the Criminal Procedure Code are intended to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of under section 517 of the Code.

During the investigation into a case of theft, certain currency notes were produced before the Police by the petitioner. One T. was eventually convicted of criminal misappropriation in respect of the notes and the notes were made over to the complainant under the orders of the Magistrate. The petitioner was subsequently tried and convicted of an offence under section 411 of the Penal Code in respect of the notes, but was acquitted by the Sessions Judge on appeal. Nearly six months after his acquittal he applied to the Sessions Judge for restoration of the notes to him. The Sessions Judge rejected the application on the ground that it was barred by limitation:

Held, (1) that the application was in no sense an appeal against the order of the Magistrate making over the notes to the complainant but an independent application to the Sessions Judge himself with a view to his taking action under section 520 of the Criminal Procedure Code;

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(2) that as such, no period of limitation was applicable to it;

(3) that under section 520 of the Code the Sessions Judge was possessed of very wide powers and could pass any order that he deemed just. *L KANSHI RAM v. EMPEROR*, 4 L. 49; 3 P. W. R. 1923 Cr.; 24 Cr. L. J. 713 937

s. 522—Restoration of property—Trial Court, refusal of, to make order—Appeal—Revision.

The discretion to pass or not to pass an order for restoration of property under section 522 of the Criminal Procedure Code is vested in the Trial Court, and where that Court declines to make such an order in the exercise of its discretion, a Court of Appeal or Revision has no jurisdiction to compel it to do so.

Bhagbat Shaha v. Siddique Ostagar, 16 Ind. Cas. 176; 39 C. 1050; 16 C. W. N. 811; 13 Cr. L. J. 608 and *Muhammad Din v. Emperor*, 48 Ind. Cas. 510; 14 P. R. 1919 Cr.; 20 Cr. L. J. 30; 1 P. W. R. 1919 Cr.; 33 P. L. R. 1919, relied on. *A AZIZ AHMAD v. BUDDHU KHAN*, 21 A. I. J. 459; 24 Cr. L. J. 677; 45 A. 553 773

Criminal trial—Cognizance taken by different Magistrates, legality of.

Proceedings under sections 120 A and 420, Penal Code, were taken against the accused in the Court of a Deputy Magistrate before whom the case remained pending and no evidence was taken up to a certain date, when a formal complaint was laid before the District Magistrate by the Police on which the District Magistrate took proceedings which ended in the committal of the accused to the Court of Session:

Held, that there was no illegality in the District Magistrate taking cognizance of the case, as, though the law prevents a person being tried twice over for the same offence, there is no provision that if cognizance is taken by two different Magistrates at different times the trial can be before one of them only. *G HARI SATYA BISHNU v. EMPEROR*, 37 C. L. J. 327; 50 C. 482; (1923) A. I. R. (C.) 652; 24 Cr. L. J. 710 934

Prosecution, failure of, to produce all witnesses, effect of.

The mere fact of the non-production of some of their witnesses by the prosecution cannot, in any way, affect the credibility of witnesses who are produced. *L INDAR SINGH v. EMPEROR*, 24 Cr. L. J. 708 932

Stay of trial pending decision of civil suit—Proper procedure—Criminal Procedure Code (Act V of 1898), s. 344—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107.

An application for stay of trial in a criminal case pending the decision of a Civil Court ought to be made in the first instance to the Magistrate trying the case under section 344 of the Criminal Procedure Code and if the party fails to get a reasonable order, a revision against the order of refusal, should be filed to the High Court.

The High Court will not act under section 107 of the Government of India Act on an independent

Criminal trial—contd.

dent application for stay of proceedings. **M**
YALAVARTY ANKANNA v. PILLAMERI ADRIKHOTLU,
18 L. W. 236; 24 Cr. L. J. 640 **528**

— *Witness deaf but able to speak and write—Refusal to examine witness, effect of.*

A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but who is able to speak and write, and such refusal, if prejudicial, vitiates the trial. **G** **GANODA DASSYA v. SRIMANTA GHOSH**, 24 Cr. L. J. 688 **784**

Custom v. Personal law—Brahmans of Gokalgarh, District Ambala—Burden of proof.

The circumstance that a family or a tribe has departed from its personal law in one respect, for instance, the incompetency of a daughter to inherit her father's property, does not necessarily lead to the conclusion that it has adopted agricultural custom in all other respects.

The initial presumption in the case of Brahmans is that they are governed by their personal law and the onus is on the person who sets up a custom restricting a Brahman proprietor's powers of alienation to establish it.

The Brahmans of Gokalgarh in the Ambala District are not governed by agricultural custom in matters of alienation.

Ambala is, ethnically and by language, more connected with the United Provinces than the Punjab, and the Brahmans of that District follow their personal law and do not observe any custom like that of the agriculturists of the Punjab.

Kapuria v. Mangal, 149 P. R. 1908; 192 P. W. R. 1908, followed. **L** **SALIG RAM v. BADHAWA** (1923) A. L. R. (L.) 501; 4 L. 254 **759**

— *Personal law—Sadozai-royal family, whether governed by custom or Muhammadan Law—Succession—Females, exclusion of.*

Whenever there is a gap in the Customary Law which cannot be filled otherwise, it must be filled by a reference to the personal law of the litigating parties.

Daya Ram v. Sohail Singh, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.), relied on.

The Sadozai family, descended from Shah Shuja, follows Muhammadan Law in matters of succession and no custom obtains in the family whereby females are excluded from inheritance.

Pesh FATEH MUHAMMAD KHAN v. WAFI BEGUM **609**

— *Non-proprietors, right of, to transfer house—Mauza Raja Jang, Tahsil Kasur, District Lahore.*

Several previous sales of their houses by non-proprietors in a village, even where acquiescence by the proprietors is proved, do not necessarily imply a renunciation by the proprietors of their discretionary right to object to subsequent sales or establish a custom recognising such sales as authorised by the proprietors.

Kharak Singh v. Alladitta, 85 P. R. 1882; **Maya Das v. Jan Muhammad**, 13 P. R. 1889, **Buta Mal v. Ruldu**, 40 P. R. 1889, **Khudayar v. Kapur Singh**, 50 P. R. 1889 and **Harsahai v. Ganga Ram** 7 P. R. 1900, P. L. R. 1900, p. 145, followed.

Custom—contd.

Mauza Raja Jang, in Tahsil Kasur, District Lahore, is a village and not a town.

Non-proprietors of **Mauza Raja Jang** have not by custom the right to transfer their rights of residence in the village without the consent of the proprietors. **L** **MUHAMMAD DIN v. LABH SINGH** **220**

— *Proof—Opinion of tribe, value of—Tribal and family custom—Special custom—Burden of proof.*

Custom is a mere crystallisation of public opinion in matters affecting the social and economic life of a community, and it is not an unsound criterion of the existence of a custom whether or not it is to any extent in harmony with general opinion.

It is dangerous to hold that a custom, which is categorically repudiated and condemned by the majority of a tribe, is actually the custom by which they are bound.

There is an overwhelming presumption that a particular family follows the general custom of its tribe, and, in particular cases, definitely established instances of a mode of succession in a family belonging to a particular tribe are of enormous value in arriving at a general custom which is simply the aggregate of the custom of particular families.

Courts have the widest latitude in discovering and establishing any particular custom applicable to any particular community, and it is for this reason that case-law has been particular in distinguishing the customs of various tribes. But Courts are bound to recognise some limit to the distinctions which can be drawn among different members of the same community, and they are obliged to take certain tribes as the lowest unite regarding which case-law can be established as binding.

Courts must, in the interests of justice and the discouragement of litigation and uncertainty of tenure, lay down the normal rule of succession applicable by custom to the tribe as a whole. In such cases it may be possible for special families to prove a special custom but the onus will lie heavily on him who asserts a departure from the general rule.

The statement of a custom prevailing among Muhammadans as being in conformity with Muhammadan Law, is no bar whatever to its being a valid and a genuine tribal custom. This is particularly the case where there is any confusion or variety in the details of the custom, and where it has been, in any way, in a state of flux. In such a case it is natural and legitimate that members of the tribe concerned should refer their custom to the test of Muhammadan Law, and although this test may not be the ultimate *ratio decidendi*, it is not one which in any way invalidates a statement of custom. **Pesh SAIFDAR KHAN v. MOHAMMAD ZAMAN KHAN** **577**

— *Adoption—Descendants of adopted son, succession to natural family.*

Under the Customary Law the descendants of an adopted son who has succeeded to the property of his adoptive father, retain their right of succession in the natural family of the adoptee in the presence of and along with the other de

Custom—contd.

scendants of that family. **L ISHAR v. HUKAM SINGH**, (1923) A. I. R. (L.) 485 **788**

— **Alienation by female—Consent of reversioner, effect of—Sons of reversioners, whether bound.**

The assent of a reversioner to an alienation by female in possession if made *bona fide*, without collusion or intention to injure the other reversioner, is binding upon his sons and debars them from challenging the alienation.

Habib Khan v. Muhammad Khan, 16 Ind. Cas. 463; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912, followed. **L MAKHAN SINGH v. KISHEN SINGH** **273**

— **by limited owner—Female reversioner, whether can object.**

Where a female is in possession of certain property with a limited interest, her alienations can be controlled by another female who is entitled to succeed to the estate on the death of the alienor.

Maqsum-un-nissa v. Kaniz Zohra, 135 P. R. 1908; 194 P. W. R. 1908, followed. **L MAWAZ v. KHAN ZOHRA JAN** **583**

— **Necessity—Money borrowed for trade—Antecedent debt—Mortgage, prior.**

Money borrowed for the purposes of trade is not taken for necessity. An alienation, therefore, by an agriculturist of ancestral land for such purposes would not be justified.

Where two mortgages, executed within a few days of each other in favour of the same mortgagee form practically one transaction, the mortgage prior in date cannot be considered as an antecedent debt. **L MOHAMMAD USMAN KHAN v. ATA MOHY-UD-DIN**, (1923) A. I. R. (L.) 142; 5 L. J. 304 **871**

— **Ancestral property—Alienation—Sonless proprietor of Rohtak Tahsil, District Rohtak.**

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land.

Giani v. Tek Chand, 64 Ind. Cas. 549; 11 P. L. R. 1922; (1922) A. I. R. (L.) 69; 4 L. 111 and **Uggar Sain v. Tetu**, 71 Ind. Cas. 829; (1923) A. I. R. (L.) 193; 4 L. 113, followed.

Budal v. Kirpa, 23 Ind. Cas. 211; 76 P. R. 1914; 148 P. L. R. 1914; 131 P. W. R. 1914, dissented from. **L KALA v. MAM CHAND**, 4 L. 282 **988**

— **Gift in favour of collateral—Gilotar Jats of Jhang District.**

Among **Gilotar Jats** of the Jhang District a male proprietor is empowered by custom to make a gift of ancestral property in favour of a collateral to the exclusion of other collaterals. **L SAMAIL v. AHMADA**, 4 L. 189; (1923) A. I. R. (L.) 517 **452**

— **Hindu Law—Marriage between Khatri male and Brahmani woman, validity of.**

It is dangerous to seek to extend custom by such logical processes as analogy.

Bhambul Devi v. Narain Singh, 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916, followed.

Custom—contd.

The initial presumption in the case of high caste Hindus is in favour of their following their personal law and the *onus* of proving any special or general agricultural custom lies on the person asserting the existence of such:

A marriage between a Khatri male and a Brahmani woman is not valid under the Hindu Law.

Sahib Ditta v. Bela, 50 P. R. 1907, P. L. R. 1907; p. 154, distinguished. **L PARS RAM v. HUKMAN SINGH** **239**

— **Partition—Widow, whether can claim partition—Burden of proof.**

The widow of a deceased co-sharer has a statutory right to demand partition, and the *onus* is upon the party who disputes the widow's right to obtain a partition to prove that such right does not exist.

Bhag Bhari v. Wazir Khan, 14 Ind. Cas. 451; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912, **Sant Singh v. Basant Singh**, 71 Ind. Cas. 28; (1923) A. I. R. (L.) 81, followed.

Abdul Qadir v. Rabia, 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev., dissented from. **L GHANSHAM v. RAMJI LAL**, (1923) A. I. R. (L.) 625; 4 L. 344 **441**

— **Succession—Ancestral property—Equal holdings—Common ancestor expressly mentioned in pedigree table—Presumption.**

Where in a suit relating to succession under the Customary Law of the Punjab it was found that the holdings of the plaintiffs, collaterals of the deceased, were almost equal in area to those of the deceased, some of the *khata*s being still joint, and that the common ancestor of the parties was expressly mentioned in the pedigree tables prepared at the different Settlements:

Held, that, in the absence of any indication that the property was self-acquired, the presumption was that it was ancestral.

The express mention of a common ancestor in a pedigree table furnishes a presumptive proof that the land originally belonged to him.

Jiwan Singh v. Har Kaur, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914, followed. **L MARYAM BIBI v. GHULAM MAHOMED** **881**

— **Burden of proof—Gift in favour of sister, validity of—Makwal Jats of Isan Mahar, Tahsil and District Muzaffargarh.**

The position of a sister in matters of succession in the Muzaffargarh District is a strong one.

In the Muzaffargarh District the burden lies on a collateral to show that he has a preferential right to succeed as against the sister of the last male-holder.

In the Muzaffargarh District the Jats, especially the Muhammadan Jats, have very large powers of alienation and gift.

Among Makwal Jats of Isan Mahar, Tahsil and District Muzaffargarh, a gift by a male proprietor in favour of a sister or sister's son in the presence of collateral is valid. **L HAYAT v. ALI MOHAMMAD**

Custom—contd.

Succession—Collaterals living in another village—Sisters v. Collaterals—Self-acquired property—Jats of Amritsar District.

Prima facie, the agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which land belonging to the deceased is situate.

Daya Ram v. Sohail Singh, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.) and *Nanda v. Hira*, 41 Ind. Cas. 230; 47 P. R. 1917; 117 P. W. R. 1917, followed.

Among people following Customary Law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter, and she must in such matters be regarded as a sister of that proprietor and not as a daughter of his father.

Hamira v. Ram Singh, 134 P. R. 1907; 85 P. W. R. 1907 (F. B.), followed.

Among Jats of the Amritsar District the burden is on the sister to prove that she has a right to succeed to the self-acquired property of her brother in preference to his collaterals in the third degree. *L. SANT KUAR v. SHER SINGH*, (1923) A. I. R. (L.) 476 786

Collaterals v. Sister—Lak Jats of Muzaffargarh District.

Among Lak Jats of the Muzaffargarh District a sister or sister's son excludes collaterals of the third degree.

In matters of succession under the Customary Law the position of females generally is very much stronger in the western Punjab than in other parts of the Province. *L. KADIR BAKHSH v. ALLAH DITTA* 808

Pagwand — Whole blood whether excludes half — Presumption—Swathis Mansehra Tahsil, Hazara District.

Where the *chundawand* rule prevails, the whole blood would certainly exclude half-blood, but the converse would not necessarily follow; sons might succeed to their father's estate under the *pagwand* rule and still a full brother might succeed to his brother's estate in preference to a half brother. All that can be said is that, where the relationship through mothers has been ignored in the former case, Courts should not be surprised to find it ignored in the latter also.

Sardar Bakhsh v. Ahmad Yar, 150 P. R. 1888, relied on.

A *pagwand* system of succession can be found co-existing with a system under which the whole blood excludes the half in succession to a brother's estate.

The presumption, if any, arising from the *pagwand* rule of succession, in favour of the rule that the half-blood should succeed along with the whole, is a very weak one and is easily rebutted.

The whole blood invariably excludes the half where the descendants of a common ancestor have split up into groups according to uterine descent.

The normal custom among *Swathis* of the Mansehra Tahsil, District Hazara, is for whole

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brothers to succeed solely to the estate of a deceased brother to the exclusion of half brothers. *Pesh Gul Ahmad v. Ghulam Rabani Khan* 675

Succession—Step-mother, right of, to succeed step-son—Aroras of Montgomery District—Hindu Law—Succession—Disability—Lunatic—Person unable to manage affairs—Pleadings, construction of.

In cases where custom is alleged, a duty is imposed on the Court to endeavour to ascertain the existence and nature of that custom.

Fatima Bibi v. Gul, 127 P. R. 1893, *Karlar Singh v. Mathar Singh*, 94 P. R. 1898, *Lorendi v. Krishen Kaur*, 149 P. R. 1888 and *Daya Ram v. Sohail Singh*, 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.), followed.

The fact that a particular tribe has in many matters adopted agricultural custom, cannot by itself afford a basis for the deduction that in the said tribe a custom exists by which a step-mother succeeds to her step-son.

There is no general custom in the Punjab recognising the succession of the step-mother to a step-son. On the contrary, a step-mother's right to succeed to her step-son according to the general custom has been negatived, and it is for the person setting up such a right to satisfy the Court by the production of instances where step-mothers have succeeded that such a custom exists.

Among *Aroras* of the Montgomery District a step-mother is not entitled by custom to succeed to her step-son.

Obiter dictum:—A man may be incapable of looking after his affairs without being a lunatic within the meaning of that term for the purpose of preventing his succession under the Hindu Law.

The assumption of control by the Court of Wards of the property of a person does not imply lunacy such as would cause a disability to succeed under the Hindu Law.

Surti v. Narain Das, 12 A. 520; A. W. N. (1890) 110; 6 Ind. Dec. (N. S.) 1082, relied on. *L. DAYAN v. HIRA NAND*, (1923) A. I. R. (L.) 448; 4 L. 202 898

Will—Muhammadzai Pathans of Charsadda Tahsil, Peshawar District—Sonless proprietor—Will in favour of daughters.

Custom is a mere crystallisation of public opinion in matters affecting the social and economic life of a community.

Where the practice of gift-making has established itself, the effect must be to incline public opinion favourably towards the practice of testamentary bequests, which are really in the nature of deferred gifts which are more easily revocable.

Restrictions placed upon testamentary disposition with a view to safeguarding the interests of sons have little force as presumptive evidence that a sonless proprietor is governed by similar restrictions safeguarding the interests of mere reversioners.

When the practice of Will-making establishes itself, it is the sonless proprietor who obtains the first power of bequest.

Custom—concl'd.

A sonless Muhammadzai proprietor of the Peshawar District is competent to bequeath the whole of his estate to his daughters, married or unmarried, in the presence of reversioners.

The history and conditions of the settlement of Pathan tribes in the different Districts of the North-West Frontier Province are widely dissimilar, and, in ascertaining the customs of the Pathans of the Peshawar District, no useful inferences can be drawn from customs obtaining in the other Districts of the Province. *Pesh Abdul Manan v. Farooq* 79

Damages, suit for—Cause of action. *See* AGRA TENANCY ACT, 1901, s. 146, CLAUSES FIRST AND SECOND 299

DEFINITIONS;—

Accessible to the public. *See* PUNJAB MUNICIPAL ACT, 1911, s. 3 (13) 725

Admixture. *See* OPIUM ACT, 1878, s. 9 700

All parties interested. *See* CIVIL PROCEDURE CODE, 1908, SCH. II, PARA. I 202

Appellate Court. *See* SUITS VALUATION ACT, 1887, s. 11 87

At the beginning of the tenancy. *See* EVIDENCE ACT, 1872, s. 116 450

Auladdar aulad. *See* CONSTRUCTION OF DOCUMENT 427

Building. *See* PUNJAB PRE-EMPTION ACT, 1913, s. 16 911

By right of blood relationship. *See* PUNJAB PRE-EMPTION ACT, 1905, s. 12 (a) 594

Carrying on business. *See* CIVIL PROCEDURE CODE, 1908, s. 20 205

Change of conditions. *See* BOMBAY RENT (WAR RESTRICTIONS) ACT, 1918, s. 4 (6) 319

Compensation. *See* LIMITATION ACT, 1908, SCH. I, ART. 101 17

Consequence. *See* CRIMINAL PROCEDURE CODE, 1898, s. 179 323

Defendant. *See* CIVIL PROCEDURE CODE, 1908, s. 16 405

Demand. *See* PENAL CODE, 1860, s. 331 272

Dhaddhura. *See* RIPARIAN OWNER 727

Harbour. *See* PENAL CODE, 1860, s. 216 691

Illegally ejected. *See* OUDH RENT ACT, 1886, s. 108 (10) 238

In order of succession. *See* PUNJAB PRE-EMPTION ACT, 1905, s. 12 (a) 594

Interest. *See* CIVIL PROCEDURE CODE, 1908, s. 92 302

Loss. *See* RAILWAY COMPANY 986

Malik. *See* HINDU LAW—WILL 530

Market value. *See* COURT FEES ACT, 1870, s. 7 (v) (d) 244

Order being award. *See* CIVIL PROCEDURE CODE, 1908, s. 104 820

Owner. *See* PUNJAB PRE-EMPTION ACT, 1913, s. 16 444

Payable. *See* MADRAS ESTATES LAND ACT, 1908, s. 3 (2) 733

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Person aggrieved by any proceeding. *See* MADRAS REVENUE RECOVERY ACT, 1864, s. 59 106

Preparation. *See* OPIUM ACT, 1878, s. 9 700

Proceedings for the recovery of any sum. *See* EXCESS PROFITS DUTY ACT, 1919, s. 18 106

Refusal to accept for registration, refusal to register, refusing to admit a document for registration. *See* REGISTRATION ACT, 1908, s. 72 182

Robbery. *See* RAILWAY COMPANY 986

Seen. *See* EVIDENCE ACT, 1872, s. 63 (5) 654

Share in cultivation. *See* AGRA TENANCY ACT, 1901, s. 22 1030

Shop. *See* PUNJAB PRE-EMPTION ACT, 1913, s. 16 454

Structure. *See* PUNJAB PRE-EMPTION ACT, 1913, s. 16 911

Subordinate Court. *See* LAND ACQUISITION ACT, 1894, s. 18 354

Theft. *See* RAILWAY COMPANY 986

Thirumanam. *See* MADRAS ESTATES LAND ACT, 1908, s. 3 (2) 733

Town. *See* PUNJAB PRE-EMPTION ACT, 1905, s. 3 (2) 855

Trespass. *See* PENAL CODE, 1860, s. 297 935

Unable to pay his debts. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 10 74

Dhaddhura, custom of, meaning of. *See* RIPARIAN OWNER 727

Divorce Act (IV of 1869), s. 15—Guilty party, whether can obtain relief—Desertion, what is—Cross petition by husband—Separate document, whether necessary—Foreigner named as co-respondent—Jurisdiction.

Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than it can obtain relief by way of divorce.

Otway v. Otway, (1888) 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153, followed.

The desertion required to be proved under the Divorce Act is a wilful abstention by the husband against the wish of the wife.

Bai Kanku v. Shiva Toya, 17 B. 624; 9 Ind. Dec. (N. S.) 409 (F. B.), relied on.

In a suit for divorce by a wife, the husband can, in answering his wife's petition, counter-petition for a divorce on the ground of his wife's adultery—a separate petition on a separate document is not necessary.

N. v. N. (1913) P. 75; 82 L. J. P. 56; 108 L. T. 271; 57 S. J. 343; 29 T. L. R. 321, followed.

Where a husband in a petition for divorce charges a foreigner with adultery, the Court has jurisdiction to add him as co-respondent.

Rayment v. Rayment, (1910) P. 271; 79 L. J. P. 115; 103 L. T. 430; 54 S. J. 721; 26 T. L. R. 634; followed. *B. Rose Hill v. Luke C. Hill*, 25 Bom. L. R. 289; (1923) A. I. R. (B.) 284; 47 B. 657 304

Dower-debt, suit for recovery of, nature of.

A suit to recovery a dower-debt is a suit to enforce a simple money claim founded solely on the contract entered into by the husband. It is, moreover, a suit to recover compensation within the

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meaning of Art. 116 of Sch. I to the Limitation Act. **O MAHAMMAD MAZHARAL AHAD v. MAHAMMAD AZIMUDDIN**, 37 C. L. J. 108; 27 C. W. N. 210; (1923) A. I. R. (C) 507 17

Easement—Light, easement of—Measure of right.

There is no rule defining the measure of a dominant owner's right to easement of light or requiring an angle of 45 degrees through which the rays of the sun are to be received. The principle is that interference with the dominant owner's right in order to be actionable, must be a substantial deprivation of light, enough to render the occupation of the house uncomfortable according to ordinary notions. This would differ in different places and different circumstances.

Colls v. Home and Colonial Store Limited, (1904) A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 39; 20 T. L. R. 475, followed. **A CHANDAN KUNWAR v. NARAIN**, (1923) A. I. R. (A) 542 581

Privacy, right of.

The existence of the right of privacy does not depend on the caste or the creed of the person owning the building or on the fact whether or not the building is used by ladies. It is a custom of the country and is protected as such.

Gokal Prasad v. Radho, 10 A. 358; A. W. N. (1888) 135; 6 Ind. Dec. (N. S.) 241 and **Jamiluddin v. Abdul Majid**, 28 Ind. Cas. 674; 13 A. L. J. 361, followed. **A BOHRA TARA CHAND v. RAYAZI BEGAM**, (1923) A. I. R. (A) 404 1040

Water, right to—Artificial watercourse.

The right to water flowing through artificial water-courses is a right of easement and must rest on some grant or arrangement, either proved or presumed, from, or with the owners of the land from which the water is artificially brought, or on some legal origin. It is quite distinct from the natural right, which as a natural incident to the ownership of land, entitles *prima facie* each successive riparian proprietor to the unimpeded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land. **L BELA SINGH v. BALI RAM**, (1923) A. I. R. (L) 257 489

Easements Act (V of 1882), ss. 30, 47—Transfer of dominant heritage—Easement, division of—Discontinuance of easement—Extent of easement.

Under section 47 of the Easements Act, a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of 20 years. Such period should be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, and in the case of a discontinued easement from the day on which it was last enjoyed by any person as dominant owner.

The exact nature of the right of easement acquired by a party is determined by the accustomed user and where the user proved is only the erection of a dam of flimsy structure across a stream, there is no right to erect a permanent dam.

Bakhtavatsal Ammal v. Secretary of State, 9 Ind. Cas. 636; 9 M. L. T. 375, relied on. **M HOTA VEERABHADRAYYA v. VENKATAKRISHNA RAO**, 18 L. W. 404; (1923) A. I. R. (M.) 674 66

Encumbrance—Lease, whether encumbrance.

Apart from dealings such as mortgages, which create a charge upon land, there are other dealings which amount to an encumbrance. Anything which interferes with the unrestricted rights of the proprietor is an encumbrance, for instance the granting of a lease of *zerai* lands. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land amounts to an encumbrance. **PAT MAHADEO PRASAD SAHU v. GAJADHAR PRASAD SAHU**, 1 P. L. R. 145 359

Estoppel—Incomplete transaction—Conduct.

Though a party has complete power to rescind from an incomplete engagement, such a power will be denied when the actings and conduct of the parties have carried the incompletely executed engagement into effect. But in order to exclude the plea of *locus penitentiae*, a party must base his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and conduct of the parties. **PAT MAN SINGH v. NAWLAKHBATI**, 4 P. L. T. 335; (1923) A. I. R. (Pat) 492 822

Pre-emption suit—Vendee, right of, to prove real nature of transaction.

It is open to the vendee in a pre-emption suit to prove the real nature of the transaction against a third party.

In order to maintain a plea of estoppel in a pre-emption suit, it must be proved that the plaintiff believed the representation made to him, and brought his suit on the basis of it.

Nawab Begam v. Hamid Ali, 11 O. C. 176, relied on. **O BANKE BEHARI LAL v. MANNA LAL**, 9 O. & A. L. R. 79 372

Wrong doer, whether can set up his own wrong—Person claiming through wrong-doer, position of.

A party who claims under a wrong-doer cannot be in a better position than the wrong-doer himself.

A person who can only claim through another is estopped from challenging an adoption made by a widow with the consent of the latter on the ground that his judgment, in giving consent to the adoption, was vitiated by the acceptance of a corrupt consideration.

The principle contained in the maxim *nemo allegans suam turpitudinem est audiendus*, that no one alleging his own wrong is to be heard, is applicable to this country.

Where it is necessary for a party who wishes to establish a certain state of things to set up his own wrong, he will not be allowed to do so.

Doe v. Roberts, (1819) 2 B. & Ald. 368; 105 E. R. 401; 20 R. R. 477. **Prote v. Wiggins**, (1836) 3 Bing. (N. S.) 230; 3 Scott. 601; 2 Hodges 204; 6 L. J. (N. S.) C. P. 2; 132 E. R. 398; 43 R. R. 621. **Voddina Kamayya v. Gudisa Mayayya**, 43 Ind. Cas. 352; 32 M. L. J. 484. **Sid, lingappa v. Hirasa** 31 B. 405; 9 Bom. L. R. 542, followed and applied. **M PARTHASARATHY REDDIAR v. KANDASWAMI MUDALIAR**, 32 M. L. T. 349; (1923) M. W. N. 423; 18 L. W. 156; 45 M. L. J. 161 954

Evidence, admissibility of—Goods consigned to Railway—Damages, suit for—Valuation of goods—Invoice, admissibility of.

In a suit for damages, against a Railway Company, on account of the deterioration of goods while in transit, an invoice, sent to the claimant by the consignor, showing the value of the goods, is a *prima facie* evidence of what the claimant was charged for them and what presumably he would have to pay for them, and in the absence of cross-examination, it is admissible in evidence and it is not necessary to put the consignor into the witness-box to prove what was the actual value of the goods sent. **A DUKHI RAM v. R. N. W. RAILWAY, (1923) A. I. R. (A) 145** 440

—, **admissibility of—Identification by co-accused—Secondary evidence, whether admissible—Evidence by official witness when admissible—Identification, mistake in—Evidence in other respects, whether discredited.**

Inasmuch as an accused cannot give evidence while on his trial, secondary evidence of an identification of a co-accused by him is clearly inadmissible. Evidence by an official witness of identification is only admissible, if the identifying witness is called to support his identification on oath.

The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. **A KHERAL v. EMPEROR, 21 A. L. J. 143; (1923) A. I. R. (A) 352; 45 A. 300; 24 Cr. L. J. 526** 62

—, **record of—Vernacular record not in agreement with English record—Procedure—Doubt, benefit of.**

Ordinarily, where evidence is given by a witness in his own language, the vernacular record of the case is more reliable and entitled to greater weight. But where the Magistrate recording the evidence in English is an Indian gentleman of considerable experience as a Magistrate, his record should be preferred. Where, however, the record of such a Magistrate and the vernacular record are at variance, the accused is entitled to the benefit of any omissions from the latter and the doubts created thereby. **L SADHU SINGH v. EMPEROR, (1923) A. I. R. (L) 167; 24 Cr. L. J. 625** 513

Evidence Act (1 of 1872), s. 18—Admission by predecessor-in-title, when admissible.

Statements made by persons from whom the parties to a suit have derived their interest in the subject-matter of the suit are admissible as admissions only when the admissions are of a date prior to the date of the transfer. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party claiming through them by title subsequent to the admission. **O. GALSTAUN v. ABID HUSAIN, 9 O. & A. L. R. 282; 10 O. L. J. 263** 428

—, **s. 18 (2)—Admission by vendor subsequent to sale—Purchaser, whether bound.**

A purchaser is not bound by an admission made by his vendor subsequent to the purchase by him. He is not the representative-in-interest of his vendor, though he claims his title by virtue

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of the purchase through him. **L B MAUNG AUNG v. MAUNG SHWE LIN, (1923) A. I. R. (R) 51** 1039

—, **s. 35—Confession—Certificate by Magistrate, whether conclusive.**

A certificate recorded by a Magistrate under section 35 of the Evidence Act as to the voluntariness of a confession made to him is good *prima facie* evidence of the fact which it records. The certificate, however, is not conclusive and the facts may be proved which may lead the Court to think that the confession was not really voluntary. **O NAR SINGH v. EMPEROR, 25 O. C. 229; (1922) A. I. R. (O.) 302; 24 Cr. L. J. 561** 257

—, **ss. 63, 91—Document—Secondary evidence.**

Where the terms of a contract are reduced to writing, the only evidence which is allowable under section 91 of the Evidence Act to prove the terms thereof is the document itself or such secondary evidence as is mentioned in section 63 of the Act. Any other kind of documentary evidence is inadmissible in evidence.

Where a portion only of a dominant heritage passes to another by a sale-deed, the whole of the easement right cannot be deemed to have been transferred, notwithstanding that no right was specially reserved by the vendor in the sale-deed. Under section 30 of the Easements Act when a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the sharers provided that such annexation is consistent with the terms of the instrument under which the division was made. **M HOTA VEERABHADRAYYA v. VENKATAKRISHNA RAO, 18 L. W. 404; (1923) A. I. R. (M.) 674** 66

—, **s. 63 (5)—Secondary evidence—"Seen," meaning of—Illiterate witness.**

Under section 63 (5) of the Evidence Act secondary evidence of the contents of a document must be given by a person who has seen the original. If a document is read over to a man because he cannot read it himself, and he signs it and signs it as containing what has been read over to him, he may be said within the meaning of section 63 of the Evidence Act to have "seen" the contents of the document.

Ghure v. Chattrapal Singh, 23 Ind. Cas. 111; 12 A. L. J. 239, explained. A PUDAI SINGH v. BRIJ MANGAL, (1923) A. I. R. (A.) 612 654

—, **s. 90—Old document—Executant's signature through scribe—Authority to scribe—Presumption.**

In the case of a document more than 30 years old produced from proper custody, the legal presumption is that it was executed by the person who purports to execute it; but if it is signed by the scribe on behalf of the executant, there is no presumption that the scribe had authority from the executant to sign.

Gokul Singh v. Saheb Singh, 38 Ind. Cas. 162; 15 A. L. J. 121 and Lokman Das v. Ganga Sahai, 66 Ind. Cas. 96, followed.

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Yar Ali v. Hashmat Bibi, A. W. N. (1897) 90, distinguished. *A BOODHA v. SUKHRAM SINGH*, (1923) A. I. R. (A) 420 989

— s. 112—*Legitimacy, rule of—Rule, applicability of, to Muhammadans.*

The rule as to legitimacy contained in section 112 of the Evidence Act is a rule of procedure and not of substantive law, and as such is applicable to Muhammadans.

Mazhar Ali v. Budh Singh, 7 A. 297; A. W. N. (1884) 333; 4 Ind. Dec. (N. S.) 422 (F. B.) and *Mairaj Fatima v. Abdul Waheed*, 63 Ind. Cas. 286; 43 A. 673; 19 A. L. J. 715, relied on. *A HAJIRA KHATUN v. AMINA KHATUN*, (1923) A. I. R. (A) 570 983

— s. 114 (e)—*Civil Procedure Code (Act V of 1908), O. XXI, r. 24 (2)—Warrant signed by Serishtadar "by order"—Presumption.*

Where a *Serishtadar* signs a warrant "by order" the presumption under section 114 (e) of the Evidence Act is applicable, and he must be held to be the officer appointed by the Court to sign processes as required by clause (2) of r. 24 of O. XXI of the Civil Procedure Code. *G GIRIDHAR SARKAK v. HARISH CHANDRA*, 37 C. L. J. 331; (1923) A. I. R. (C) 584; 27 C. W. N. 1044; 24 Cr. L. J. 584 328

— s. 116—*Landlord and tenant—Estoppel—At the beginning of the tenancy, meaning of.*

The words "at the beginning of the tenancy" in section 116 of the Evidence Act apply only to cases in which a tenant is put into possession of the tenancy by the person to whom he has attorned and do not apply to cases in which the tenant has previously been in possession.

Lal Mahomed v. Kallianus, 11 C. 519; 5 Ind. Dec. (N. S.) 1104, *Sibu Sant v. Netai Charan Das*, 9 Ind. Cas. 806; 15 C. L. J. 114, *Yerraguntha Seshachari v. Mukkumalia Chinniah*, 15 Ind. Cas. 721, relied on.

Ketu Das v. Surendra Nath Sinha, 7 C. W. N. 596 and *Mathra Prasad v. Gokal Chand*, 51 Ind. Cas. 546; 17 A. L. J. 835; 1 C. P. L. R. (A) 100; 41 A. 654, distinguished.

In answer to a suit for rent on the basis of a written lease the defendant stated that the house to which the lease referred was really the joint property of himself and the plaintiff, who was his brother and who had agreed to a scheme of partition by which the house in dispute was to go to him and another house to the defendant, and that as a guarantee for carrying out the terms of this arrangement the defendant had been persuaded to execute the lease, but that the partitions had fallen through and the document remained a mere formality, no rent having ever been paid.

Held, that in the absence of proof of any rent ever having been paid or that the defendant was inducted as a tenant by the plaintiff, the former was not estopped from denying that he was the plaintiff's tenant. *L. RIKHI DAS v. B. ELA RAM*, (1923) A. I. R. (L.) 403 450

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— s. 138—*Cross-examination, right of—Examination-in-chief, value of, in absence of cross-examination.*

Section 138 of the Evidence Act merely lays down the order in which witnesses will be examined, cross-examined and re-examined. An examination-in-chief of a witness, without an opportunity being offered to the opposite party to cross-examine, is not legally acceptable. *PAT MOTI SINGH v. DHANUKDHARI SINGH*, (1923) A. I. R. (Pat.) 53; 24 Cr. L. J. 595 339

Excess Profits Duty Act (X of 1919), s. 18, rules framed under, rule 24 (3)—"Proceedings for the recovery of any sum," meaning of.

The words "proceedings for the recovery of any sum" in sub-rule (3) of rule 24 of the rules framed under section 18 (1), (2) of the Excess Profits Duty Act, mean the proceedings taken under sub-rule (1) of that rule after default has been made in payment. *L. GIAN SINGH-BAHADUR SINGH v. EMPEROR*, 4 L. 165 108

Execution of decree—Assignment of decree by decree-holder—Transfer of decree for execution—Objection to executability of decree, whether maintainable.

Where a decree-holder assigns the decree and applies to the Court for the recognition of the assignment and for a transfer of the decree to another Court for execution, and the Court transmits the decree without adjudicating on its executability, the mere omission by the judgment-debtor to take objection to the assignment of the decree being recognised and to its transmission to another Court for execution, does not preclude him from raising in the Executing Court the question that the decree is not executable. *M. NATESA CHETTIAR v. ANNAMALAI CHETTIAR*, 17 L. W. 319; 32 M. L. T. 157; (1923) A. I. R. (M.) 487 213

— *Decree for possession and mesne profits—Stay of execution on production of sureties—Application for determination of future mesne profits—Step-in-aid of execution—Sureties not made parties—Limitation against sureties, saving of—Limitation Act (IX of 1908), Sch. I, Art. 182.*

The plaintiff obtained a decree in 1907 for possession, and mesne profits, past and future. In March 1908 he filed a *darkhast* for the recovery of possession and past mesne profits. In the meanwhile, the judgment-debtor got the execution stayed under the order of the High Court after sureties had passed security bonds for the due fulfilment of the decree. The High Court confirmed the decree in September 1915 and the execution proceedings that had been stayed were continued and the decree-holder recovered possession and past mesne profits in 1916. In April 1918, the plaintiff made an application for the determination of the future mesne profits from the date of the decree, making the judgment-debtor only the party. On ascertaining the mesne profits the plaintiff put in the present *darkhast* in January 1920 for recovering from the judgment-debtor

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or the sureties the amount of future mesne profits so determined:

Held, that the *darkhast* of 1920 was time-barred as against the sureties, inasmuch as limitation as against them ran from 1915, the date of the High Court decree, and though the application to ascertain the amount of mesne profits was made to keep the decree alive as against the judgment-debtor it would not keep the decree alive as against the sureties.

An application for the ascertainment of the mesne profits awarded by a decree prior as well as subsequent to its date is not a proceeding in the suit but a proceeding in execution and comes within Art. 182 of the Indian Limitation Act. **B USUR ALI v. AMIN**, 25 Bom. L. R. 810; (1923) A. I. R. (B.) 366; 47 B. 778 **233**

— *Money-decree—Judgment-debtor's estate taken over by Court of Wards—Instalments, whether should be allowed.*

The mere fact that the estate of a judgment-debtor has been brought under the management of the Court of Wards is not a reason for allowing him to pay by instalments the amount of a money-decree obtained against him. **L WALI DAD KHAN v. MANI RAM**, (1923) A. I. R. (L.) **800**

— *Sale of tenure—Crops, whether belong to raiyat or purchaser.*

The sale of a tenure in execution of a decree would pass all that is growing upon the land, unless the growing crops are excepted by the notification of sale, or else a custom is proved that the outgoing *raiyyat* should have the crops, subject to a payment for use and occupation of the land while they remain on the ground.

Afatabolla Sirdar v. Dwarka Nath Moitry, 4 C. 814; 4 C. L. R. 95; 2 Ind. Dec. (C.) 57516, relied on. **PAT DHOBI ROY v. MAHADEO SINGH**, 4 P. L. T. 318; 1 P. L. R. 269; (1923) A. I. R. (Pat.) 355 **451**

Ex parte decree—Appeal—Appellate Court, power of.

When a suit is decided *ex parte* the Appellate Court to which an appeal from the decree is preferred, has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing.

Sadhu Krishna Ayyar v. Kuppan Ayyangar, 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F. B.), relied on. **O FARZAND ALI v. EKADASHI**, 26 O. C. 10; 9 O. & A. L. R. 332; 10 O. L. J. 36; (1923) A. I. R. (O.) 177 **591**

Family settlement, principles applicable to—Minor whether bound.

A family arrangement might be upheld even though there were no rights actually in dispute at the time of making it, and the Courts will not be disposed to scan with much nicety the quantum of consideration.

It is a mistake to suppose that the doctrine of family settlement extends no further than

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arrangements for the settlement of doubtful or disputed rights. The principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace but also to cases in which arrangements are made between them for the preservation of its property.

Helan Dasi v. Durga Das Mundal, 4 C. L. J. 327, relied on.

In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or any similar ground, a family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from. If the parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of them more than that which he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them.

There is nothing in this doctrine of family arrangements opposed to the general principle that, when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate an arrangement in the case of adults; but when there is no defect of this nature the settlement of a doubtful claim is of as much advantage to a minor as to an adult and where a genuine dispute has been fairly settled, the dispute cannot be re-opened solely on the ground that one of the parties to the family arrangement was a minor.

Keramutulla Miah v. Keramutulla Meah, 49 Ind. Cas. 586; 23 C. W. N. 118, relied on. **PAT RAM BAHADUR SEN v. GANESH BHAGAT** **542**

Government of India Act (5 & 6 Geo. V, c. 61), 107—Powers of superintendence, when to be exercised.

Semble.—The High Court will not, in the exercise of its power of superintendence under section 107 of the Government of India Act, interfere with an order of a lower Court when it is not manifestly erroneous and unjust. **M LAGADAPATI VENKATARAMANABUSHANAM v. KARELI A RAMASWAMY**, 17 L. W. 375; (923) M. W. N. 244, 4 M. L. J. 78; (1923) A. I. R. (M.) 500 **131**

Guardian and ward—Ward, whether can question act of guardian after disability ceases.

A person under disability is bound by the act of his guardian by whom he is represented in a proceeding, but such a person can re-open the proceeding after the disability ceases, if he satisfies the Court that the act of the guardian has prejudiced him. **PAT MAN SINGH v. NAWLAKHBATI**, 4 P. L. T. 35; (923) A. I. R. (Pat.) 42 **822**

Guardians and Wards Act (VIII of 1890), ss. 7, 8—Appointment of guardian—Notice to interested party not given, effect of—Person other than

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applicant appointed—Separate application, whether necessary.

It is open to a person who should have been, but who has not been, served with notice of an application for appointment as guardian, to object in revision to an order granting such application.

Sections 7 and 8 of the Guardians and Wards Act do not necessarily require that, when once proceedings for the appointment of a guardian of a minor have been properly instituted, a separate application should be taken from the person whom the Court appoints, though in practice it may be usual to take one. *O ISLAMAN v. MAQBULAN*, 9 O. & A. L. R. 74 255

g. 25—Custody of infant—Father and mother, rights of—Arrangement transferring custody of child, whether revocable.

A father is entitled to the custody of his child as against the mother even though the child is only four years old and is likely to be better looked after by the mother, unless it is shown that he is unfit to have the custody of the child.

Where there is nothing established against the father except that he and the mother have, during the past, been on bad terms and have been engaged in litigation, the father ought not to be deprived of the right to the custody of the child.

An arrangement by which a father abandons a child's custody to the mother is not irrevocable.

Mrs. Annie Besant v. Narayamah, 24 Ind. Cas. 290; 38 M. 807 at p. 808; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. M. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1125; 41 I. A. 314 (P. C.), followed. *M. SATYANARAYANA v. NARASIMMA*, 18 L. W. 173; (1923) M. W. N. 668 948

Hindu Law—Father's debt—Sons, pious duty of—Death of father, effect of.

A debt by a Hindu father which is neither antecedent nor for legal necessity, is not binding on the sons on the plea of pious obligation merely because of the father being dead on the date of the institution of the suit.

Chet Ram v. Ram Singh, 67 Ind. Cas. 569; 44 A. 368; 49 I. A. 228; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), followed.

Gharib Ullah v. Khalak Singh, 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.), distinguished. *A RAJA SINGH v. DURGA SINGH*, (1923) A. I. R. (A.) 529 607

Invalid mortgage by deceased father—Pious obligation of sons.

A mortgage by a Hindu father, not incurred for legal necessity or for the payment of an antecedent debt, is not binding on his sons even after his death, on the ground of any pious obligation on them to pay their deceased father's debts. *O RAM SARUP SINGH v. JAGESHAR SINGH*, 9 O. & A. L. R. 157; (1923) A. I. R. (O.) 150 486

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Adoption—Gift of only son in adoption—Widow, power of—Adoption by widow—Adopted son, right of, to contest prior alienations.

A Hindu widow can make a valid gift of her only son in adoption.

Krishna v. Paramshri, 25 B. 537; 8 Bom. L. R. 73, followed.

Strictly speaking, as soon as a Hindu widow takes a boy in adoption, all alienations made by her become ineffective against the adopted son, though it can be shown that they were made for necessity. In the case of a lease, however, by the widow, it is good until the adopted son chooses to contest it. He may be willing to take advantage of the lease and receive rent thereunder. It is only when he chooses to contest the lease that he is entitled to mesne profits in addition to the rent. *B GANPATI SHANKRAPPA HEDGE v. KRISHNAPA SHIVRAM HEGDE* 204

Sister's son—Sudras—Leva patidars of Gujarat, whether Sudras.

The *leva patidars* of Gujarat are Sudras, and the adoption of a sister's son is valid among them. Among Sudras there is no necessity to prove a custom permitting the adoption of a daughter's son or a sister's son.

Manchharam Bhiku v. Dattu Bhiku, 54 Ind. Cas. 110; 21 Bom. L. R. 1172; 44 B 166, followed. *B KAHNDAS NARAIN v. JIWAN PRAG*, 25 Bom. L. R. 510; (1923) A. I. R. (B.) 427 1023

Alienation by father—Legal necessity—Justification—Immediate necessity.

In order to justify an alienation made by a Hindu father it is not sufficient in law to show that at the time of the alienation debts binding upon the family were outstanding. It must further be shown that the alienation had to be undertaken under the pressure of present necessity for the discharge of the debts.

Where, therefore, a Hindu father sold the joint family property in order to pay off debts including a mortgage-debt which formed the bulk of the consideration but which was not to fall due till two years and some months subsequent to the date of the sale, and the scheme adopted for the liquidation of the debts by the father was not a prudent one:

Held, that the sale could not be held to have been made for a legal necessity and was liable to be set aside. *A BANDHU RAM v. RAM KISHUN SONAR*, 21 A. L. J. 354; (1923) A. I. R. (A.) 535 1010

Charitable endowment—Temple site purchased in name of one member of joint family—Other members, right of, to joint trusteeship—Family God installed in new temple—Original founder of worship, position of—Usage of institution, evidential value of.

The mere fact that a site was purchased in the name of one of the members of a Hindu joint family and a temple was subsequently built on that site does not show that that member was the founder of the temple and that his descendants alone, to the exclusion of those of other

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members, are entitled to the trusteeship of the temple.

The site of a temple was purchased in the name of one of the members of one of three branches of a Hindu family and a temple was built on it. There was no evidence to show whether that member acted for his branch only or for the whole joint family consisting of all the three branches, or whether they were divided from one another at that period; nor was there any definite evidence as to how the money for the purchase of the site and for the building of the temple was found. Prior to the building of the temple the common ancestor of all the three branches had a place of worship in a temple-house for a deity which was afterwards installed in the suit temple. There was also an effigy in the temple of the original common ancestor. Several temporary arrangements had been made in which one branch recognised the right of the other branches to manage:

Held, that in view of these facts all the three branches were equally entitled to the trusteeship of the suit temple either because the original ancestor was accepted as the real founder or because the member in whose name the site was purchased was acting on behalf of all the three branches of the family.

Where a family god that is worshipped in a temple house belonging to a person is afterwards installed in a newly built temple, the new temple must be regarded only as an enlargement of the original institution in the temple house and the latter must be taken as the original foundation and its founder as the founder of the new temple.

Mahomed Ismail Ariff v. Ahmed Moola Davood, 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 1101; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 2 Bur. L. T. 141; 8 L. B. R. 517; 43 L. A. 127 (P. C.), followed.

Where there is no direct evidence as to who was the founder of a temple and what are the rules of succession to the trusteeship, the Court must infer them from the practice of the institution and the conduct of the parties. *M. NARAYAN CHETTY v. ELAYAPERUMAL* 381

Hindu — Illegitimate offspring by Muhammadan mistress, whether Hindu.

Under the Hindu Law a man cannot be regarded as a Hindu by birth unless both his parents are Hindus, consequently an illegitimate offspring of a Hindu by a Muhammadan mistress would not be a Hindu:

Lingappa Goundan v. Esudasan, 27 M. 13; relied on. *B. SITARAM PANDURANG v. GANPAT DAULATRAO*, 25 Bom. L. R. 429; (1923) A. I. R. (B.) 384 412

Inheritance, exclusion from — Insanity.

Insanity to cause exclusion from inheritance under the Hindu Law need not be congenital. *B. BAPUJI NARSO v. DATTU ANTAJI*, 25 Bom. L. R. 404; 47 B. 707; (1923) A. I. R. (B.) 425 279

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Joint family — Alienation by manager — Minor members, position of — Advantage — Necessity.

An alienation of joint family property by the manager would affect the shares of the minor co-parceners only if it is proved that the alienation was for necessity.

The manager of a joint Hindu family cannot justify the sale of family property merely on the ground that the sale at the time appeared to be advantageous. *B. VISHNU VISHVANATH NIMKAR v. RAMCHANDRA SADASHIV NIMKAR*, 25 Bom. L. R. 508 1017

Alienation by manager, suit to set aside — Purchase-money partly raised for binding purposes — Decree, form of.

In a suit by a Hindu co-parcener to set aside an alienation made by the manager, where part of the purchase-money is found to have been raised for purposes binding on the family, the Court should make the decree for possession conditional on the payment of the amount.

Koor Hasmat Rai v. Sunder Das, 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1013 followed; *L. AMIR v. KAHAN CHAND*, (1923) A. I. R. (L.) 255 818

Decree against father — Family property sold in execution — Sons, position of — Civil Procedure Code (Act V of 1908), s. 47 — Decree against father of Hindu joint family — Suit to make son's interest liable, maintainability of — Suit, whether maintainable.

In the absence of any objection by any member of a Hindu joint family, when joint family property is put up for sale in execution of a decree against the manager, it may be inferred that the intention was to pass the interest of all the members in the family, though it may be open to other members of the family to dispute that intention and to satisfy the Court either that the alienation was not binding on them or that the debt incurred by their father was not binding on them or that in any way possible their interest in the family property had not passed to the auction-purchaser.

Sripal Singh v. Prodyot Kumar Tagore, 39 Ind. Cas. 252; 44 I. A. 1; 32 M. L. J. 133. 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 1290; 44 C. 524 (P. C.), followed.

Where in the case of a Hindu joint family consisting of a father and his sons, the family property is sold in execution of a decree against the father, the auction-purchaser can, if the sons contest his right, bring a separate suit for recovery of possession. Such a suit is not barred by section 47 of the Civil Procedure Code as the sons cannot be considered to be the representatives of their father.

Sadashiv Mahadu v. Narayan Vithal, 11 Ind. 987; 35 B. 452; 13 Bom. L. R. 661, distinguished. *B. DADA JINAPPA VAGIANI v. YESU bin SAKHOBA UGARE*, 25 Bom. L. R. 494 402

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Joint family—Hundi executed by manager
Liability of co-parceners—Unsecured debt
Liability of estate—Debt by manager—
Presumption—High rate of interest—Necessity—
Burden of proof.

A hundi executed and signed by the manager of a Hindu joint family as such for family necessity is binding on the entire co-parcenary body. *Krishnanand Nath Khare v. Raja Ram Singh*, 66 Ind. Cas. 150; 20 A. L. J. 233; (1922) A. I. R. (A.) 116; 44 A. 393, followed.

The manager of a Hindu joint family can incur simple debts in his capacity as such manager and on behalf of the family.

Dhiraj Singh v. Manja Ram, 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec. (N. S.) 196 and *Kailu v. Faiyaz Ali Khan*, 30 A. 394; 5 A. L. J. 307; A. W. N. (1908) 173, distinguished.

There is no presumption that a debt incurred by the head of a Hindu joint family is one incurred on behalf of the family. The person who asserts that a particular debt of the manager is binding on the family must prove it.

Soiru Padmanabh Rangappa v. Narayanrao, 18 B. 520; 9 Ind. Dec. (N. S.) 855, relied upon.

Where the rate of interest of a loan taken by the manager of a Hindu joint family is unduly high, the creditor in order to bind the family estate must prove not only the necessity for the loan, but also the necessity to borrow it at so extravagant a rate.

Nawab Nazir Begam v. Rao Raghunath, 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 44; 30 C. L. J. 86; (1919) M. W. N. 498; 11 U. P. L. R. (P. C.) 49, followed. *A RAGHUNATH SINGH v. SRINARAIN*, 21 A. L. J. 323; (1923) A. I. R. (A) 424; 45 A. 434 1018

Joint estate, blending of, with separate estate—Presumption.

When members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests, the presumption is in favour of the whole property becoming joint. It makes no difference whether separate estate is brought into the joint family account or the joint family property is brought into the separate account.

Suraj Narain v. Ratan Lal, 40 Ind. Cas. 988; 40 A. 159; 44 I. A. 201; 21 C. W. N. 165; 15 A. L. J. 684; 19 Bom. L. R. 737; 23 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180 (P. C. relied on. *P C RAJANIKANTA PAL v. JAGAMOHAN PAL*, (1923) A. I. R. (P. C.) 57; 44 M. L. J. 561; 32 M. L. T. 149; 25 Bom. L. R. 683; 37 C. L. J. 515; (1923) M. W. N. 438; 50 C. 439; 18 L. W. 387; 27 C. W. N. 997; 9 O. & A. L. R. 805 (P. C.) 252

Litigation by—Separate representation of minor co-parceners—Manager, compromise of suit by, validity of.

A compromise of a suit by the manager of a joint Hindu family without obtaining the consent of minor co-parceners who are separately represented in the suit is unlawful and falls not

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only as regards the minor co-parceners but as regards the manager as well.

Where one of several mortgagors has redeemed a mortgage under which all are equally liable, he is subrogated to the rights of the mortgagee whose debt he discharges and, as an assignee of the security which he pays off, can enforce it by a suit for sale. *O LUTAR RAM v. LAL RANJIT SINGH*, 9 O. & A. L. R. 677 113

Joint family—Mortgage-decree against father—Sons, liability of.

In a joint Hindu family consisting of a father and his sons, the latter are not precluded from questioning a mortgage-decree obtained against their father, so long as the mortgaged property is still in possession of the family and no adverse proprietary rights have sprung up by a sale held in execution of the decree, and the onus is on the mortgagee decree-holder to show that the mortgage was made for payment of an antecedent debt or for a valid family necessity.

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 28; 44 I. A. 16; 15 A. L. J. 437; 39 A. 4371 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.) *Suraj Bansi Koer v. Sheo Persad Singh*, 11 A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 58; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), *Chandardeo Singh v. Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, followed.

Sripal Singh Dugar v. Prodyat Kumar Tagore, 39 Ind. Cas. 25; 44 I. A. 1; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.), *Kalyan Singh v. Dharam Singh*, 68 Ind. Cas. 704; 26 A. L. J. 721; (1-22) A. I. R. (A) 489; *Basdeo Lal v. Mahabir*, 59 Ind. Cas. 570; 8 O. L. J. 18; 23 O. C. 344; 3 U. P. L. R. (O) 1, *Bhagbut Pershad v. Girja Koer*, 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 185; 12 Ind. Jur. 280; 7 Ind. Dec. (N. S.) 1062 (P. C.), distinguished.

Gur Narain v. Gulzari Lal, 25 Ind. Cas. 917; 17 O. C. 318; 1 O. L. J. 503, not followed. *GANGA BAKSH SINGH v. RAGHUBAR SINGH*, 9 O. & A. L. R. 359; 10 A. L. J. 61; (1923) A. I. R. (O) 182 27

Mortgage, usufructuary—Necessity—Interest, whether can be allowed.

Where a usufructuary mortgage of joint family property is challenged by a co-parcener, and a portion of the mortgage-money is found to have been paid for necessity the mortgagee is not entitled to interest on that amount as a condition of delivery to the plaintiff of his share of the mortgaged property. *A RAM LALLAN SINGH v. HARAKH NARAIN RAI*, 20 A. L. J. 641; (1922) A. I. R. (A) 403 920

Nucleus of ancestral property—Separate acquisitions—Burden of proof—Nucleus, whether must be substantial.

In a joint Hindu family, where there is a nucleus of ancestral property, with the assistance of which

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subsequent acquisitions have been made, the burden of proving that any particular property is separate lies on the person who asserts it.

Lal Bahadur v. Kanhaiya Lal, 29 A. 244; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 34 I. A. 65 (P. C.), followed.

There is no authority for the proposition that in order to raise a presumption about the jointness of the acquisitions of a Hindu joint family the nucleus must be a substantial one; although a property which is incapable of yielding any income, such as an ancestral house, cannot be treated as a nucleus. *A SUKHNANDAN v. BRIJNANDAN*, (1923) A. I. R. (A) 574 1052

Joint family—Partition, partial, effect of.

The very conception of a joint Hindu family involves joint ownership of all the family property by its members, and the moment a partition takes place between the members, even though it is a partition of only a portion of the joint property, they cease to be members of a joint Hindu family.

Gaurishankar Parabhuram v. Atmaram Rajaram, 18 B. 611; 9 Ind. Dec. (N. S.) 916, dissented from. *L BENI PARSHAD v. GUR DEVI*, 5 L. L. J. 185; (1923) A. I. R. (L) 497, 4 L. 452 894

Partition—Widowed daughter-in-law—Maintenance, right to—Cause of action when arises—Limitation Act (IX of 1908), s. 28, whether extinguishes right to maintenance:

Under the Hindu Law a widowed daughter-in-law has no legal right to maintenance as against the self-acquired property of her father-in-law, if her husband died during the lifetime of her father-in-law. But although the obligation of the father-in-law to maintain his widowed daughter-in-law is only moral and not legal when he has no ancestral assets in his hands, the position of the heir who takes his estate by inheritance is different. What was a moral obligation in respect of the father ripens into a legal obligation when the estate passes into the hands of his heirs who are not entitled to evade liability merely because they do not receive the estate by inheritance but by way of gift or testamentary disposition.

Bai Parvati v. Tarwadi Dolatram, 25 B. 263; 2 Bom. L. R. 894, dissented from.

Siddessury Dasee v. Janardan Sarkar, 29 C. 557, 6 C. W. N. 539, *Indulala Dassee v. Panchamani Dassee*, 28 Ind. Cas. 578; 21 C. L. J. 292; 19 C. W. N. 1109; *Narayanarao Ramchandra Pant v. Ramabai*, 6 L. A. 114; 3 B. 415; 3 Ind. Jur. 332; 2 Shome L. R. 274; 3 Shome L. R. 190, 3 Sutu P. C. J. 617; 4 Sar. P. C. J. 24 6 C. L. R. 162; 2 Ind. Dec. (N. S.) 20 (P. C.), *Kedar Nath Coondoo Chowdhury v. Hemangini Dass*, 13 C. 336; 6 Ind. Dec. (N. S.) 725, *Khethur Monie Dassee v. Kasheerath Dass*, 20 L. R. A. C. J. 15; 10 W. R. (P. B.) 89; 1 Ind. Dec. (N. S.) 659, *Meenakshi Ammal v. Rama Aiyar*, 10 Ind. Cas. 341 37 M. 396; 13 M. L. T. 97; 24 M. L. J. 106; (1913) M. W. N. 40, *Jhki v. Nand Ram*, 11 A. 194; A. W. N. (1889) 30; 13 Ind. Jur. 347; 6 Ind. Dec. (N. S.) 552 and *Yamunuoai v. Manubai*, 23 B. 608; 1

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Bom. L. R. 95; 12 Ind. Dec. (N. S.) 406, relied upon.

When joint property of a Hindu family is partitioned, provision may be made for the maintenance of such female members of the family as are entitled to maintenance from the estate.

Kedar Nath Coondoo Chowdhury v. Hemangini Dass, 13 C. 336; 6 Ind. Dec. (N. S.) 725, and *Commumoney Dossee v. Ramnath Bysack*, (1843) Fulton 189; 1 Ind. Dec. (N. S.) 758, followed.

Section 28 of the Limitation Act does not extinguish a right to maintenance. The cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled.

Rangammal v. Eehammal, 22 M. 305; 9 M. L. J. 14; 8 Ind. Dec. (N. S.) 217, *In the goods of Gobinda Chandra*, 23 Ind. Cas. 539; 12 C. W. N. 1141, *Kedar Nath Coondoo Chowdhury v. Hemangini Dass*, 13 C. 336; 6 Ind. Dec. (N. S.) 725 and *Siddessury Dass v. Janardan Sarkar*, 29 C. 557; 6 C. W. N. 539, followed. *G GOPAL CHANDRA v. KADAMBINI DASI* 235

Joint family—Separation of one member,

effect of—Presumption—Insolvency of some members—Shares of others, whether affected.

There is no presumption that where one coparcener in a joint Hindu family separates from the others, the others remain united. It must be decided upon the evidence in each case whether the rest of the members had agreed to continue to remain united.

Balabux v. Rukhmabai, 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.), followed.

It is not open to an Insolvency Court to direct the Receiver in Insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents.

Sanyasi Charan Mandal v. Asutosh Ghosh, 26 Ind. Cas. 836; 42 C. 225, relied on.

Where some members of a joint Hindu family are adjudicated insolvents the shares only of those upon whom the debts of the insolvents are binding vest in the Receiver. Consequently, the insolvency of some members of a joint Hindu family does not affect the shares of the other coparceners except those who happen to be the sons of the insolvent or insolvents.

Sanyasi Charan Mandal v. Asutosh Ghosh, 26 Ind. Cas. 836; 42 C. 225, *Rangayya Chetti v. Thanikachalla Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757, *Fakirchand Motchand v. Motchand Hurrukchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, relied on.

Bihari Lal v. Sat Narain, 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L) 1, distinguished. *L BASUJESHAU NATH v. GANGA RAM*, (1923) A. I. R. (L) 572 281

Simple money-decree against

father—Family property sold in execution—Sons, whether can recover their share.

Where in execution of a simple money-decree against the father, the family property is sold by auction, the sons cannot recover their share of

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it unless they can show that the debt for which the property was sold was incurred for illegal or immoral purposes.

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 141 (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; (P. C.) and *Chet Ram v. Ram Singh*, 67 Ind. Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), distinguished.

Sripat Singh Dugar v. Prodyot Kumar Tagore, 39 Ind. Cas. 252; 15 A. L. J. 147; 32 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. (P. C.), *Girdharee Lall v. Kantoo Lall*, 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.), followed. *A. RAM CHANDRA v. MUHAMMAD NUR*, 21 A. L. J. 485; 45 A. 545; (1923) A. I. R. (A.) 591. 656

Joint family—Transfer by father—Property passing out of family—Sons' power to challenge transfer—Transfer, private—Legal necessity.

Where ancestral property has passed out of a Hindu joint family either under a conveyance executed by the father in consideration of an antecedent debt or in order to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that they were so contracted.

A purchaser at an auction-sale of joint family property for the father's debts, in the absence of notice that the debts were contracted for immoral purposes, is not bound to make enquiry beyond what appears on the face of the proceedings.

Suraj Bansi Koer v. Sheo Persad Singh, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. I. R. 226; 2 Shome L. R. 2421 2 Ind. Dec. (N. S.) 705 (P. C.); *Nanomi Babuasin v. Modhun Mohun*, 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.); *Bhagbut Pershad Singh v. Girja Koer*, 15 C. 717; 15 I. A. 99; 5 Sar. P. C. J. 186; 12 Ind. Jur. 289; 7 Ind. Dec. (N. S.) 1062 (P. C.); *Sahu Ram Chandra v. Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 141; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Chandradeo Singh v. Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, relied on.

It is not, however, correct to say that in every case where joint family property has passed out of the family for satisfaction of the father's debts the sons cannot challenge it unless they show that the debts were contracted for immoral purposes.

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Where a property has been sold by the father to pay off a debt and the sons bring a suit to recover it, and the property has not been sold at public auction, it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity. *A. SAHEB SINGH v. GARDHARI LAL*, 45 A. 576. 1024

Mitakshara—Joint family—Partition—Intention to divide—Partial partition—Express agreement.

Under the Hindu Law of the Mitakshara, an unambiguous and definite intimation of intention on the part of one member of a joint family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then he held in jointness.

Girja Bai v. Sadashiv Dhundiraj, 37 Ind. Cas. 321; 43 I. A. 151; 20 C. W. N. 1085; 11 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 257; 31 M. L. J. 455; 43 C. 1031 (P. C.), followed. *Romalinga Annavi v. Narayana Annavi*, 68 Ind. Cas. 451; 24 Bom. L. R. 1209; 30 M. L. T. 255; (1922) M. W. N. 399; 45 M. 489; 26 C. W. N. 929; (1922) A. I. R. (P. C.) 211; 43 M. L. J. 428; 16 L. W. 639; 20 A. L. J. 839; 37 C. L. J. 15 (P. C.), disapproved.

Where, in the case of a division of property among members of a Hindu joint family, there is evidence sufficient to show that the parties intended to sever, any property which is not divided by metes and bounds will be considered to be held by them as tenants-in-common, unless there is an express agreement between the parties that they should treat that property as belonging to them as joint tenants. They will then be joint tenants, not as members of the joint family which no longer exists, but under a special agreement made after the severance.

Gaurishankar v. Atmaram, 18 B. 611; 9 Ind. Dec. (N. S.) 916, not followed. *B. DAGADU a. SAKUBAI NANA BODAKE*, 25 Bom. L. R. 806; 47 B. 773. 369

Reversioner, interest of, nature of—Reversioner, whether can assign or bind interest.

A Hindu reversioner has no right or interest in *presenti* in property which a female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

Amrit Narayan Singh v. Gaya Singh, 44 Ind. Cas. 408; 27 C. L. J. 296; 23 M. L. T. 142; 22 C. W. N. 409; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 205; (1918) M. W. N. 506; 7 L. W. 581; 20 Bom. L. R. 346; 45 C. 590; 45 I. A. 35 (P. C.), followed.

When a dispute with regard to the rights of the members of a family has been settled by a fair com-

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promise such compromise will be upheld by the Court, although perhaps resting upon grounds which would not have been considered satisfactory if the transaction had been between strangers, but it must be established that the right compromised could at least have formed the subject-matter of a claim, though a doubtful claim.

A reversionary heir, however, who has only a *spes successionis* cannot enter into a compromise with regard to such interest as he may have in the estate of the person whose reversionary heir he claims to be.

But a compromise of a doubtful claim by the holder of a limited interest binds the reversionary heir if it is established that the compromise was a fair and honest one and that the limited holder entered into the transaction as representing the estate and for the protection of the estate and not as representing herself and for her own protection.

Whenever a question is raised whether a transaction is an alienation or a compromise of a doubtful claim the true test to apply is to see whether the alienee derives title from the holder of the limited interest. Where a transaction is based on the assumption that there was an antecedent title of some kind in both the parties and the agreement acknowledges and defines what that title is, the transaction is not an alienation but a compromise of a doubtful claim.

Bhagwati Kuer v. Jagdam Sahay, 62 Ind. Cas. 933; 6 P. L. J. 604; 2 P. L. T. 471, followed. **PAT**
RAM BAHADUR SEN v. GANESH BHAGAT 542

Succession—Ancestral property—Daughter's son, position of—Survivorship.

The doctrine of survivorship, as understood by the Mitakshara Law, is not limited to unobstructed succession and to the succession to the joint property of re-united co-parceners.

Under the Mitakshara Law the right of survivorship will not prevail in favour of a survivor as against the male issue of the deceased.

"Ancestral property," in its technical sense in the Hindu Law, means property which descends upon one person in such a manner that his issue acquire certain rights in it as against him.

It is true that under the Hindu Law it is only the persons who offer the funeral cake to the owner of the property that are regarded as having an interest in the property by birth. But it is well-established that as each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth.

Whatever the position of a daughter's son may have been under the Hindu Law, before the appointment of a daughter to raise up issue for her father became obsolete, under the present form of that law he is a member of his own father's family and cannot be regarded as a member of his maternal grandfather's family. **PAT** *MAN SINGH v. NAWLAKHSAH*, 4 P. L. T. 335; (1923), A. L. R. (Pat) 492 822

Disability—Lunatic. *see* CUSTOM 898

—SUCCESSION

Hindu Law—contd.

Succession—Widow, disqualification of—Unchastity—Hostility.

Under the Hindu Law unchastity disqualifies a widow from succeeding to her husband's estate but it must be physical unchastity which occurred during the lifetime of the husband.

In the absence of unchastity, a widow will be excluded from succeeding to her husband only on proof of malignant or unjustified hostility towards her husband for which she is alone, or at least partly, responsible.

Khettermont Dassi v. Kadambini Dassi, 17 Ind. Cas. 83; 16 C. W. N. 964, relied on. **PESH**
MUKANDI BAI v. JAMNI BAI 875

Widow—Adoption after death of adult son—Consent of Sapindas.

An adoption by a Hindu widow subsequent to the death of her unmarried adult son is legal and valid if made with the consent of her deceased husband or of his sapindas.

Tripuramba v. Venkataratnam, 72 Ind. Cas. 278; 44 M. L. J. 349; 46 M. 423, followed.

The onus of proving that in the case of an adoption by a Hindu widow the consent of the sapindas was procured by a bribe is strongly on the person who alleges it and the mere fact of a promise of payment of money is not conclusive on the question of the consent having been obtained.

M. PARHASARATHY REDDIAR v. KANDASWAMI MUDALIAR, 32 M. L. T. 349; (1923) M. W. N. 423; 18 L. W. 156; 45 M. L. J. 161 954

Gift of estate to next reversioner—Acceleration—Provision for widow's maintenance.

A gift of the entire estate by a Hindu widow in possession, in favour of the next reversioner, which operates as an acceleration of the estate to the latter, is not vitiated by its containing a provision for the maintenance of the widow.

Rangasami Gounden v. Nachiappa Gounden, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 L. A. 72 (P. C.) and *Angamulhu Chetti v. Varatharajulu Chetti*, 53 Ind. Cas. 386; 42 M. 854; 37 M. L. J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 11 L. W. 11 (F. B.), followed.

Bhagwati Kuer v. Dhanukdary Prasad Singh, 53 Ind. Cas. 347; 46 L. A. 259; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.) and *Sureshwar Misser v. Maheshwari Misra*; 57 Ind. Cas. 325; 47 L. A. 233; 48 C. 100; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 25 C. W. N. 194 (P. C.), relied on. **A**
RAM ADHAR SINGH v. RAM MAOHAR SINGH, 21 A. L. J. 548 990

Marriage of daughter—Gift to son-in-law—Legal necessity.

It is the duty of a Hindu mother to provide a husband for her daughter and for this purpose

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she has power to make a gift of property to her son-in-law whenever it is necessary.

N hard and fast rule can be laid down as to extent of a Hindu widow's right of alienation in this respect. If the property is of large value, probably the alienation of more than a quarter would not be upheld. But where the property is very small in value and other circumstances, such as, blindness of the girl, also require it the alienation of the whole even will be a sheer legal necessity. A BHAGWATI SHUKUL v. RAM JATAN TEWARI, 21 A. L. J. 232; 45 A. 297 648

—Widow—Surrender, requisites of—Bengal Court of Wards Act (IX of 1879), s. 60, applicability of, to surrender by Hindu widow of life-estate.

Though actual transfers by Hindu widows have, in many cases, been supported by reference to the theory of the relinquishment of the widow's entire interest, there is relinquishment in the true sense of the term, when there is disclaimer by the widow at the time of the death of her husband, or renunciation of the world by her afterwards, or some act by her which might, in the eye of the law, justify the inference that the widow is civilly dead. It is only where the widow is dead, either actually or civilly, that the law steps in and gives the estate of her husband to the next reversioner. On the other hand, there are cases which are called cases of relinquishment but which are in fact not cases of relinquishment at all, where alienations by Hindu widows have been upheld by arguing from analogy. But analogy denotes only a partial similarity; and it does not follow that, because where a widow renounces the word the next reversioners take the estate by operation of law, there is also a succession by operation of law, where, as a result of a transaction not amounting to relinquishment of properly so-called but capable of being supported by reference to the theory of relinquishment, the estate comes to the next reversioners.

For instance, a Hindu widow may sell for valuable consideration the entire estate of her husband to the next reversioner or to an entire stranger with the assent of the next reversioner. The transaction will be upheld by applying the analogy of a relinquishment of her estate by the Hindu widow; but it cannot be argued that there is relinquishment, properly so-called, in such a case, or that the title of the reversioner arises by operation of law.

The law on the subject has grown from precedent to precedent and it cannot be argued that because a certain legal incident is true of a certain proposition, it must also be true of every proposition which may have been logically drawn from the first proposition or which is capable of being supported by reference to the first proposition.

It is one thing to say that because, upon the death of a widow, either actual or civil, the estate would at once vest by operation of law in the

Hindu Law—contd.

next heir of her husband, therefore, the widow can operate her own death by conveying absolutely the estate of her husband to one who, at the moment of the conveyance, is the next heir of her husband; and it is quite another thing to say that when the widow does convey the estate to the next reversioner, the reversioner takes the estate by operation of law and not by virtue of the conveyance. In other words, it does not follow that, because the heir takes by operation of law where there is real relinquishment by the widow, that is to say, when she elects to die a civil death, he also takes by operation of law when, as a result of a transaction which may be supported by reference to the theory of relinquishment, but which is in fact not relinquishment, the estate is carried from the widow to the heir or to a stranger with the consent of such heir.

In a case of disclaimer by a Hindu widow at the time of the death of her husband or of relinquishment, properly so-called, afterwards, the title of the heir would arise by operation of law, and if the widow happens to be a ward of Court at the time of relinquishment section 60 of the Bengal Court of Wards Act would not, in such a case, operate to the prejudice of the heir. But wherever the transaction is one, not of relinquishment, but capable of being supported by reference to the theory of relinquishment, the title of the heir arises, not by operation of law, but by the act of transfer on the part of the widow, and if the latter is a ward of Court, on the date of the transaction, the transaction comes within the prohibition contained in section 60 of the Bengal Court of Wards Act.

A deed of surrender executed by two Hindu widows in favour of the next heirs of their husband of their husband's estate after reciting that the widows being old were desirous of spending the remainder of their lives in Divine Worship at the holy City of Benares, stipulated for a substantial monthly allowance for the widows for their lives which was to be a first charge on certain properties. Certain other duties were imposed upon the heirs and the deed provided that if the heirs neglected the performance of those duties the widows would be entitled to enforce them. On the date of the execution of the deed of relinquishment the widows were wards of Court, but the sanction of the Court of Wards to the deed was not obtained:

Held, that the transaction did not amount to a relinquishment, properly so-called, but operated as a conveyance in favour of the heirs and fell within the prohibition contained in section 60 of the Bengal Court of Wards Act.

A relinquishment by a Hindu widow becomes operative only when the widow acts upon the declaration and withdraws herself from the estate. *PAT MAN SINGH v. NAWLA KHBATI*, 4 P. L. T. 335; (1923) A. I. R. (Pat.) 492 822

—Will—Absolute estate bequeathed to widow, legality of—Construction of Will—"Malik," import of.

Hindu Law—concl'd.

A Hindu can give by Will an absolute estate in his property to his widow.

The word "*malik*" employed in a Will has considerable force as indicating that the person in reference to whom it is used should take absolute interest in the properties conferred. **P. Q. SUDHAMANI DAS v. SURAT LAL DAS**, (1923) A. I. R. (P. C.) 65; 18 L. W. 86; 45 M. L. J. 247; (1923) M. W. N. 601; 38 C. L. J. 253 580

Will appointing heir—No provision for widow—Presumption—Residence and maintenance of widow.

Where a Hindu makes a Will in which he deliberately makes no express provision with reference to his wife, it cannot be assumed that his intention was that his wife should be in the same position as if he had died intestate, the proper implication, if any, to be made is that he was satisfied that the maintenance and residence out of his estate to which she was entitled would be sufficient maintenance for her.

A Hindu (Jain) made a Will whereby he appointed a certain person as his heir and declared that he should act under the orders of his wife. The Will further provided that if no male issue were born to the appointed heir, and it were necessary to adopt a son, then during the lifetime of the testator's wife the selection should be made with her consent. After the death of the testator the widow brought a suit for declaration of her rights as a Hindu widow, alleging that under the terms of the Will the testator did not dispose of his estate during her lifetime:

Held, that the testator had disposed of the estate to the appointed heir and that the widow was only entitled to rights of maintenance and residence. **P. Q. FOOLCOOVERBAI v. KESHURISINGH**, 25 Bom. L. R. 621; (1923) A. I. R. (P. C.) 112; 18 L. W. 153; 45 M. L. J. 249; (1923) M. W. N. 578; 33 M. L. T. 214; 9 O. & A. L. R. 799 242

Indian Soldiers (Litigation) Act (IX of 1918), s. 11, applicability of—Plaintiff who has ceased to be a soldier on date of suit, whether can claim benefit of section.

Under section 11 of the Indian Soldiers (Litigation) Act the time during which a plaintiff has been serving under War conditions is to be excluded in computing the period of limitation for the suit only in a case in which the plaintiff is an Indian Soldier. The section does not apply to the case of a plaintiff who has been a Soldier but has ceased to be one at the time when he brings his suit. **L. MUHAMMAD DIN v. ILAM DIN**, 5 L. L. J. 174; (1923) A. I. R. (L.) 455 817

Insolvency—Assignment of prospective surplus—Assignee, rights of.

An insolvent can assign any prospective surplus that may remain over after his estate has been fully administered in insolvency, such assignment is of a contingent interest and does not give the assignee the right to intervene until it is ascertained whether or not there is a surplus. **B. RAMCHANDRA NARAYAN v. NIPUNGE**, 25 Bom. L. R. 499 378

Insolvency—concl'd.

Claim to property sold as insolvent's disallowed—Suit to establish title, whether maintainable—Civil Procedure Code (Act V of 1908), O. XX-I, r. 92 (3), application of.

Where an Insolvency Court disallows the claim of a person to property attached and sold as the property of the insolvent, a regular suit to establish his right to the property is maintainable. The provisions of the Code of Civil Procedure do not apply to such a case.

Ram Piyara v. Bhana Mal, 61 Ind. Cas. 332; 2 L. 147; 3 U. P. L. R. (L.) 401; 3 L. L. J. 233, relied on. **L. HARNAM v. GANPAT**, 5 L. L. J. 9; (1923) A. I. R. (L.) 224 367

Interpretation of Statutes—Court, duty of.

Courts cannot read into Statutes provisions which are not there, even if they think that anomalies are not to be avoided otherwise.

In the Punjab the Legislature has taken the responsibility of embodying the customary rules of pre-emption in a Statute and the Courts must presume that Statute to be exhaustive and must follow it. **L. HADAYAT ULLAH v. GHULAM MUHAMMAD BEG**, (1923) A. I. R. (L.) 529 444
Jurisdiction—Civil or Revenue Court—Dispute between tenants.

The Civil and not the Revenue Court has jurisdiction to adjudicate upon a dispute between two parties both claiming to be tenants of the same land under the same *zemindar*, where the claimant has never held possession of the land. **O. GAYA DIN SINGH v. CHAUHANJA PANDE**, 9 O. & A. L. R. 87; 10 O. L. J. 178 238

Criminal case pending in another Province, stay of—High Court, jurisdiction of.

A High Court has no jurisdiction to declare that a criminal case pending in a Court not subject to its jurisdiction is triable exclusively in another Court; nor has it jurisdiction to stay all further proceedings in a criminal case which is in course of hearing in a Court not subject to its jurisdiction.

Charu Chandra Majumdar v. Emperor, 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 320; 25 C. L. J. 165; 18 Cr. L. J. 81 (F. B.), not followed. **A. RADHIKA NATHA SAHA v. JOTISH GHANDRA SADHU**, 24 Cr. L. J. 635 523

Magistrate issuing rule whether competent to make absolute on report of another Magistrate. See CRIMINAL PROCEDURE CODE, 1898, s. 133 802

Jurisdiction of Civil Courts. See PUNJAB TENANCY ACT, 1887, ss. 53, 76 (i), (e), (f) 209

Jurisdiction of Civil and Revenue Courts—Jurisdiction, whether can be conferred by consent. See PUNJAB TENANCY ACT, 1887, ss. 77 (3), (i) 760

Suit by landlord for declaration of right to receive *batai*—Suit for correction of revenue entry. See PUNJAB TENANCY ACT, 1887, s. 7 (3) 67

Khoti-nisbat lands—*Injali trees, properly in—Dunlop's Proclamation, effect of—Kabuliyat, failure of Khot to execute, effect of.*

Defendants who had held certain Khoti-nisbat lands as tenants of the khot since the introduction of the Survey Settlement, subject to certain rights in the nature of occupancy rights, claimed to be the owners of the injali trees standing on the lands. It was found that, before the introduction of the Survey Settlement, the lands used to be let out by the khot from year to year on an annual lease. The trees were originally the property of Government.

Held, that, by virtue of Dunlop's Proclamation of 1824, the khot had become the owner of the trees and that, afterwards, there had been nothing to extinguish those rights or to transfer them to the defendants.

Collector of Rainagiri v. Vyankatray, 8 B. H. C. R. (A. C. J.) 1, followed.

Per Crump, J.—The mere failure on the part of a *vatandar khot* to sign the annual *kabuliyat*, can have this result only, that he would not be entitled for the time being to the right of management of the village. That would not, however, affect any other rights which he might have independent of that right of management, such as the right to timber growing in *khoti-nisbat* lands.

Per Macleod, C. J.—There is no general rule, that no *vatandar khot* can claim to be the owner of the soil. With regard to *khoti khasgi*, and *khoti-nisbat* lands he is very much in the position of an owner. **B AHMED BALU DABIR v. GANESH VISHNU**, 25 Bom. L. R. 521. 1035

Khoti Settlement Act (I of 1880), s. 10—*Mortgage of Khoti land, effect of—Khot, right of, to claim land.*

A simple mortgage of *khoti* land by the occupant thereof, amounts to a transfer of his interest in the land, within the meaning of section 10 of the Khoti Settlement Act, and entitles the khot to claim the land, even though the mortgage was paid off before the khot advanced his claim. **B VASU KRISHNA YEKAUDA v. MADHAVRAO MORESHWAR BHADANEKAR**, 24 Bom. L. R. 1160; (1923) A. I. R. (B) 33. 880

Land Acquisition Act (I of 1894), s. 18—*Application for reference, essentials of*

The conditions prescribed by section 18 of the Land Acquisition Act are the conditions to which the power of the Collector to make the reference is subject and those conditions must be fulfilled before the Court can have jurisdiction to entertain the reference.

Where on a compulsory acquisition of his property, a person sends a letter to the Land Acquisition Officer stating that the compensation awarded to him is inadequate and that unless the property is released or proper compensation awarded, he would have the acquisition declared void in a Civil Court, that does not amount to an application for reference under section 18 of the Land Acquisition Act. **O SAMUEL BURGE v. IMPROVEMENT TRUST, LUCKNOW**, 9 O. & A. L. R. 925. 127

s. 18—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Geo. V,

Land Acquisition Act—contd.

c. 61), s. 107—Collector, refusal by, to make reference—Revision—“Subordinate” Court, meaning of.

The High Court has no power to interfere in revision under section 115 of the Civil Procedure Code with an order of a Collector refusing to make a reference under section 18 of the Land Acquisition Act.

Macleod, C. J.—Having regard to the provisions of section 107 of the Government of India Act, wherein the High Court is said to have superintendence over Courts which are subject to its appellate jurisdiction, it may be assumed, in the absence of any other statutory direction to the contrary, that unless the High Court has appellate jurisdiction over a Court, that Court will not be subordinate to it within the meaning of section 115 of the Civil Procedure Code.

A Collector acting under section 18 of the Land Acquisition is not a Court, but even if a Court, it is not a Court subordinate the High Court. **B BALKRISHNA DAJI v. COLLECTOR “BOMBAY SUBARBAN,”** 25 Bom. L. R. 398; (1923) A. I. R. (B.) 290; 47 B 699. 354

Landlord and tenant—Agreement to settle land—Payment of salami—Failure to execute kabuliyat, effect of.

Plaintiff, who was in occupation of certain land belonging to the second defendant, obtained a settlement of the land from the latter subject to the payment of a certain sum as *salami* and the execution of a *kabuliyat* within fifteen days. He paid the *salami* and although he continued in possession of the land, did not execute the *kabuliyat* till several months after. In the meantime, the landlord cancelled the arrangement with the plaintiff and settled the land with first defendant.

Held, that the plaintiff had acquired the rights of a tenant on the date on which the land was settled with him, and that the delay in the execution of the *kabuliyat* could not affect the tenancy which had already been granted to the plaintiff, and the landlord was not competent to cancel the arrangement with the plaintiff so as to enable him to make a new settlement. **C BHAGU SINGH v. MOHESHWAR BARIK**. 291

Denial of landlord's title, what amounts to—Ejectment—Forfeiture—Agricultural tenancy.

In order to succeed in a claim for possession of the lands comprised in a tenancy based on forfeiture resulting from a denial of the landlord's title by the tenant, the landlord must satisfy the Court, first, that there has in fact been a denial of the nature contemplated by law, that is to say, a distinct unequivocal renunciation of the tenancy; secondly, that the denial is in respect of the land sought to be recovered; and thirdly, that the principle of forfeiture is applicable to an interest in land of the nature held by the defendant.

In considering whether what has taken place amounts in law to a denial of the landlord's title, the Court must have regard not only to the language used and the circumstances under which it came to be used, but must also consider what

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the tenant intended by using the particular words under the particular set of circumstances:

Where a portion of the lands comprised in a tenancy was acquired by Government and in the Acquisition proceeding the tenant put forward the claim that he was the owner of the land acquired with a view to obtain the largest possible share of the compensation awarded:

Held, that this did not amount to a denial of the landlord's title, especially with regard to the remainder of the lands, so as to entitle the landlord to resume the possession on the ground of forfeiture.

Quere.—Whether the principle of forfeiture by denial of the landlord's title applies to an agricultural lease. *L. ZIA-UD-DIN v. FAKHAR-UD-DIN*, 4 L. 160; (1923) A. I. R. (L.) 454

Grove-holder—Right to transfer trees.

The general law is that a person who plants a grove with the permission of the *zemindar* acquires a transferable interest in the trees.

Jugdip Narain Singh v. Jokhan Akir, 5 Ind. Cas. 250 and *Ram Sarup v. Jagan Nath*, 25 Ind. Cas. 152, distinguished.

Haidar Ali Khan v. Gangu, A. W. N. (1905) 204, *Haji Muhammed Ismail Khan v. Mithu Lal* 17 Ind. Cas. 956; 11 A. L. J. 649 and *Jalesar Sahu v. Raj Mangal*, 63 Ind. Cas. 437; 43 A. 606; 19 A. L. J. 616, followed. *A. LAL BAIJNATH SINGH v. CHANDRAPAL SINGH*, 21 A. L. J. 457; (1923) A. I. R. (A.) 553

Lease for specific purpose—Purpose not carried out—Lease, determination of—Perpetual lease—Lessee, death of, effect of.

Where a lease is granted for a specific purpose it lapses automatically, if the purpose is not carried out.

A perpetual lease is determined by the death of the lessee. Therefore, a lease of land to a Company for a specific purpose, whereby the Company is given the power of holding the land as long as it pleases, is determined as soon as the Company becomes defunct.

Vaman Shripad v. Maki, 4 B. 424; 2 Ind. Dec. (N. S.) 788, relied on, *N. GOWARDHANDAS v. WAHIDKHAN*, 6 N. L. J. 170; (1923) A. I. R. (N.) 243

Notice to quit—Tenant holding over—Sub-letting by tenant at profit—Landlord, right of, to recover such profit—Civil Procedure Code (Act V of 1908), s. 2 (12).

Where after receiving notice to quit a tenant holds over and sub-lets the premises leased to him and in addition to the rent receives a premium from the sub-tenant, such premium amounts to profits received by him while in wrongful possession within the meaning of section 2 (12) of the Civil Procedure Code, and he is liable to pay the sum so received, together with the rent, to the landlord. *B. GHULAM MOHIUDIN v. DAYABHAI CHIMAN LAL*, 25 Bom. L. R. 447; (1923) A. I. R. (B) 398

Occupancy rights, mortgage of—Relinquishment in favour of landlord—Redemption.**Landlord and tenant—contd.**

Where an occupancy tenant relinquishes his holding in favour of the *zemindar*, the *zemindar* becomes the transferee of any mortgagor's right, which might have been created on it and is entitled to redeem the mortgage. *A. KUMAR SAINTHWAR v. BISHUN MOHAN SAHAI*, 21 A. L. J. 120; (1922) A. I. R. (A.) 263

Surrender of tenancy—Sub-tenancy, determination of—C. P. Tenancy Act (X I of 1898), ss. 47, 95—C. P. Tenancy Act (I of 1920), ss. 13, 105—Suit to eject sub-tenant after surrender of tenancy—Jurisdiction of Civil Courts.

If a tenant surrenders his holding, the sub-tenancy created by him is also determined.

Bhopal Singh v. Thakur Borelal, 6 C. P. L. R. 74, relied on.

A Civil Court has jurisdiction to try a suit to eject a sub-tenant after a surrender of the tenancy by the tenant. Such a suit is not between a landlord and a tenant but between a landlord and a trespasser.

Ganesh Das v. Shankar, 13 Ind. Cas. 909; 8 N. L. R. 22, distinguished. *N. GOPALA V. SAKHARAM*, 6 N. L. J. 224; (1923) A. I. R. (N.) 261

Tenancy, nature of—Proof—Presumption.

Where the origin and the original purpose of a tenancy are not known, the facts that the rent has never changed, that there have been several devolutions by inheritance in the family of the tenant and that the land of the tenancy is used in part for dwelling purposes and in part as a garden, point to the conclusion that the tenancy is a non-agricultural permanent tenancy of a transferable character.

When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and the acts and condition of the parties generally constitute the evidence, and may be the only evidence, available to prove the nature of the tenancy.

Moharam Sheikh v. Talemuddin Khan, 13 Ind. Cas. 608; 16 C. W. N. 567; 15 C. L. J. 220, followed.

The purpose of a tenancy may be altered by consent of the contracting parties and when such alteration takes place the incidents of the tenancy may not be identical with those at its inception. *C. MAKHAN LAL DE v. ARUN BALA DEVI*

Tender of rent—Amount not including interest on arrears—Tender, refusal of—Tender and appropriation.

A landlord is not bound to accept the principal amount of rent when the interest due thereon is not tendered in full. As the principal and interest constitute one indivisible and entire claim, the landlord is entitled to refuse a tender by which what is due as rent is transmitted but what is remitted as the entire amount due on account of interest on rent, cesses and interest on cesses is less than what is legally due.

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of a part of an entire and indivisible debt. But, though a tender of a smaller amount than that of

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which an indivisible and entire claim consists will be invalid as a tender there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account, always provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole.

The cause of action where principal and interest thereon are both due, is only one, so that if the creditor sued to recover only the interest he could not sue to recover the principal and subsequent interest in a second suit.

A tender must be unconditional, or, at all events, free from any condition to which the creditor may rightfully object. *C. BEHARI LAL v. NASIMANNESSA BIBI*, 37 C. L. J. 222; (1923) A. I. R. (C.) 527 482

Transfer of holding—Demand of rent from transferee of holding, effect of.

A demand by the landlord for rent from the transferee of a holding professing to be in occupation of the holding as a tenant is good evidence of mutual consent to the creation of a tenancy unless the landlord is able to explain that the demand was not unqualified and should be differently interpreted.

Underhay v. Redd (1888) 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457, 36 W. R. 298; *Brown v. Storey* (1840) 1 M. & G. 117; 1 Scott (N. S.) 9; 9 L. J. C. P. 225; 4 Jur. 319; 133 E. R. 270, relied upon.

Deonandan Pershad v. Meghu Mahton, 5 C. L. J. 181; 11 C. W. N. 225; 34 C. 57, distinguished. *C. MONMOTHA NATH v. PROBODH CHANDRA*, 37 C. L. J. 52; (1923) A. I. R. (C) 102 416

Trees, whether belong to tenant—Burden of proof—Pleadings and proof.

Under the general law trees standing on land held by a tenant on cash-rent belong to the landlord and if any custom deviating from this general proposition is alleged, it must be proved conclusively by those who maintain it. *PAT NATHUNI RAI v. RAMESHWAR SINGH*, 1 P. L. R. 289 629

Wrongful exclusion of tenant—Rent-suit, dismissal of—Subsequent suit for possession and mesne profits by tenant—Landholder's right to claim deduction for rent.

In calculating the mesne profits to be allowed to a tenant in a suit by him against the landholder for wrongful exclusion, the landholder is entitled to deduct from such profits the rent payable to him during the period of exclusion, notwithstanding that a suit by him for rent in the Revenue Court was dismissed on the ground that the relation of landlord and tenant was not subsisting between the parties. *M. RAMACHANDRULU v. VENKATA NARASIMHA*, 44 M. L. J. 486; 17 L. W. 545; 32 M. L. T. 364; (1923) M. W. N. 437; (1923) A. I. R. (M.) 557 670

Legal Practitioners Act (XVIII of 1879), s. 13 (b) (g)—Giving wrong information to client—Professional misconduct—Absence of fraud—Costs.**Legal Practitioners Act—concl.**

Where a Pleader, who was in possession of documents belonging to his client, from some motive, of fear and self-interest, caused by certain circumstances, concealed the fact from him and denied being in possession of them, but it appeared his conduct was in no way fraudulent and there was no intention to hurt the client:

Held, (1) that the conduct of the Pleader in telling a lie to his client, from whatever motive, amounted to professional misconduct;

(2) that in the absence of any fraudulent intention, it was not necessary to take any action against the Pleader beyond expressing strong disapproval of his conduct, especially in view of the fact that he had to defend himself against very serious charges of fraud which had not been made out;

(3) that having regard to the vindictive conduct of the petitioner and the fact that the charges of fraud brought by him against the Pleader had not been substantiated it was not necessary to direct the Pleader to pay the costs of the petitioner. *M. A. FIRST GRADE PLEADER, In the matter of*, 17 L. W. 358; (1923) A. I. R. (M) 485; 24 Cr. L. J. 585 329

s. 28—Pleader, professional services by—Suit for recovery of remuneration, maintainability of.

The Court is reluctant to restrict the provisions of section 28 of the Legal Practitioners Act by placing a narrow and restricted interpretation thereon.

Sib Kishore Ghosh v. Manik Chandra Nath, 29 Ind. Cas. 453; 21 C. L. J. 618 a; p. 620, *Kamini Debi v. Khetra Mohan Ganguli*, 11 Ind. Cas. 382; 15 C. L. J. 690; 15 C. W. N. 631, *Ishan Chandra Kar v. Ram Churan Pal*, 26 Ind. Cas. 960; 20 C. L. J. 445 and *Mohendra Lal v. Akhil Chandra Pakrashi*, 20 Ind. Cas. 47; 20 C. L. J. 424, followed.

Where there is no agreement between a Pleader and his client, the Pleader is entitled to maintain an action for recovery of reasonable remuneration for services rendered. But where there is a contract between the parties such contract to be enforceable must fulfil the requirements of section 28 of the Legal Practitioners Act, namely, the contract must be in writing and the writing must be deposited in Court within the prescribed period.

Plaintiff, a legal practitioner, rendered certain professional services to the defendant. There was an agreement between the parties as to the remuneration to be paid to the plaintiff but it was not filed in Court. On accounts being adjusted between the parties a certain sum was found due to the plaintiff on the basis of the agreement. He sued to recover this amount:

Held, that the suit was in its essence to enforce the agreement and was not maintainable on account of failure to comply with the provisions of section 28 of the Legal Practitioners Act.

Kamini Debi v. Khetra Mohan Ganguli, 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45, *Krishnasami v. Kesara*, 14 M. 63; 5 Ind. ec. (N. S.) 45 and *Anantayya v. Padmayya*, 16 M. 2-8; 2 M. L. J. 247; 5 Ind. Dec. (N. S.) 900 relied upon. *C. KALIPADA DAS v. DURGA DAS ROY*, 27 C. W. N. 769; (1923) A. I. R. (C) 677 10

Letters Patent (Bom.) * cl. 15—*Appeal—Security for costs—Principles applicable.*

In an appeal under clause 15 of the Bombay Letters Patent it is open to the High Court to demand such further security, beyond the Rs. 500 deposited by the appellant under High Court Rule 736, for the costs of the appeal as it may think fit.

In order to justify the exercise of the power to demand security for the costs of an appeal, there must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the appeal is vexatious. **B RATANCHAND DAYACHAND v. DAMJI DHARSEY**, 25 Bom. L. R. 468; (1923) A. I. R. 399 474

Letters Patent (Mad.), cls. 11, 15—*Transfer of suit from District Court to High Court, by Original Side Judge—Order, whether "judgment."*

An order of a Judge sitting on the Original Side transferring a suit from a District Court to the High Court under clause 13 of the Letters Patent of the Madras High Court is a judgment within the meaning of clause 15 of the Letters Patent and is, therefore, appealable.

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. L. J. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1. **DeSouza v. Coles**, 3 M. H. C. R. 384; **Vaghoji Kuverji, v. Camaji Bomanji**, 29 B. 249; 6 Bom. L. R. 958 and **Kanalal Bhoya v. Balaram Paramasudhoss**, 68 Ind. Cas. 921; 16 L. W. 608; 31 M. L. T. 284; 43 M. L. J. 480; (1923) A. I. R. (M) 44, followed.

Justices of the Peace for Calcutta v. The Oriental Gas Co., 8 B. L. R. 433 at p. 435; 17 W. R. 364 and **Khatizan v. Spnairam. Daulatram**, 60 Ind. Cas. 963; 47 C. 1104, not followed. **M KRISHNA REDDY v. THANAKACHALA MUDALI**, 45 M. L. J. 153; (1923) M. W. N. 681 1054

Limitation Act (IX of 1908), ss. 3, 29—*Limitation Act (X of 1922),* s. 3—*Limitation under special law—Waiver.*

A waiver of the question of limitation under any special law is no longer permissible under section 29 of the Limitation Act as amended by Act X of 1922, read with section 3 of the Act. **O SAMUEL BURGE v. IMPROVEMENT TRUST, LUCKNOW**, 9 O & A. L. R. 925 127

s. 5—Appellant having good case on merits—Admission of appeal after limitation.

The fact that an appellant has a good case on the merits, is not a good ground for the exercise of the Court's discretion under section 5 of the Limitation Act for the admission of the appeal after expiry of limitation. **L LAKHMI DAS v. MEHR CHAND**, (1923) A. I. R. (L) 44 910

s. 5, application of. See **CIVIL PROCEDURE CODE (Act V of 1908)**, O. XXII, r. 9 215

s. 12—Civil Procedure Code (Act V of 1908), O. XLII, r. 2—*Appeal, second—Time spent in obtaining copy of Trial Court's judgment, whether can be excluded.***Limitation Act—contd.**

Under section 12 of the Limitation Act only the time requisite for obtaining copies of the judgment and decree appealed against can be excluded in computing the period of limitation prescribed for the appeal. In the case of a second appeal the appellant is not entitled to the exclusion of the time spent in obtaining a copy of the Trial Court's judgment although under r. 2, which has been added by the Lahore High Court to O. XLII of the Civil Procedure Code, a copy of the Trial Court's judgment must be filed along with the memorandum of appeal. **L CHUHAR MAL v. BIRA RAM**, (1923) A. I. R. (L) 461 919

s. 12—Time requisite for obtaining copies, what is—Appeal, second—Finding of fact—Revision.

Under section 12 of the Limitation Act only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded.

A finding as to the time requisite for obtaining copies under section 12 of the Limitation Act is one of fact and cannot be attacked in second appeal, much less in revision.

Sher Singh v. Pem Raj, 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918, **Bawa Singh v. Thukur Singh**, 67 Ind. Cas. 478; 4 U. P. L. R. (L) 80; (1922) A. I. R. (L) 423, followed. **L RAM SARUP v. ZORAWAR MAL** 447

s. 14—Dismissal of suit for non-joinder of necessary parties—Exclusion of period of litigation.

Some of the trustees of a mosque sued for the appointment of a Receiver for the properties belonging to the mosque and for the removal of the manager who, it was alleged, was indebted in a large sum to the mosque. The manager disputed plaintiffs' right to sue and claimed that the mosque was indebted to him. Issues were framed as to this liability and the Court found that a certain sum of money was owing by the mosque to the manager. A Receiver was appointed and was directed to settle accounts with the manager who was thereafter paid a portion of the amount found due. On appeal, however, the plaintiff's suit was dismissed on the ground that some of the trustees alone were not competent to sue. In a subsequent suit by the manager for recovery of the amount due to him from the mosque:

Held, that during the whole period of the previous litigation in the Court of first instance and in appeal, the plaintiff was *bona fide* litigating his rights and that that period must, under section 14, of the Limitation Act be excluded from the period of limitation prescribed for the suit.

The interpretation to be put upon section 14 of the Limitation Act must be a wide one, the principle being that limitation would remain in suspense while a plaintiff is *bona fide* litigating his rights in a Court of Justice.

Nrityamont Dass v. Lakhan Chunder Sen, 33 Ind. Cas. 452; 30 M. L. J. 529 at p. 541; 20 C. W. N. 522; (1916) 1 M. W. N. 332; 3 L. W. 471 18

Limitation Act—contd.

Bom. L. R. 418; 24 C. L. J. 11-20 M. L. T. 10; 43 C. 660 (P. C.), relied on.

Per Wallace, J.—The dismissal of a suit on the ground of non-joinder of necessary parties is a dismissal for a cause of a like nature with defect of jurisdiction within the meaning of section 14 of the Limitation Act. *M. THURUTHIELAKATH THORTINAKKARA PUTHIA PURAYIL v. THARAYIL PERIYAYIL KUNHAMMAD*, 44 M. L. J. 179; (1923) A. I. R. (M) 347. 139

ss. 14, 29 (b)—*C. P. Land Revenue Act (I of 1917)*, s. 169 (1) (b)—*Partition proceedings—Title suit—Limitation—Suit filed in wrong Court—Exclusion of period.*

Before its amendment by Act X of 1922, section 29 (b) of the Limitation Act of 1908 operated to exclude the applicability of section 14 of the Act to a suit filed in accordance with an order passed under clause (b) of section 169 (1) of the C. P. Land Revenue Act.

Abdul Hakim v. Laljunnissa Khatun 30, C. 532; 7 C. W. N. 550; *Kalimuddin Mollah v. Sahabuddin Molla*, 54 Ind. Cas. 705; 47 C. 300; 24 C. W. N. 4; 30 C. L. J. 455 and *Kopparthi Lingayya v. Aravelli Chinnarayana*, 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (F. B.), relied on. *N. LAKSHMAN v. KESHOA RAO*, 6 N. L. J. 205. 1021

s. 19—*Statement admitting execution of mortgage-bond—Acknowledgment of liability.*

A mere statement by a person that he executed a mortgage-bond for the balance of the sale price due under a sale-deed does not amount to an acknowledgment under section 19 of the Limitation Act of a liability subsisting at the time when the statement was made.

Kandasami Reddi v. Suppammal, 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 218; (1922) M. W. N. 168; (1922 A. I. R. (M) 104; 32 M. L. T. 166, *Ittappan Kuthiravattat Nayer v. Manu Sastri*, 2 M. 34; 12 M. L. J. 101 and *Venkata v. Partha ayadhi*, 16 M. 220; 3 M. L. J. 35; 5 Ind. Dec. (N. S.) 860, followed.

Subramania. Iyer v. Veeraladra Pillai, 70 Ind. Cas. 593; 14 L. W. 148; (1921) M. W. N. 475; 41 M. L. J. 217, doubted. *M. MUTHUKUMARA MUDALIAR v. CHOCKALINGA MUDALIAR*, 17 L. W. 674; (1923) A. I. R. (M) 634. 952

s. 22—*Pre-emption, suit for—One of several vendees impleaded after expiry of limitation, effect of.*

In a suit for pre-emption one of several vendees was, owing to the negligence and carelessness of the plaintiff's next friend, not impleaded as defendant till after the expiry of the period of limitation for the suit.

Held, that the suit had become barred by time and the mere fact that the plaintiff was a minor was no ground for condoning the negligence and carelessness of his next friend. *L. NIAZ ALI KHAN v. MUHAMMAD ABZAL KHAN*. 364

s. 28, whether extinguishes right to maintenance.

Section 28 of the Limitation Act does not extinguish a right to maintenance. The cause of ac-

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tion for maintenance accrues from time to time according to the want and exigencies of the person entitled.

Rungammal v. Echammal, 22 M. 305; 9 M. L. J. 14; 8 Ind. Dec. (N. S.) 217. *In the goods of Gobinda Chandra*, 23 Ind. Cas. 539; 12 C. W. N. 1141, *Kedar Nath Coondoo Chowdhry v. Hemangini Dass*, 13 C. 336; 6 Ind. Dec. (N. S.) 725 and *Siddessary Dass v. Janardan Sarkar*, 27 C. 557; 6 C. W. N. 530, followed. *G. GOPAL CHANDRA v. KADAMBINI DASI*. 235

Sch. I, Art. 10—*Pre-emption, suit for—Property in possession of tenants—Physical possession—Limitation.*

Whether the subject of a sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards became susceptible of physical possession.

Property which is in the possession of a tenant does not admit of physical possession within the meaning of Art. 10 of Sch. I to the Limitation Act. *L. GANWAV. JOTI PRASAD*. 903

Arts. 48, 49—*Provincial Small Cause Courts Act (IX of 1887)*, Sch. II, Art. 35 (ii)—*Suit to recover compensation for trees wrongfully cut and removed—Small Cause Court, jurisdiction of—Limitation.*

Defendant sold certain standing trees to the plaintiff which were to be cut and removed by the latter. Subsequently, the defendant sold the land to a third person, who sold the trees which were cut and removed by the purchasers. Plaintiff sued to recover the trees or compensation for them.

Held, (1) that the suit fell within the purview of Art. 35 (ii) of Schedule II, to the Provincial Small Cause Courts Act, and was, therefore, not cognisable by a Court of Small Causes;

(2) that the suit was governed by Art. 48 or Art. 49 of Schedule I to the Limitation Act and that limitation began to run from the date on which the trees were cut and misappropriated. *L. BIR SEN v. RAJA RAM*. 33

Arts. 57, 59, 60—*Loan and deposit, distinction between—Burden of proof.*

A plaintiff relying upon Art. 60 of Schedule C to the Limitation Act must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money "a deposit" and not "a loan." That might arise from a direct agreement or might be implied from the circumstances in which the money came to the hands of the borrower.

Ordinarily, when one person hands over money to another on the understanding that it is not a gift, but has to be re-paid when demanded, that would be considered in law "a loan"; and if the lender seeks to prove that the money so handed over was a "deposit," the onus would lie upon him to prove that there were additional circumstances which turned the "loan" into a "deposit." *B. GOVIND CHINTAMAN BHAT v. KACHUBHAI GULABCHAND*, 25 Bom. L. R. 503. 974

Limitation Act—contd.

Sch. I, Arts. 61, 83—*Contract Act* (IX of 1872), s. 222—Principal and agent—Suit by agent to recover, amount of loss incurred—Limitation, commencement of.

Plaintiffs agreed to purchase a certain amount of grain, to hold it for the defendant, and to resell it under his instructions at such times and in such lots as he might think fit. The grain was purchased and sold in accordance with this agreement and there was a loss on the whole transaction. Plaintiffs sued to recover the amount of the loss from the defendant;

Held, (1) that the transaction between the parties amounted to a contract of agency carrying with it the right to indemnity conferred upon the agent by section 222 of the Contract Act;

(2) that, therefore, the suit was governed by Art. 83 and not by Art. 61 of Sch. I to the Limitation Act;

Manghi Ram v. Ram Saran Das-Maman Chand, 26 Ind. Cas. 415; 23 P. R. 1915; 100 P. L. R. 1915; 218 P. W. R. 1915; followed.

Kandaswami Pillai v. Avayambal, 7 Ind. Cas. 399; 30 M. 167; (1910) M. W. N. 316; 8 M. L. T. 194; 20 M. L. J. 989, dissented from.

(3) that limitation began to run from that date when plaintiffs paid for the grain and not from the date when the loss was ascertained after re-sale.

Kadari Pershad-Cheddi Lal v. Har Bhagwan, 66 Ind. Cas. 900; 3 L. L. J. 65, followed. *L. DEVISAHAI-RAMJIDAS v. TIRATH RAM*, (1923) A. I. R. (L.) 473 148

Art. 85—Mutual, open and current account, what is.

An open account is one which is continuous or current, uninterrupted, or unclosed by settlement or otherwise, consisting of a series of transactions.

A current account is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be, ascertained.

A mutual account is an account which shows reciprocity of dealings between the parties and not an account having items on one side only though made up of debits and credits.

Ram Pershad v. Harbans Singh, 6 C. L. J. 158, relied on.

In order that an account might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations.

Hirada v. Gadigi, 6 M. H. C. R. 142, relied on.

A mutual account is made up of matters of set-off, or, in other words, an account between parties who have a mutual and alternate course of dealings under an implied agreement that one account may and shall be set off against the other *pro tanto*.

The plaintiff firm was employed by the defendant firm to buy grain and sell it at a profit on behalf of the latter. The plaintiff firm was to supply

Limitation Act—contd.

funds for making these purchases, the defendant firm making a few advances in the beginning by way of margin money. The plaintiff firm was entitled to charge commission on the sales and purchases made on the defendant firm's behalf. In a suit by the plaintiff firm to recover a certain amount as balance due from the defendant firm on the transactions, it was found that, except in the beginning, when the defendant firm made some advances by way of margin money, the balance of the account had never been in favour of the defendant.

Held, that it could not be said that the account between the parties was a mutual account within the meaning of Art. 85 of Schedule I to the Limitation Act, and the suit, therefore, was not governed by that Article. *L. FIRM RUP CHAND-JIWAN SINGH v. FIRM POHO MAL-NATEU MAL*, (1923) A. I. R. (L.) 347 916

Sch. I, Arts. 103, 104, 116, applicability of—Dower-debt, suit for recovery of, nature of—Registered dower-debt—Limitation—"Compensation," meaning of—Legislative recognition of judicial construction.

Article 116 of the First Schedule to the Limitation Act is applicable to all cases where the position can be reasonably maintained that the claim sought to be enforced is a claim for compensation for the breach of a contract in writing registered.

A suit for recovery of dower-debt when there is a registered dower-deed is governed by Art. 116 of the First Schedule to the Limitation Act, although Arts. 103 and 104 of the Schedule would apply when there was no such registered instrument.

Ful Chand Bibee v. Nawab Ali Chowdhury, 1 Ind. Cas. 740; 36 C. L. J. 184; 9 C. L. J. 195; 13 C. W. N. 134, *Aisatulla v. Danes Mohammad*, 70 Ind. Cas. 169; 36 C. L. J. 379, (1922) A. I. R. (C) 152, relied on.

A suit to recover a dower-debt is a suit to enforce a simple money claim founded solely on the contract entered into by the husband. It is, moreover, a suit to recover compensation within the meaning of Art. 116 of Sch. I to the Limitation Act.

Wafeah v. Saheeba, 8 W. R. 307, *Janee Khanum v. Amatul Fatima*, 8 W. R. 51, *Mahabubibi v. Amina*, 10 B. H. C. R. 430, *Ranee Khajooroonissa v. Ranee Ryesoonissa*, 2 I. A. 235; 24 W. R. 163; 15 B. L. R. 306; 5 Sar. P. C. J. 526 (P. C.), *Hamira Bibi v. Zubaida Bibi*, 36 Ind. Cas. 87; 43 I. A. 294; 38 A. 581; 25 C. L. J. 517; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517 (P. C.), *Nurunnissa Khanum v. Muhammad Sakru*, 56 Ind. Cas. 8; 47 C. 537; 31 C. L. J. 14; 24 C. W. N. 335, relied on.

The term "compensation" as used in Arts. 115 and 116 of the Schedule to the Limitation Act is not sufficiently precise, but the technical distinction between a debt and damages is too refined for the purpose.

Ordinarily, the term compensation is not used as equivalent to damages al-

Limitation Act—contd.

though compensation may often have to be measured by the same rule as damages in an action for the breach. It signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money of something lost or withheld.

The term compensation etymologically suggests the image of balancing one thing against another its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.

The Legislature is presumed to know not only the general principles of law but also the construction which the Courts have put upon particular Statutes.

Where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment is treated as a legislative recognition of that construction.

Jogendra Chandra Roy v. Syam Das, 1 Ind. Cas. 168; 36 C. 543; 9 C. L. J. 271, *Kamini Debi v. Promatha Nath*, 10 Ind. Cas. 491; 39 C. 33; 13 C. L. J. 597 and *Nogendra Mohan Roy v. Pyari Mohan Saha*, 30 Ind. Cas. 420; 43 C. 103; 21 C. L. J. 605; 20 C. W. N. 319, relied on. *MAHAMMAD MAZHAR AL AHAD v. MAHAMMAD AZIMUDIN*, 37 C. L. J. 108; 27 C. W. N. 210; (1923) A. I. R. (C.) 507 17

Sch. I, Art. 116. See REGISTRATION ACT, 1908, ss. 17, 28, 29 188

Arts. 123, 144—Muhammadan Law—Succession—Suit to recover share—Limitation.

The joint family is not an institution of the Muhammadan Law.

On the death of a Muhammadan each of his heirs becomes entitled to claim his or her share and limitation begins to run against each under Art. 144 of Sch. I to the Limitation Act.

There is no presumption in such a case that the male heirs hold the shares of the female heirs on behalf of the latter as managers of a joint family.

Nasiruddin Shah v. Lal Bibi, 89 P. R. 1888, *Murad Khatun v. Muhammad Bakhs*, 33 Ind. Cas. 742; 85 P. R. 1916; 85 P. W. R. 1916 followed. *L. ZAINAB v. GULAM RASUL*, (1923) A. I. R. (L.) 319 425

Art. 144—General Clauses Act (X of 1897), s. 3 (25)—Materials of standing house, transfer of—Suit for possession—Limitation.

A transfer of the materials of a standing house is a transfer of immoveable property and a suit for possession of such materials is governed by Art. 144 of Sch. I to the Limitation Act. *L. SHANCHI KHAN v. KARAM CHAND*, (1923) A. I. R. (L.) 150 705

Art. 144—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), s. 1, applicability of—Custom—Alienation by grandfather—Suit by grandson to challenge

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alienation—Limitation—Collateral, right of, nature of.

A collateral governed by the Customary Law of the Punjab does not derive his right to challenge an alienation of ancestral property from or through his father, but from or through the common ancestor who owned the land.

Sundar v. Salig Ram, 9 Ind. Cas. 300; 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911 (F. B.), followed.

The Punjab Limitation (Ancestral Land Alienation) Act does not affect any prescriptive right or title which had accrued or was acquired before the Act came into operation.

Sahib Dad v. Rahmat, 90 P. R. 1904; 88 P. L. R. 1904 (F. B.), followed.

Plaintiff sued to recover possession of certain land which had been sold to the defendants by their grandfather in 1887. The alienor died in 1898. Plaintiff's father had not been heard of for ten years before the institution of the suit and was presumed by the Court to have been dead;

Held, (1) that the suit was governed by Art. 144 of Schedule I to the Limitation Act and not by the Punjab Limitation (Ancestral Land Alienation) Act;

Sahib Dad v. Rahmat, 90 P. R. 1904; 88 P. L. R. 1904 (F. B.), *Tulsi v. Madho Ram*, 13 Ind. Cas. 343; 30 P. R. 1912; 72 P. L. R. 1912; 133 P. W. R. 1912 and *Arur Singh v. Solakhan Singh*, 37 Ind. Cas. 412; 174 P. W. R. 1916, followed.

(2) that limitation under Art. 144 of Schedule I to the Limitation Act began to run against the plaintiffs when the possession of the defendants became adverse to the former, that is to say, on the death of their father, when their right to possession accrued;

(3) that the plaintiff's father not having been proved to have died more than twelve years before the institution of the suit, the suit was within limitation.

Roda v. Harnam, 18 P. R. 1895 (F. B.), and *Arur Singh v. Solakhan Singh*, 37 Ind. Cas. 412; 174 P. W. R. 1916, followed.

The *terminus a quo* under Art. 144 of Schedule I to the Limitation Act is the date when the possession of the defendant becomes adverse to the plaintiff. *L. SARUP SINGH v. PAL SINGH*, (1923) A. I. R. (L.) 642 357

Sch. I, Art. 175—Execution of decree—Compromise—Agreement to pay by instalments, effect of—Limitation. See CIVIL PROCEDURE CODE, 1908, s. 48 671

Arts. 177, 181—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of defendant—Failure to apply within time for substitution—Abatement—Failure to object, effect of.

Where no application is made within the time prescribed by law for bringing the legal representatives of a deceased respondent on the re. ord, the appeal abates, and no failure by the persons concerned to object to action taken on an application presented after expiry of the time limited by law would alter the fact of abatement.

Limitation Act—contd.

Art. 177 of Sch. I to the Limitation Act has no applicability to an application for bringing on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death. Such an application is governed by Art. 181 of Sch. I to the Act. **L WAHID BAKSH V. LALTA PERSHAD** 387

Sch. I, Art. 182—Application for determination of future mesne profits—Step-in-aid of execution. See EXECUTION OF DECREE 233

Art. 182—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Mortgage suit—Preliminary decree—Application to make decree final—Limitation, operation of.

A preliminary decree in a mortgage suit must be made final before it can be executed, and an application to make such a decree final must be made within three years and six months from its date. Such an application cannot be looked upon as a proceeding in execution, and the fact that a previous application, made within the period prescribed, is dismissed for want of prosecution will not avail to save limitation for a subsequent application made after the expiry of that period. **B HARJIWAN DEVRAJ V. GAJANAN KASHINATH**, 25 Bom. L. R. 459; (1923) A. I. R. (B) 420 187

Art. 182—Step-in-aid of execution—Talbana, payment of, whether step-in-aid.

The mere payment of talbana in compliance with an order of the Court is not a step-in-aid of execution which would extend the period of limitation for the execution of a decree. **O MOHAMMAD ALAM V. BACHCHU**, 9 O. & A. L. R. 68 211

Art. 182 (4)—Execution of decree—Amendment of decree after execution has become barred, effect of.

A decree which is capable of execution and is not executed within the period of limitation becomes dead and cannot be revived by a subsequent application for amendment.

Rabiuddin v. Ram Kanai Sen, 59 Ind. Cas. 186, followed.

Where a decree is quite capable of execution as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under clause (4) of Art. 182 of Schedule I to the Limitation Act.

Anandram v. Nityananda Barham, 32 Ind. Cas. 744, relied upon. **L JHAMMAN LAL V. DAULAT RAM** 461

Art. 182 (5)—Execution of decree—Appeal against order in execution, whether step-in-aid of execution.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution within the meaning of clause (5) of Art. 182 of Sch. I to the Limitation Act.

Kristo Coomar Nag v. Mahabat Khan, 5 C. 595; 2 Ind. Dec. (N. S.) 986, **Nand Kishore v. Sipahi**

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Singh, 26 A. 608; **A. W. Ne** (1904) 139; 1 A. L. J. 336, relied on. **B GOVINDDAS V. GANPATDAS**, 25 Bom. L. R. 518; (1923) A. I. R. (B.) 431; 47 B. 783 1080

Sch. I, Art. 182 (5)—Execution of decree—Application for postponement, whether step-in-aid of execution.

An application made by the decree-holder and the judgment-debtor to the Executing Court to postpone the execution proceedings with a view to a compromise being arrived at between the parties, does not constitute a step-in-aid of execution within the meaning of clause (5) of Art. 182 of Sch. I to the Limitation Act.

Abdul Kadir Rowther v. Krishna Malamal Nair, 23 Ind. Cas. 533; 38 M. 695; 1 L. W. 271; (1914) M. W. N. 563; 26 M. L. J. 433; 15 M. L. T. 305, relied on.

In order to be regarded as a step-in-aid of execution, an application must ask the Court to do something which would assist the decree-holder in furthering the execution of the decree.

An application for postponement of the proceedings with a view to a compromise being arrived at is not intended as a step towards execution but as a step which, if successful, would avoid the necessity for execution. **B VISHNU NAGAPPA VENKATESH BHAT V. NARASINHA PANDURANG**, 25 Bom. L. R. 490 1011

Limitation Act (X of 1922), s. 3. See LAND ACQUISITION ACT, 1894, s. 18 127

Lunacy Act (IV of 1912), s. 14—Civil Procedure Code (Act V of 1908), ss. 115, 151—Letters Patent (Lahore), cl. 12—Order by District Magistrate under s. 14—Revision—Remedy.

The Lunacy Act deals specifically and under separate headings with the two branches of proceedings, executive and judicial.

An order passed by a District Magistrate under Part II of the Lunacy Act is a purely executive order and cannot form the subject-matter of a revision application to the High Court, nor has the High Court the power to interfere with such an order under clause 12 of the Letters Patent or in the exercise of its powers of superintendence.

Any person considering himself aggrieved by an executive order passed by the District Magistrate under section 14, Part II of the Lunacy Act may apply under Part III of the Act for a regular inquiry conducted by a judicial officer. The result of such inquiry is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. **L DOUGLAS DONALD**, *In the matter of*, 4 L. 1124 Cr. 1. J. 664 696

Madras Agency Rules, rr. 8, 24, 25—Order of Assistant Agent in execution—Appeal, whether lies—Remedy.

An order of an Assistant Agent in execution proceedings is not a decree within the meaning of the Agency Rules and no appeal lies therefrom to the Agency Commissioner.

Sri Sri Vithram deo Maharajuliam Garu v. Sri Neladevi Pottamudhedevar Gar, 2 M. 256, **Lagadapati Venkatanagabushanam v. Ovilapati Mahajayami**, 42 Ind. Cas. 555; 41 M. 325; 34 M. L. J.

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524, *Rani of Tunt v. Maharaja of Jeypore*, 66 Ind. Cas. 113; 16 L. W. 8; 42 M. L. J. 487; 30 M. L. T. 339; (1922) M. W. N. 314; (1922) A. I. R. (M.) 271; followed.

The remedy in such a case is for the aggrieved party to move the Agency Commissioner under r. 25 of the Agency Rules to make a reference to the Government. *M. LAGADAPATI VENKATARAMA BUSHANAM v. KARELLA RAMASWAMY*, 17 L. W. 375; (1923) M. W. N. 244; 45 M. L. J. 781 (1923) A. I. R. (M.) 590

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—Local Rules—Rules 13, 14, 15—Municipal

Election—Absence of initials of Polling Officer on ballot paper—Vote, validity of.

Under the rules framed by the Governor-in-Council for the conduct of Municipal elections under the Madras District Municipalities Act, a properly recorded vote by a duly qualified voter cannot be treated as invalid and rejected on the sole ground that the ballot paper did not bear the Polling Officer's initials as required by rule 14 (1).

Rule 14, clause (1), is not a mandatory rule, the infringement of which will render the vote necessarily invalid. The rule is intended to identify the ballot paper as one given by the Polling Officer and where such identity can be established by other evidence, the absence of initials may be disregarded.

Rules 13 to 15 are intended to enable a duly qualified voter to give his vote secretly and freely on the ballot paper supplied to him by the Polling Officer to the candidate he approves of. Where this object is shown to have been attained in spite of the infringement of any rule, such infringement cannot justify the rejection of the vote more particularly when the infringement is not by the voter but by the Polling Officer.

Shyam Chand Basak v. Chairman of the Dacca Municipality, 53 Ind. Cas. 741; 47 C. 524; 30 C. L. J. 270; 24 C. W. N. 189, distinguished.

Ackers v. Howard, (1886) 16 Q. B. D. 739; 55 L. J. Q. B. 233; 54 L. T. 651; 14 W. R. 609, *Islington case*, (1901) 5 O. M. & H. 125, relied on. *M. KANNIAPPA MUDALIAR v. CHINNASAMI CHETTIAR*, 18 L. W. 160; 45 M. L. J. 329; 33 M. L. T. 37

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—s. 352—Specific Relief Act (I of 1877).

s. 42—Municipal Election—Rejection of Nomination Paper by Chairman—Local Government declining jurisdiction to decide as to validity of Nomination Paper—Injunction restraining holding of election pending decision of civil suit—Jurisdiction of Civil Courts—Election held—Injunction restraining Councillor elected from acting, whether can be granted—Civil suit, maintainability of—Remedy.

A Nomination Paper put in on behalf of a candidate for election as a Municipal Councillor was wrongly rejected by the Chairman of the Municipal Council and on the rejection of the Nomination Paper, the only other candidate was declared under the rules to have been duly elected. In a suit by the candidate whose nomination was rejected for an injunction to restrain the elected

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candidate from acting as Councillor and the Chairman of the Council from holding a meeting of the Council as then constituted for the purpose of electing a new Chairman:

Held, (1) that the plaint disclosed no cause of action against either of the defendants; the successful candidate did nothing wrong, as he simply found himself elected and proposed to take his seat nor could the Court be properly asked to restrain the Chairman from holding a meeting of the Council;

(2) that the proper remedy of the plaintiff was to proceed by an Election Petition to set aside the election which had already taken place.

Where after the rejection of the Nomination Paper of a candidate for a Municipal Council the election regarding the other candidates validly nominated was to be held and the candidate whose Nomination Paper was rejected attempted under rule 31 of the Madras Municipal Election Rules to refer the question of the rejection of his nomination to the Local Government and the Local Government wrongly declined jurisdiction and thereupon he brought a suit for a declaration that his Nomination Paper was wrongly rejected by the Chairman and for an injunction to restrain him from holding the election without the plaintiff as duly nominated candidate and also to compel him to hold an election with plaintiff as a candidate:

Held, (1) that the plaintiff was not bound to wait till the election was held; he had a cause of action to prevent by injunction the carrying out of the threatened action which would have the effect of illegally interfering with his rights;

(2) that section 352 of the Madras District Municipalities Act did not preclude a suit for an injunction to restrain the doing of a threatened wrongful act to the detriment of the plaintiff;

(3) that the Local Government having declined jurisdiction to interpret the rules and there being no conclusive ruling on the point, notwithstanding rule 31 of the Madras Municipal Election Rules, the Civil Court had jurisdiction to inquire into and decide the matter.

Per *Schwabe, C. J.*—If a man entitled to vote or be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him; but if the act by which the right is interfered with is done in a judicial capacity, no action for damages will lie unless the act is done maliciously, i.e., dishonestly.

Ashby v. White, 1 Sm. L. C. (11th Ed.) 240 at p. 295 and (10th Ed.) 231; 2 Ld. Raym. 938; 14 Howel St. Tr. 695; 92 E. R. 126, *Municipal Board of Agra v. Asharfi Lal*, 65 Ind. Cas. 984; 44 A. 201; 20 A. L. J. 1, (1922) A. I. R. (A) 1, *Pickering v. James*, (1873) 8 C. P. 489 at p. 509, 42 L. J. C. P. 217, 29 L. T. 210; 21 W. R. 786, relied on.

Apart, however, from an action for damages in respect of past acts, there is also a cause of action of a different nature to prevent by injunction the carrying out of any threatened action which would have the effect of illegally

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interfering with the plaintiff's rights. Where there is a legal right which can be asserted in law or equity, a Court of Equity can grant an injunction in protection of that right.

Aslati v. Southampton Corporation, (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111. *Richardson v. Methley School Board*, (1893) 3 Ch. 510; 62 L. J. Ch. 943; 3 R. 701; 69 L. T. 308; 42 W. R. 27, relied on.

Per *Wallace, J.*—The right of being nominated to stand as a candidate for a Municipal election is a legal character within the meaning of section 42 of the Specific Relief Act; but this legal character is itself the creation of a specific Statute and where the Statute itself sets up a proper Tribunal for trying cases of the infringement of the right to such a legal character and that Tribunal has functioned judicially, the Civil Court has no jurisdiction to deal with a case of an alleged infringement of that right.

But where the duly constituted tribunal has declined jurisdiction and refused to try the question of the right of a party to a legal character the aggrieved party is thus bereft of his statutory and constitutional remedy, and it is the province of the Civil Court as a Court of Equity to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise.

Accordingly, where the Local Government which is the statutory tribunal in a particular case, misinterprets its own rules as giving it no jurisdiction to decide the validity of a Nomination Paper at a Municipal election, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried.

(Case-Law English and Indian, considered.) *M. SARVOTHAMA RAO v. CHAIRMAN MUNICIPAL COUNCIL, SAIDAPET*, 17 L. W. 431; (1923) M. W. N. 266; 32 M. L. T. 178; 45 M. L. J. 23; (1923) A. I. R. (M.) 475.

Madras Estates Land Act (I of 1908), s. 3 (2), (5), (11), (15)—*Madras Regulation XXV of 1802, cl. 4*—Grant by zemindar free of kattubadi prior to 1802—Pre-settlement inam or "estate"—Assignment of inamdar's interest in holding for term of years for money consideration with proviso for surrender—Mortgage or lease—Thirumanam, meaning of.

A *sarva dumbala inam* free of kattubadi granted by a landlord prior to his lands being constituted a *zemindari* by a *sannad* issued under Regulation XXV of 1802 is not an "estate" within the meaning of section 3 (2) of the Madras Estates Land Act, even though the accounts on which the *peishkush* on the part of the *zemindar* was fixed were those taken by a Circuit Committee prior to the grant of the said inam.

Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards, 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 L. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.), *Brahmayya v. Achiraju*, 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31

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M. L. T. 91; 43 M. L. J. 229; (1922) A. I. R. (M.) 373, *Suryanarayana v. Patanna*, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 L. A. 209 (P. C.), *Secretary of State v. Rajah of Venkatagiri*, 73 Ind. Cas. 741 *Infra*; 44 M. 864; 41 M. L. J. 624; (1922) M. W. N. 130; M. L. T. 164; 26 C. W. N. 809; (1922) A. I. R. (P. C.) 168 (P. C.), *Venkatayangaya Appa Row v. Poranki Appalarazu*, 8 Ind. Cas. 546; 20 M. L. J. 728 at p. 734; 8 M. L. J. 429, *Sri Rajah Sobhanadri Appa Rao Bahadur v. Sri Rajah Venkatanarasimha Appa Rao Bahadur*, 26 M. 493 at pp. 404, 409; *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur*, 29 M. 52; 8 Bom. L. R. 1; 10 C. W. N. 161; 3 A. L. J. 55; 3 C. L. J. 1; 1 M. L. T. 3; 16 M. L. J. 1; 33 L. A. 46; 8 Sar. P. C. J. 897 (P. C.), *Rajah Nilmony Singh v. The Government*, 6 W. R. 121, *Nilmoni Singh v. Bakranath Singh*, 9 L. A. 104 at p. 121; 9 C. 187; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.) and *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra*, 26 Ind. Cas. 676; 42 C. 710 at p. 727; 19 C. W. N. 65; 2 L. W. 11; 17 M. L. T. 1; 21 C. L. J. 31; 17 Bom. L. R. 32; 28 M. L. J. 457; 42 L. A. 20 (P. C.); considered.

Both the Madras Regulation XXV of 1802 and the *sannads* issued under it speak from their dates so that all grants of *inam* made by *zemindars* prior to 1802 are *prima facie* excluded from the Permanent Settlement.

Where in the case of an *inam* granted by a *zemindar* prior to 1802 the *inamdar* assigned his interest in his holding to a third person under a document styled "thirumanam" by which the latter was placed in possession of the holding for a term of years in consideration of certain money payments and was to pay all dues other than extra taxes levied thereafter, and was bound at the end of the term to surrender without any separate relinquishment:

Held, (1) that notwithstanding the absence of any provision for payment of a periodical rent, the document was not a mortgage but a lease; *Basant Lal v. Tapeswari Rai*, 3 A. I. Ind. Dec. (N. S.) 956, *Bengal Indigo Company v. Roghobur Das*, 24 C. 272; 1 C. W. N. 83; 23 L. A. 158; 2 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848 (P. C.) and *Nidha Sah v. Murlidhar*, 25 A. 115; 30 L. A. 54; 5 Bom. L. R. 111; 7 C. W. N. 289; 8 Sar. P. C. J. 435 (P. C.); relied on.

(2) that the lessee was not a *raiyat* holding, an "estate" within the meaning of section 3 (2), (15) of the Madras Estates Land Act and had no occupancy rights in the land.

Chidambara Sivaprakasa Pandara Sannadhyal v. Veerama Reddi, 68 Ind. Cas. 538; 45 M. 586; 16 L. W. 102; 31 M. L. T. 54; (1922) M. W. N. 749; 43 M. L. J. 640; (1922) A. I. R. (P. C.) 292; 37 C. L. J. 199; 27 C. W. N. 245 (P. C.); distinguished.

Per *Oldfield, J.*—The word "payable" in section 3 (11) of the Madras Estates Land Act means "payable according to the terms of the contract between the parties to it," and section 3 (12) and (15) of the Act are applicable whatever

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the stage or the stages at which those terms, so far as they relate to payment for the use of the land, have to be or have been fulfilled.

Although etymologically a *thirumanam* document is one executed in discharge, the term *thirumanam* has acquired a wider meaning as importing merely a settlement. *M. KUPPU REDDI v. MANDALUKA*, (1923) M. W. N. 170; 17 L. W. 712; (1923) A. I. R. (M.) 454; 44 M. L. J. 91. 733

ss. 13, (3), 187.—Improvements made by ryots after Act—Landlord, right of, to recover rent at wet rates under contract made before Act.

Under section 13 (3) of the Madras Estates Land Act, a landholder is not entitled to recover rent at wet rates from his ryots for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense after the Act came into force but on the strength of a contract made before the Act was passed. Dictum of *Venkata Perumal v. Ramudu*, 27 Ind. Cas. 688; 39 M. L. J. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, not followed.

The intention of the Legislature in framing sections 13 and 187 of the Madras Estates Land Act was to refuse to contracts made before, equally with contracts made after, the passing of the Act any effect on the relation between the ryot and the landholder. *M. CHOKALINGAM CHETTIAR v. PALANI AMBALAN*, 32 M. L. T. 377 (1923) M. W. N. 411; 45 M. L. J. 124 (1923) A. I. R. (M.) 685; 46 M. L. J. 18 L. W. 646. 926

Madras Permanent Settlement Regulation (XXV of 1802), ss. 3, 4—Permanently settled zemindaris—

Venkatagiri zemindari—Resumption of inam or lakhiraj lands—Government, powers of.

The reversion in respect of inams or lakhiraj lands situated within the zemindari of Venkatagiri belongs to the zemindar and the Government is not entitled to resume or assess them to public revenue.

Under the sanad granted to the Venkatagiri zemindari in 1802, when it first came under the East India Company, the Government fixed a definite specific assessment on the whole zemindari irrespective of the particular assests derived from each particular unit of property within the estate and the zemindar, on his side, accepted that arrangement on that special understanding.

In view of section 3 of Regulation XXV of 1802, section 4 of that Regulation has no application to cases of permanently settled zemindaris such as the Venkatagiri zemindari. *P. C. SECRETARY OF STATE FOR INDIA v. RAJAH OF VENKATAGIRI*, 30 M. L. T. 164; 44 M. L. J. 864; 41 M. L. J. 624, (1922) M. W. N. 1; 26 C. W. N. 809; (1922) A. I. R. (P. C.) 168. 741

Madras Revenue Recovery Act (II of 1864), s. 59

—Madras Irrigation Cess Act (VII of 1865), s. 1—Limitation Act (IX of 1908), Sch. I, Art. 16—Cess paid under protest—Suit to recover amount paid—Limitation.

A person who pays under protest water-cess under the Madras Irrigation Cess Act when a demand is made and then claims to

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recover it back by suit is not a "person aggrieved by any proceeding" within the meaning of section 59 of the Madras Revenue Recovery Act.

The period of limitation for such a suit is one year under Art. 16 of Schedule I to the Limitation Act and not six months under section 59 of the Madras Revenue Recovery Act.

Ruvula Vengala Reddi v. Secretary of State, 15 Ind. Cas. 328, followed.

Orr. v. Secretary of State, 23 M. L. J. 10 M. L. J. 261, dissented from. *M. SECRETARY OF STATE FOR INDIA v. CHELLASANI VENKATARATNAM*, 32 M. L. T. 236; (1923) M. W. N. 258; 17 L. W. 683; 45 M. L. J. 12; 46 M. L. J. 488; (1923) A. I. R. (M.) 652. 106

Madras Village Courts Act (I of 1889), ss. 66, 67

—Civil Procedure Code (Act V of 1908), s. 39—Village Court decree—Transfer for execution—District Munsif, power of.

A District Munsif receiving by transfer a decree of a Village Court under section 66 of the Madras Village Courts Act or withdrawing execution of a decree to his own file under section 67 of the Act has no jurisdiction to transfer it for execution to another District Munsif under section 39 of the Civil Procedure Code. *M. KANDOTH SANKARAN v. KARAYI KUZHAKEPROTH ACHUTHAN*, 44 M. L. J. 643; (1923) M. W. N. 353; 32 M. L. T. 403; 18 L. W. 191; (1923) A. I. R. (M.) 651; 46 M. L. J. 734. 793

Malabar Law—Stanom—Grant by stanomdar—Benefit of institution—Burden of proof—Recitals in deed, value of.

If a Malabar stanomdar, who is also the manager of the family for the time being, grants a lease or makes an alienation to ensure beyond his lifetime which is for the benefit of the family, it will be upheld; as, on the other hand, any such transaction if prejudicial to the family will be set aside.

Kaithal Kuttiyan v. Kuzhalte Puthen Veetil Thirumangalath Kunharatan Ummama, 62 Ind. Cas. 62; 44 M. L. J. 509 at p. 512; 13 L. W. 208; 29 M. L. T. 172; (1921) M. W. N. 169; 41 M. L. J. 202, followed.

Ordinarily, the recitals in a document upon which such a grant depends would not by themselves be sufficient without reference to other evidence, to prove that the grant was made for the benefit of the institution or the family represented by the grantor even though the document is more than 70 years old. The grant must be supported by proof *abunde* that it was made for an unavoidable necessity or for the benefit or preservation of the institution of the estate.

Hari Kishen Bhagat v. Kashi Pershad Singh, 27 Ind. Cas. 674; 42 C. L. J. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 L. A. 84 (P. C.), followed.

Magniram Sitaram v. Kasurthai Manithai, 66 Ind. Cas. 162; 49 I. A. 54; 26 C. W. N. 473; 42 M. L. J. 501; 30 M. L. T. 208, 20 A. L. J. 171; 35 C. L. J. 421; 24 Bom. L. R. 584; (1922) M. W. N. 313; 46 B. 481; (1922) A. I. R. (P. C.) 163 (P. C.), *Chockalingam Pillai v. Mayandi Chettiar*, 19 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043 on 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043 on

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- appeal *Mayandi Chettiar v. Chochalingam Pillay*, 27 M. 291; 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar P. C. J. 587 (P. C.), distinguished. **M**
- MEETHALE CHALIL, PAEKUM THIRUMANGALATH v. KANDIVIL PARKUM PONGOT RAMAN NATR* 275

—Tarwad—Trusteeship—Minor, competency of—Uraima right, transfer of.

A minor is not incompetent to be an Uraiman of a Malabar Illom or Tarwad when the trusteeship belongs to it and the duties of the minor trustee may be performed by a properly constituted guardian.

Somasundra Mudaliar v. Vythilinga Mudaliar, 19 M. 285; 6 M. L. J. 92; 6 Ind. Dec. (N. S.) 904
Muthu Kumara Mudaliar v. Palaniappa Chettiar, 10 Ind. Cas. 300; (1911) 1 M. W. N. 303; 9 M. L. T. 495, distinguished.

A renewal of a Kanom by some only of the Uralars of a Devaswom without consulting the rest is invalid.

It is incompetent for the last male member of a Malabar Illom to alienate the trusteeship of a temple by vesting the Uraima right by a Will in his sons. **M** *SUNKARAN NAMBI v. DEVAKI AN-
 THERJENAM*, 16 L. W. 26; (1922) M. W. N. 428; (1922) A. I. R. (M) 259; 43 M. L. J. 572 **491**

**Malicious prosecution—Charge absolutely false—
 Probable and reasonable cause—Further evidence,
 whether necessary.**

Where in a suit for damages for malicious prosecution it is found that the charge made by the defendant was absolutely without foundation, further evidence directly going to show that there was no reasonable and probable cause for making the charge is not necessary, as, in such a case, it is legitimate to infer that the defendant had no probable or reasonable cause. **A** *BISHUN SARUP v. BINDRABAN*, (1923) A. I. R. (A) 531 **448**

—Damages, action for—Death of plaintiff—Right to continue suit, whether survives.

An action for damages for malicious prosecution being personal to the plaintiff does not survive beyond his lifetime, and the action, so far as it relates to the expense incurred by the deceased plaintiff in defending himself against the prosecution, cannot be transmitted to his personal representatives.

- Rustomji Dorabji v. Nurse*, 62 Ind. Cas. 260; 44 M. 357; 40 M. L. J. 173; (1921) M. W. N. 121; 29 M. L. T. 121; 14 L. W. 200 (F. B.) and *London v. London Road Car Company*, (1888) 4 T. L. R. 448, relied on.

Twycross v. Grant, (1878) 4 C. P. D. 40 at p. 45; 48 L. J. C. P. 1; 39 L. T. 618; 27 W. R. 27, distinguished.

Krishna Behari Sen v. Corporation of Calcutta, 31 C. 993; 8 C. W. N. 745, not followed. **B** *MOTILAL SATYANARAYAN v. HARNARYAN PREMSUKH*, 25 Bom. L. R. 435; (1923) A. I. R. (B) 408; 47 B. 716 **385**

Mesne profits, application for determination of future—Step-in-a-id of execution. See EXECUTION OF DECREE **233**

Minor, transaction with—Fairness of transaction—Partition—Adult co-owner, position of—Partial partition.

It is the duty of an adult person dealing with a minor through his guardian to show that the transaction is a fair one and the minor is not prejudiced in any way by any act or omission on his part.

Yeechuri Ramamurthy v. Yeechuri Ramamma, 33 Ind. Cas. 961; 30 M. L. J. 308; 3 L. W. 322, *Nallappa Reddi v. Balammal*, 2 M. H. C. R. 182, relied on and followed.

A Hindu co-parcener seeking to set aside a partition effected during his minority must allege and prove that the partition is unfair or prejudicial to his interests. An alienee from the guardian of a minor has to prove necessity or benefit to sustain the alienation. But the case of a co-owner who wishes to sustain a partition between himself and a minor occupies a position midway between the above two cases.

Where in a partition between one co-owner and another minor co-owner represented by his mother, it appeared that the land allotted to the adult was twenty times the size of that allotted to the minor and was situated in a locality of growing commercial importance and the mother had not independent advice and important facts were suppressed from her knowledge:

Held, that the onus of proving that the transaction was fair or beneficial to the minor was on the co-owner and the transaction on the above facts was an unconscionable one and must be set aside.

In a partition between co-owners it is proper that each co-sharer should ordinarily be given his share in every item of property belonging to the co-owners unless the items cannot be divided either conveniently or without prejudice or without affecting their utility or commercial value.

Mahomed Ibrahim v. Haji Mahomed Ibrahim, 7 Bom. L. R. 482 at p. 485; 13 C. L. J. 322; 15 C. W. N. 552, *Ashamullah v. Kali Kinkur Kur*, 10 C. 675; 5 Ind. Dec. (N. S.) 453, relied on. **M** *PARAMASIVAM PILLAI v. MINAKSHISUNDARAM PILLAI*, 16 L. W. 721; (1922) M. W. N. 732; (1923) A. I. R. (M.) 96 **883**

Mortgage—Mortgagees, prior and subsequent—Decree obtained by prior mortgagee—Subsequent mortgagee not made party, effect of—Release of property from mortgage-lien, effect of—Apportionment—Equity of redemption, whether extinguished by mortgage decree.

A decree obtained by a prior mortgagee on the basis of his mortgage is not binding on a subsequent mortgagee who was not made a party to the suit on the prior mortgage and does not affect his right of redemption.

A prior mortgagee cannot by releasing a portion of the mortgaged property from his mortgage-lien throw the entire burden of his mortgage-debt on the remaining portion so as to affect a subsequent mortgagee with whom that portion is mortgaged.

The equity of redemption in a mortgaged property is not extinguished merely by the passing of a decree on the mortgage. It subsists until

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the sale is held and the sale-proceeds are distributed.

Bibijan Bibi v. Sachi Bewah, 31 C. 863; 8 C. W. N. 684; *Muhammad Musa v. Babu Aidal Singh*, 65 Ind. Cas. 801; 3 P. L. T. 232; (1922) A. I. R. (Pat.) 92, relied on. **PAT SARJUG PRASAD v. HARISHCHANDRA** 661

Sale under decree of prior mortgagee—Puisne mortgagee not impleaded—Property, purchase of, by prior mortgagee—Suit for sale by puisne mortgagee—Prior mortgagee, whether necessary party.

A puisne mortgagee cannot sue successfully for a decree for sale of the mortgaged property without impleading a prior mortgagee who has already purchased the mortgaged property in execution of a decree for sale on his mortgage without impleading the puisne mortgagee. **A BENARSI v. BHULLU**, (1923) A. I. R. (A.) 423, 227

Subrogation—Intention of parties—Subrogation by co-mortgagor.

A claim to subrogation can be sustained when there is an agreement, either express or implied, with the debtor, that the lender shall be subrogated to the rights of the mortgagee. Such an agreement may be express or may be presumed from the circumstances of the case. The question to ask in each case will be, whether the new lender was lending the money on the personal security of the borrower or on the understanding that he would be substituted in place of the former mortgagee.

Mohesh Lal v. Mohant Baiwan Das, 9 C. 961; 10 I. A. 22; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 and *Gokuldas Gopaldas v. Puranmal Premsukh Das*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 5 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), followed. **O. DUTAR RAM v. LAL RANJIT SINGH**, 9 O. & A. L. R. 677. 113

Muhammadan Law—Decree against one of several heirs—Remaining heirs, whether bound.

Where in a suit against one of several heirs of a deceased Muhammadan, a decree is obtained by the plaintiff, the remaining heirs are not bound by the decree, nor do their interests in their father's estate pass by sale in execution of that decree. **B. LALA MIYA v. MANUBIBI**, 25 Bom. L. R. 408; (1923) A. I. R. (B.) 411; 47 B. 712. 246

Divorce—Delegation of power—Agreement entitling wife to divorce on husband's expulsion from community—Public policy.

Under the Muhammadan Law marriage is pure, a civil contract and an agreement that the wife should be entitled to get a divorce pronounced on the breach of certain conditions of the marriage contract is not void as being opposed to the principles or policy of that law, though a Court may not give effect to the condition if as in the case of an ordinary contract, it is unreasonable and ought not to be enforced.

A condition in a marriage contract under the Muhammadan Law that the wife will be entitled

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to a divorce if the husband forsakes the faith of the community to which both the husband and wife belong, or is expelled from it by its Spiritual Head is not an unreasonable condition and the wife is entitled to a divorce for a breach of the condition.

Budrunissa Bibee v. Nufseutoollah, 15 W. R. 555; 7 B. L. R. 442, *Meer Ashruf Ali v. Meer Arshad Ali*, 16 W. R. 260, *Ayatunnesa Beebee v. Karam Ali*, 1 Ind. Cas. 513; 36 C. 23; 12 C. W. N. 907, *Mahavram Ali v. Ayessa Khatoon*, 31 Ind. Cas. 562; 19 C. W. N. 1226, *Hamidoolla v. Faizunnessa*, 8 C. 327; 10 C. L. R. 291; 6 Ind. Jur. 414; 4 Ind. Dec. (N. S.) 209, *Nuruddin v. Chamuri*, 3 C. L. J. 49, relied on.

Under the Muhammadan Law a husband can authorise another person to pronounce a divorce between him and his wife, and when this is done unconditionally, the person so appointed can pronounce a divorce for any reason that would entitle the husband himself to do so, with the exception of a mere whim or caprice of his own, a divorce by an agent for such a cause being an unreasonable and unjustifiable use of his powers. **N. FIDA ALI v. SANAI BADAR**, 6 N. L. J. 166; (1923) A. I. R. (N.) 262. 1042

Legitimacy.

The Muhammadan Law raises a strong presumption in favour of legitimacy where a child is born under a man's roof and continues to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring. **O. GALSTAN v. ABID HUSAIN**, 9 O. & A. L. R. 282; 10 O. L. J. 263. 428

Marriage—Iddat on death—Pregnancy, effect of—Marriage during iddat, validity of.

The period prescribed by the Muhammadan Law for the Iddat of a widow, on the death of a regularly married husband, if not pregnant, is four months and ten days, and if pregnant, four months and ten days or until delivery, whichever is longest.

The marriage of a Muhammadan woman before the expiry of the period of Iddat is illegal.

Ilahtia v. Imam Din, 1 Ind. Cas. 894; 29 P. R. 1909; 34 P. W. R. 1909; 47 P. L. R. 1909, followed. **L. JHANDU v. HUSAIN BIBI**, 4 L. 192; (1923) A. I. R. (L.) 499. 590

Option of puberty—Ignorance of marriage, effect of.

Under the Muhammadan Law a girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of the marriage, and the option is prolonged until she is acquainted with the fact that she has the right to repudiate the marriage.

Bismillah Begam v. Nur Mohammad, 63 Ind. Cas. 702; 19 A. L. J. 845; 3 U. P. L. R. (A.) 186; 4 A. 61; (1922) A. I. R. (A.) 155, relied on. **L. SULTAN v. WARYAM**, (1923) A. I. R. (L.) 502. 895

Pre-emption—Several vendees—Talab-istishhad; performance of.

The Muhammadan Law of Pre-emption requires that the second demand should be made either in

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the presence of the vendor or the vendee or on the property sought to be pre-empted. The singular words "vendor and vendee" include the plural as so.

Therefore, *talab-i-istishhad*, if it is made in the presence of the vendee, cannot, in case there are more vendees than one, be said to be properly made, unless it is made in the presence of all the vendees. **A ALIMAN BEGAM v. ALI HASAN**, (1923) A. I. R. (A.) 355; 45 A. 449 **1029**

— **Restitution of conjugal rights—Marriage by way of exchange—Puberty—Presumption.**

The father of the defendant, a Muhammadan girl, married her to plaintiff while she was still an infant in order to procure for himself the hand of the plaintiff's sister by way of exchange. Several years after the marriage and nearly two years after defendant had attained puberty, the plaintiff sued for restitution of conjugal rights:

Held, that under the circumstances the defendant was justified in denying the plaintiff's right to restitution of conjugal rights, which could not, therefore, be enforced.

The age of puberty is generally fixed at 14 in the male and 12 in the female but according to Muhammadan Law a girl must be presumed to have reached puberty on completing the fifteenth year of her life. **L NAWAB BIBI v. ALLAH DITTA**

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— **Succession—Suit by heir against widow for share—Dower-debt, payment of.**

The liability of the heirs of a deceased Muhammadan to pay the dower of his widow is not personal, and an heir who sues the widow for possession of his share of the estate of the deceased is liable only to pay a proportionate part of the dower-debt.

Muhammad Karim Ullah Khan v. Amani Begam, 17 A. 93; A. W. N. (1895) 16; 8 Ind. Dec. (N. S.) 385, **Hamira Bibi v. Zubaida Bibi**, 7 Ind. Cas. 497; 33 A. 182; 7 A. L. J. 1025, relied on.

Section 212 of the C. P. Land Revenue Act makes it clear that the right of a *raiayat* to hold *raiayatwari* land devolves as if it were land.

There is a presumption that when such land passes from father to son and from the son to his widow it passes by heirship. Where *raiayatwari* land forms part of the estate of a deceased person it is liable to the claim of his heirs along with the rest of his property.

Gulabrao v. Sitaram, 8 C. P. L. R. 11, distinguished. **N RAHMAT BI v. BHURI BI**, 6 N. L. J. 161. **959**

— **Waki—Dedication, proof of—Burial of saintly person, whether renders land trust property.**

In the absence of proof of a dedication, express or implied, of a plot of land to public religious uses, the mere burial in it of a saintly person cannot have the effect of converting the land into trust property. **L ALI MOHAMED KHAN v. ALI AKBAR KHAN**, 4 L. 133 **613**

— **Widow—Dower-debt—Inherited property—Creditor of husband, rights of—Suit by widow for dower-debt—Subsequent suit by**

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creditor of husband—Widow, whether can claim remaining portion of dower—Civil Procedure Code (Act V of 1908), O. II, r. 2.

Under the Muhammadan Law a dower-debt is not a secured debt but a simple debt ranking equally with other debts due from the estate of the husband.

The widow's lien for dower, under the Muhammadan Law, is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him by proceeding against the share of the estate which the widow has inherited.

A Muhammadan widow sued the other heirs of her husband to recover her dower-debt, but she deducted from her claim a sum proportionate to the share which she had inherited from her husband as his heir. Subsequently, a creditor of the husband who had obtained a decree against his estate sought to sell in execution of the decree the share which the widow had inherited from her husband. The widow objected that she had a charge on that share to the extent of the amount of the dower which she had excluded from her claim against the other heirs in the previous suit.

Held, (1) that the dower-debt was not a secured debt and could not, therefore, operate as a charge; (2) that the widow's claim to the portion of the dower-debt which she did not include in her suit against the other heirs was barred by the provision contained in O. II, r. 2 of the Civil Procedure Code.

Inayat Ali v. Jaitun Bibi, 32 Ind. Cas. 362; 18 O. C. 263; 2 O. L. J. 579, relied on. **KANEER FATIMA BEGUM v. RAM NANDAN DEAR DUBE**, 21 A. L. J. 209; (1923) A. I. R. (A.) 331; 45 A. 384 **977**

Opium Act (I of 1878), s. 9—Punjab Excise Manual, r. 37 (d)—"Preparation" and "admixture," meaning of—Opium mixture in process of preparation, possession of—Total weight exceeding prescribed limit—Offence.

The word "preparation" in rule 37 (d) of the Punjab Excise Manual designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used. In the same way the word "admixture" refers also to a completed article and can only be applied to a thing after the mixing has been finished, and not earlier.

In the intermediate stages of a preparation of opium an offence is committed only if the amount of opium used in the manufacture is more than that permitted by law. **L HAMIRI v. EMPEROZ**, 4 L. 12; 24 Cr. L. J. 668 **700**

Oudh Rent Act (XXII of 1886), s. 108 (10)—
"Illegally ejected," meaning of.

The words "illegally ejected" in section 108 (10) of the Oudh Rent Act imply that the plaintiff must have been in possession, and are not applicable to a case in which he had never been in possession. **O GAYA DIN SINGH v. CHAUHANJA PANDE, 9 O. & A. L. R. 87; 10 O. L. J. 178** 238

— **s. 108 (15)—Suit by member of joint Hindu family against another for profits, whether maintainable.**

A suit for profits under section 108 (15) of the Oudh Rent Act, brought by one member of a joint Hindu family against another is maintainable, if the plaintiff is a recorded co-sharer, recorded in respect of a specific share. **O SOHBAT KUAR v. RAJ DEVI, 9 O. & A. L. R. 236** 688

Ownership, transfer of—Principle applicable. See RIPARTAN OWNER 727

Pardah nashin lady, transaction with—Undue influence—Independent advice—Burden of proof.

The jurisdiction of Courts of Law to afford protection to *pardah nashin* ladies rests on a presumption of the imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *pardah nashin* lady to show that the deed was explained to her and understood by her.

Starting from the elementary principle that every person taking a document from a *pardah nashin* lady is bound to show affirmatively that the document is her document, that is to say, that she understood the nature of the transaction and the effect of it, Courts of Law have laid down certain rules for assisting them in determining the point; but the rules so laid down are rules of prudence rather than rules of law, and their application depends on the particular facts of each case. There is a grave risk of a failure of justice if these rules are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

A Court when called upon to deal with a deed executed by a *pardah nashin* lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter.

Cases in which these questions arise fall broadly into two groups, *viz.*, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases, where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved

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intrinsically. The Court must in such cases have regard to the intellectual attainments of the lady concerned and will be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

What is meant by independent advice in this connection is that a *pardah nashin* lady should receive advice as to the legal effect of a particular document which she is about to execute and her position under it as compared with the position which she would occupy if she does not execute the document.

Pardah nashin ladies have a claim to special consideration where they deny on oath an effectual knowledge of documents which they are said to have executed.

Where the question is whether a *pardah nashin* lady has operated her civil death, which she was not bound to do, the Courts will act with great caution; and will not deprive her of her property unless compelled to do so. **PAT MAN SINGH v. NAWLAKHBATI, 4 P. L. T. 335; (1923) A. I. R. (Pat.) 492** 822

Parties—Mortgage suit—Person claiming title paramount, whether proper party.

A plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee.

This rule is not one of convenience merely, and where the holder of a title paramount objects to being made a party to the mortgage-suit he must be discharged, even where it would be convenient to try his title in the mortgage-suit proceedings. At the same time, where no clear and distinct claim is made in the pleadings by such a party defendant and a prayer in express terms to be dismissed from the suit not being made the Court is permitted to proceed to a trial on the merits without protest the party cannot during arguments in the First Court after a protracted trial demand that he should be dismissed from the suit. **O GALSTAN v. ABID HUSSAIN, 9 O. & A. L. R. 282; 10 O. L. J. 263** 428

— **Suit for possession against joint holders, dismissal of—Appeal in presence of some only of respondents, whether competent—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Suit for possession against joint holders, dismissal of—Appeal, abatement of, against one respondent—Appeal, entire, whether abates.**

An appeal against the dismissal of a suit for possession against several persons who hold the property jointly cannot proceed in the presence of some only of the respondents.

BEJOY GOPAL BOSE v. UMESH CHANDRA BOSE, 6 C. W. N. 196, BASIR SHEIKH v. FARLE KARIM BISWAS, 28 Ind. Cas. 793; 19 C. W. N. 290 and AZIMUDDIN MANDAL v. TARA SANKAR GHOSE, 47 Ind. Cas. 638; 28 C. L. J. 201, relied on.

An appeal against the dismissal of a suit for possession against several persons who hold the

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property jointly abates in its entirety, where one of the respondents dies and his legal representatives are not brought on the record within time.

Khuda Bakhsh v. Mathra Das, 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R. 1913; 89 P. W. R. 1913; *Hadu Lala*, 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914; *Inayat v. Ganga*, 32 Ind. Cas. 829; 3 P. R. 1916; 260 P. W. R. 1915; *Daya Singh v. Buta Singh*, 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916; *Fateh v. Bhanju Ram*, 41 Ind. Cas. 739; 96 P. R. 1917; 49 P. W. R. 1917; *Jamna v. Sa jit*, 52 Ind. Cas. 510; 67 P. R. 1919; *Sardari Lal v. Ram Lal*, 57 Ind. Cas. 199; 1 L. J. 225; 1 L. J. 225; 143 P. L. R. 1920; and *Fatta v. Sikandar*, 56 Ind. Cas. 927; 2 L. L. J. 442; 2 U. P. L. R. (L.) 112, relied on.

Gajo Singh v. Amrit Nayain Singh, 60 Ind. Cas. 722; 2 P. L. T. 234, distinguished. *L. SARDARA v. ALLAYAR*, (1923) A. I. R. (L.) 132. 604

Partition Act (IV of 1893), s. 4, applicability of.

Section 4 of the Partition Act refers to cases where a share in a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family, but even where the section does not apply the principle is that on partition property must, so far as possible, be left in possession of the person in occupation. An Executing Court should have regard to the principles of equity in adjusting the mode of partition.

Basanta Kumar Ghosh v. Moti Lal Ghosh, 11 Ind. Cas. 370; 15 C. W. N. 555 Note; 6 C. L. J. 8 Note; *Debi Sahai v. Tara Chand*, 44 Ind. Cas. 135; 44 P. W. R. 1918; 22 P. L. R. 1918; *Fateh Chand v. Bilas Rai*, 34 Ind. Cas. 587; 61 P. L. R. 1916; 89 P. W. R. 1916; 96 P. R. 1916; 140 P. W. R. 1916, relied on. *Pesh GULAM HAIDAR KHAN v. SARDAR ALI KHAN* 748.

Penal Code (Act XLV of 1860), s. 34—Common intention—Sudden quarrel.

Where several persons go to the house of another and on a quarrel ensuing there, one of the party calls on his companions to beat the latter, and they do so, section 34 of the Penal Code applies to impute common intention to all of them even though the party did not come with the intention of beating the men in the first instance. *O MIAN JAN v. EMPEROR*, 24 Cr. L. J. 525. 61

ss. 34, 149—Riot—Common object—Liability of persons present at different times.

In cases of convictions of members of a riotous mob, for a specific act of violence, if persons found at particular points of time to be members of the mob but not shown to have taken part in the specific act, are to be held guilty of that act by force of sections 34 or 149 of the Penal Code, it must be clearly found that that act was done in furtherance of the common intention of the mob while the accused were in it or that the act was such as these accused knew to be likely to be committed in prosecution of their object.

Where the common object of a crowd innocent at first develops by degrees into something heinous

Penal Code—cont'd.

and culpable and such developments are not inherent in its original common object but are merely ebullitions of spasmodic fury in a direction which none at first in the crowd could have contemplated, members originally present but absent at the time of the latter acts are not liable for these latter acts. A Court cannot presume that any and every person who is found to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end. In such cases the Court should consider, first, what was the original intention of the mob and which of its offences naturally were inherent or likely to have occurred in the prosecution of that intention and which were not; secondly, at what stage of the riot were the accused present and what was the temper, the intention, and the common object of the mob while they were present, what acts was it likely to go on to commit in furtherance of that common object; and thirdly, whether if they had left the mob at any stage, they could nevertheless be constructively held guilty of any of the acts committed by the mob after they had left. *M. GANAPATHI SARMA v. EMPEROR*, 17 L. W. 197; (1923) M. W. N. 104; (1923) A. I. R. (M.) 369; 24 Cr. L. J. 531. 147

ss. 88, 92—Chaining up insane person—Good faith.

Where a person, of education and wealth and living in a town, where medical attendance can easily be procured, chains up his occasionally insane brother in an unnecessarily cruel way for over 3 months and apparently would have continued so to confine him indefinitely, if the District Judge had not interfered, he cannot be said to have acted in good faith, i.e., with due care and attention and cannot be given the benefit of sections 88 and 92 of the Penal Code. *A. SHIMBHU NARAIN v. EMPEROR*, 21 A. L. J. 395; 45 A. 495; 24 Cr. L. J. 638; (1923) A. I. R. (A.) 546. 526

ss. 96, 97, 102, 105, 340—Right of citizen to arrest another—Apprehension of commission of offence—Common Law, principles of, whether applicable to British India.

In India, the Criminal Law has been codified in the Penal Code and in the Criminal Procedure Code, and where the Codes specifically deal with a question, Courts are not entitled to invoke the Common Law of England.

Under the Penal Code, every citizen has the right to arrest or confine another where there is genuine and reasonable apprehension of danger to person or property from that other.

The decision in *In re Ramasami Iyer*, 61 Ind. Cas. 652; 44 M. 913; 14 L. W. 189; 22 Cr. L. J. 412 approval but not the grounds of decision.

Per *Schwabe, C. J.*—Under section 340 of the Penal Code the arrest of any person who has not been guilty of any offence for which arrest without warrant is permitted is *prima facie* wrongful confinement of the person, but sections 96 and 97 of the Code give a right to every person to defend his own body and the body of every other person

Penal Code—contd.

and the property of himself and every other person against certain offences and this right of private defence commences under sections 102 and 105 of the Code, when a reasonable apprehension of danger to the person or property commences. Therefore, a person who has a genuine and reasonable apprehension that to allow another to remain at large will endanger the person and property of others is entitled, to arrest or confine that other.

M. GOPAL NAIDU, *In re*, 17 L. W. 592; 44 M. L. J. 655; 32 M. L. T. 352; (1923) M. W. N. 425; (1923) A. I. R. (M) 523; 46 M. 605; 24 Cr. L. J. 599

s. 99—Right of private defence, extent of.
When exercising the right of private defence, it is difficult to expect the person to weigh "with golden scales" what maximum amount of force is necessary to keep within that right. **A RADHEY v. EMPEROR**, (1923) A. I. R. (A) 357; 24 Cr. L. J. 735

ss. 147, 325—Unlawful assembly—Rioting and grievous hurt—Rioting not complete without hurt—Separate sentences whether can be inflicted.
Separate sentences for the offences of rioting and grievous hurt cannot legally be imposed upon a member of an unlawful assembly where the offence of rioting is not itself complete until the grievous hurt is actually inflicted, that is to say, where the causing of the hurt is itself the form of force or violence which constitutes the offence of rioting.

Bhagwan Singh v. Empress of India, 4 P. R. 1901 Cr.; 59 P. L. R. 1901, relied on. **L BISHNA v. EMPEROR**, (1922) A. I. R. (L) 405; 24 Cr. L. J. 629

ss. 147, 426—Damage to property of another—Mischief—Rioting.

In a Collectorate partition a certain building which was in the possession of the complainant fell to the share of one A. Subsequently, there was a compromise between A and the complainant whereby the former agreed to give up the building to the latter in exchange of a plot of land. This compromise was filed before the Collector who gave effect to it in the Collectorate partition. Complainant continued in possession of the building. Accused, a servant of A, along with others, demolished the building and ploughed up the site asserting that the building belonged to his master A and that the compromise was ineffective as no deed of exchange has been drawn up in accordance therewith.

Held, (1) that the compromise having been given effect to by the Collector in the partition the title in the building had passed to the complainant;

(2) that the accused was, therefore, guilty of mischief, and consequently of rioting.

Ram Krishna Singh v. Emperor, 66 Ind. Cas. 817; 5 P. L. T. 335; (1922) A. I. R. (Pat.) 197; 23 Cr. L. J. 321, distinguished. **PAT TANAK CHAUDHRY v. EMPEROR**, (1923) A. I. R. (Pat.) 361; 24 Cr. L. J. 542; 1 P. L. R. 242 Cr.

s. 186—Obstructing public servant—Assault on persons summoned by public servant and in investigation.

Penal Code—contd.

A Naib-Tahsildar of Income Tax visited the village of the accused where he was told by the *Lambardars* that the accused kept several shops and ought to be assessed to Income Tax. A dispute, thereupon, took place between the *Lambardars* and the accused and, in the course of the quarrel the latter assaulted and beat the former, who, as a result, declined to render any help to the Naib-Tahsildar in his investigation:

Held, that the action of the accused did not amount to obstructing the Naib-Tahsildar in the discharge of his public functions within the meaning of section 186 of the Penal Code. **L MATU RAM v. EMPEROR**, 24 Cr. L. J. 594

s. 216, offence under, when complete—“Harbour,” meaning of.

There is no time limit for the completion of an offence under section 216 of the Penal Code, which is complete as soon as it is committed, and it is immaterial whether the evasion of apprehension of the offender lasts six hours or six years.

The word "harbour" in section 216 of the Penal Code includes "the assisting of a person in any way to evade apprehension," and is not confined to providing shelter, food and clothing. **L EMPEROR v. SARWAN SINGH**, (1923) A. I. R. (L) 223; 5 L. L. J. 329; 24 Cr. L. J. 659

s. 297—Trespass in place of worship—Trespass, meaning of—Sexual intercourse in mosque—Offence.

The word 'trespass' in section 297 of the Penal Code does not mean criminal trespass as defined in other parts of the Code. In this section it must be taken to have been used in its original meaning as covering any injury or offence done coupled with entry upon property.

Queen-Empress v. Subhan, 18 A. 395; A. W. N. (1896) 119; 8 Ind. Dec. (N. S.) 969, **Ram Prasad v. Emperor**, 12 Ind. Cas. 300; 33 A. 773; 8 A. L. J. 927; 12 Cr. L. J. 532, *In re Ratna Mudali*, 10 M. 126; 1 Weir 256; 3 Ind. Dec. (N. S.) 839, relied on.

Where a man and a woman enter a mosque and have sexual intercourse in it they are guilty of an offence under section 297 of the Penal Code. **A MAQSUD HUSAIN v. EMPEROR**, 21 A. L. J. 455; 45 A. 529; 24 Cr. L. J. 711

ss. 299, 300, 326—Murder—Intention—Wound causing death—Grievous hurt.

Section 300, paragraph 2, of the Penal Code is only intended to be invoked when some injury which would not in the ordinary course of nature cause death was known to be likely to cause death by the offender in consequence of the latter being aware of some abnormal condition of the deceased.

Section 300, paragraph 4 of the Penal Code can never be invoked in a case where there was an intention of causing specific bodily injury to a particular person; it only applies to a case of dangerous action without an intention to cause specific bodily injury to any person. As this paragraph is the most difficult paragraph in the section it is very undesirable to invoke it where it is not applicable.

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- Rama Singh v. Emperor*, 58 Ind. Cas. 463; 42 A. 302; 18 A. L. J. 224; 21 Cr. L. J. 783; 2 U. P. L. R. (A.) 407, dissented from.

The words "or with the knowledge that he is likely by such act to cause death" in section 299, of the Penal Code, must be read in the light of the language of section 300 of the Penal Code, and so read they are not applicable to a case where specific bodily injury is intentionally caused to a particular person.

In the absence of any evidence to indicate that a blow on a particular part of a person was intended to be a blow on a more vital part it must be held that the offender inflicted the blow where he intended.

The expression "I shall kill you," used by an assailant does not necessarily show an intention to commit murder.

Wounds which actually cause death must be held to have endangered life within the meaning of section 326 of the Penal Code.

Obiter.—If there was an intention to cause death and death was caused by a wound or wounds inflicted in pursuance of that intention, the case would be one of murder, even though none of the wounds which the accused inflicted were of a character which would, within the knowledge of the accused or in the ordinary course of nature, have proved fatal. *O RAM ASRE v. EMPEROR*, 9 O. L. J. 490; (1923) A. I. R. (O) 97; 26 O. C. 18; 24 Cr. L. J. 513 49

ss. 300, Except I, 326—Death caused by single thrust of pen-knife without premeditation—Offence—Grave and sudden provocation.

In connection with the marriage of accused with one *Musammal I*, a certain ceremony was to be performed on a certain date. On the day so fixed, the accused found one *Musammal N* taking *Musammal I* away from her village, and when he remonstrated with her she told him that the ceremony would not take place on that day and abused him. The accused thereupon attacked the women with a pen-knife and inflicted one injury on each in the abdomen, as the result of which *Musammal N* died, but *Musammal I* survived:

Held, (1) that the conduct of *Musammal N* amounted to the giving of grave and sudden provocation within the meaning of Exception I to section 300 of the Penal Code;

(2) that having regard to the facts that the accused acted without premeditation, used only a pen-knife and inflicted each woman only one injury, there was a very strong presumption that he neither intended to cause death nor such bodily injury as he knew to be likely to cause death;

(3) that, however, it must be presumed that the accused intended to cause grievous hurt to the women and was, therefore, guilty of an offence under section 326 of the Penal Code. *L ALLAH DIN v. EMPEROR*, 24 Cr. L. J. 663 695

ss. 302, 304—Death caused by violent kick—Intention—Offence.

Accused taxed his wife with consorting and flirting with other men and she replied "what does it matter;" he, thereupon, struck her on the

Penal Code—contd.

cheek and she fell down abusing him. The accused then gave a forcible kick on the prostrate body of the woman on her side which caused her immediate death:

Held, though the accused could be exonerated from the intention or knowledge requisite for an offence falling under section 302 of the Penal Code, the circumstances fully justified the inference that in kicking the deceased, accused knew he was likely to cause death so as to render him guilty of an offence under the latter part of section 304 of the Code.

Empress of India v. Idu Beg, 3 A. 776; A. W. N. (1881) 132; 6 Ind. Jur. 264; 2 Ind. Dec. (N. S.) 697, distinguished. *M MARIMUTHU, In re*, 18 I. W. 188; (1923) M. W. N. 796; 24 Cr. L. J. 721 961

ss. 304, 325—Culpable homicide—Joint attack by several persons—Offence.

Where several persons jointly attack another with laths fracturing his skull and inflicting a number of other injuries which result in his death they are all equally guilty of culpable homicide even though it may not be possible to prove which of them inflicted the fatal blow.

Emperor v. Ram Newaz, 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615, relied on. *A GHULAM HUSSAIN v. EMPEROR*, 24 Cr. L. J. 673 769

s. 331—Causing grievous hurt to extort confession—Promise to restore abducted woman—"Demand," meaning of.

The accused compelled the complainant by causing grievous hurt to him to execute an agreement to restore a woman whom he was alleged to have abducted;

Held, that the accused could not be said to have committed an offence under section 331 of the Penal Code, inasmuch as the extortion of the promise for the restoration of the woman did not amount to the extortion of a confession or information which might lead to the detection of an offence within the meaning of the section.

The "demand" referred to in section 331 of the Penal Code must be with respect to property.

Queen-Empress v. Ella Boyan, 11 M. 257; 1 Weir 336, 4 Ind. Dec. (N. S.) 179, relied on. *L MAULA BAKHSH v. EMPEROR*, 5 L. L. J. 375; 24 Cr. L. J. 576 272

ss. 342, 500—Defamation—Evidence as to reputation of complainant, admissibility of—Publication, proof of—Prosecution, duty of—Examination of accused, value of.

In an action for damages for libel or slander evidence may be given in mitigation of damages to show that the plaintiff has a general bad character.

Scott v. Sampson, (1882) 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408, relied on.

Similarly, in a criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of should intend to harm, or know or have reason to believe that the imputation will harm, the reputation of the per-

Penal Code—contd.

son, concerning whom it is made or published, the question what reputation the complainant has is relevant.

Where the imputation complained of is that the complainant, an official, had compelled the accused to pay him a bribe, the accused is entitled to prove that the complainant has a notoriously bad reputation as a bribe-taker, so that the imputation made as to his having taken a bribe on the particular occasion in question, even if false, could not damage his reputation as he had none to lose. In any case, proof of the complainant's bad reputation would affect the sentence to be passed in case of a conviction.

It is the duty of the prosecution in every case to make out its case by evidence, and a gap in the evidence cannot be filled up by any statement made by the accused in his examination under section 342 of the Criminal Procedure Code.

Mohideen Abdul Kadir v. Emperor, 27 M. 238; 2 Weir 408; 1 Cr. L. J. 566, relied on.

A Magistrate is not entitled under section 342 of the Criminal Procedure Code to put questions to the accused if the prosecution has not let in evidence implicating him in the offence with which he is charged, and answers to questions put by a Magistrate in contravention of that section are not admissible in evidence against the accused.

In re Abbulla Rowthan, 30 Ind. Cas. 447; 39 M. 770; (1915) M. W. N. 413; 2 L. W. 939; 16 Cr. L. J. 623, relied on.

Where in a prosecution for defamation no evidence is let in on behalf of the prosecution to prove the making or the publishing by the accused of the imputation complained of, the accused is entitled to an acquittal, and the prosecution cannot claim to have proved their case by virtue of any admission made by the accused in his examination. *L. DEVI DIAL v. EMPEROR*, (1923) A. I. R. (L) 225; 4 L. 55; 2 R. W. R. 1923; 24 Cr. L. J. 693. 805

s. 363—*Kidnapping—Minor voluntarily leaving home.*

If a minor girl leaves her husband's home without any persuasion, inducement or blandishment held out to her, so that she gets fairly away from home and then goes to a man, the latter cannot be deemed to have infringed the law even if he does not restore her to her lawful guardian. *L. LACHHI RAM v. EMPEROR*, (1923) A. I. R. (L) 330; 24 Cr. L. J. 564. 260

s. 363—*Kidnapping—Muhammadan minor wife—Custody of husband—Lawful custody—Removal of wife—Offence.*

The husband of a Muhammadan girl who has not attained puberty is not the lawful guardian of her person under the Muhammadan Law, and in the absence of proof that he was lawfully entrusted with the care and custody of the minor, so as to make the explanation to section 361 of the Penal Code applicable, the forcible removal of such a girl from his custody is not an offence punishable under section 363 of that Code. *DARAJUDDIN AKANDA v. EMPEROR*, 37 C. L. J. 329; 27 C. W. N. 531; (1923) A. I. R. (C) 672; 24 Cr. L. J. 712. 986

Penal Code—contd.

ss. 379, 411—*Theft—Receiving stolen property—Accused pointing out place of concealment.*

The mere pointing out by an accused person of the place where stolen property is concealed, which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft, or for dishonestly receiving stolen property. *L. INDAK SINGH v. EMPEROR*, 5 L. J. 87; 24 Cr. L. J. 587. 331

s. 400—*Association for habitually committing dacoity—Evidence of accomplice.*

When persons are charged with belonging to a gang associated for purposes of habitually committing offences, the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasions, but the man who gives evidence of habitual association for a particular purpose must almost inevitably be an accomplice. *L. CHHAPROLIA v. EMPEROR*, 24 Cr. L. J. 696. 808

s. 401—*Associating for habitually committing theft, requisites of—Proof.*

To sustain a conviction on a charge under section 401 of the Penal Code, it is necessary to prove,—

- (1) that there existed a gang of persons;
- (2) that those persons were associated for the purpose of committing theft or robbery;
- (3) that theft or robbery was to be committed habitually; and

(4) that the accused was a member of such gang. *Beja v. Emperor*, 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 33; 223 P. L. R. 1915; 63 P. W. R. 1913 Cr., followed.

The associating and the purpose of the association may be proved by direct evidence, such as that the accused or the accused and others met and determined to join together for the purpose of habitually committing theft or robbery. In the absence of direct evidence, the associating and the purpose of the association may be established by proof of acts from which these may reasonably be inferred.

Public Prosecutor v. Bonigiri Pottigadu, 2 Ind. Cas. 307; 32 M. 179; 9 Cr. L. J. 567; 5 M. L. T. 100, relied on.

For instance, the commission of a large number of thefts by the accused within a comparatively short time gives rise to an inference that they must have been associated for the purpose of habitually committing theft. *L. PIR BUKHSH v. EMPEROR*, (1923) A. I. R. (L) 327; 24 Cr. L. J. 703. 815

s. 406—*Criminal breach of trust—Hire-purchase agreement—Purchaser, rights of—Transfer of article during currency of agreement—Offence, nature of.*

The purchaser of an article under a hire-purchase agreement has no title to the article other than that of a hirer with a right to become the owner if he choose to pay the last instalment, and if he transfers the article to a third person before all the instalments have been paid his act amounts to the offence of criminal breach of trust under section 406 of the Penal Code. *A. CADD v. EMPEROR*, 21 A. L. J. 510; 24 Cr. L. J. 620; 45 A. 588; (1923) A. I. R. (A) 598. 608

Penal Code—contd.

s. 412—Retention of property obtained in dacoity—Property belonging to different owners—Separate convictions.

A person found in possession of property which he knew or had reason to believe was stolen in a dacoity, and which property is identified as belonging to different owners, cannot be convicted separately in respect of the property identified by each owner unless there is evidence to prove that it was received by him at different times or from different persons.

Queen-Empress v. Mahan, 15 A. 317; A. W. N. (1893) 101; 7 Ind. Dec. (N. S.) 913, *Ishan Muchi v. Queen-Empress*, 15 C. 511; 7 Ind. Dec. (N. S.) 925, followed. *A SHEO CHARAN v. EMPEROR*, 21 A. L. J. 389; 45 A. 485; 24 Cr. L. J. 632 (1923) A. I. R. (A.) 547 520

ss. 415, 417—Despatch of insured cover purporting to contain notes, but in fact empty, whether cheating.

Accused sent an insured cover to the complainant through the Post Office purporting to contain a number of Government Currency Notes. On receipt the cover was found to contain only a letter advising the despatch of the notes and some bits of waste paper.

Held, that the conduct of the accused did not amount to cheating inasmuch as the complainant was not subjected to any of the consequences detailed in section 415 of the Penal Code. *C RAMAN BEHARI ROY v. EMPEROR*, 50 C. 849; 24 Cr. L. J. 684 780

s. 426—Mischief—Removal of earth by tenant in exercise of bona fide right—Dispute of civil nature—Criminal Courts, duty of.

Criminal Courts are not meant to decide questions which are of a civil nature between a landlord and his tenants.

Accused removed some earth from a plot of land belonging to his landlord in the exercise of an alleged customary right under which all residents of the village were entitled to remove earth when they wanted it. He was convicted under section 426 of the Penal Code.

Held, that the dispute, if any, between the accused and his landlord was of a civil nature and the conviction of the accused was not, therefore, justified. *A HUKAM CHAND v. EMPEROR*, (1923) A. I. R. (A.) 544 806

s. 441—Criminal trespass—Intention to cause annoyance.

Where, with a view to attach the property of his judgment-debtor, a decree-holder enters the premises of a third person without having any right to do so, his act amounts to an invasion of the privacy of that person which would necessarily cause great annoyance, and comes within the definition of section 441 of the Penal Code, even though his primary object may not have been to cause annoyance, as he should be deemed to have intended the natural consequences of his act.

Ram Saran v. Emperor, 12 P. R. 1906 Cr.; 4 Cr. L. J. 293; 54 P. L. R. 1907, relied on.

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Bhikam Singh v. Emperor, 42 Ind. Cas. 1006; 15 A. L. J. 808; 19 Cr. L. J. 46, not followed.

Akshoy Singh v. Rameshwar Singh, 35 Ind. Cas. 515; 43 C. 1143; 20 C. W. N. 1071; 17 Cr. L. J. 339, distinguished. *L. LAKHMI DAS v. EMPEROR*, 4 L. L. J. 532; 24 Cr. L. J. 639 527

s. 498—Criminal Procedure Code (Act V of 1898), s. 403—Detaining married women—Offence, nature of—Previous acquittal, whether bars prosecution for subsequent act of detention.

The detention of a married woman is a continuing offence, and the fact that a person has been acquitted of such an offence on one occasion, does not operate as a bar to his prosecution for any subsequent act of detention. To such subsequent prosecution the provisions of section 403 of the Criminal Procedure Code do not apply.

Emperor v. Harmam Singh, 6 Ind. Cas. 497; 22 P. L. R. 1910; 11 Cr. L. J. 366; 53 P. W. R. 1910 Cr., distinguished. *L. NADAR v. EMPEROR*, 4 L. L. J. 535; 24 Cr. L. J. 636 524

Pleadings—Appeal—New case.

The Zemindars of a village sued for possession of a house alleging that it was a *Thakardwara*, where the villagers worshipped and that it had recently been unlawfully taken possession of by the defendant. The suit was dismissed on the finding that the place had long ceased to be a *Thakardwara* and that the defendant had been in adverse possession for over twelve years. In appeal the plaintiffs gave up their previous position and sought to urge that on the house ceasing to be a *Thakardwara*, it became *shamilat* or common property of the village and that, therefore, the possession of the defendant could not be adverse.

Held, that this amounted to setting up an entirely new case which could not be permitted to be done in appeal. *L. DEOK RAM v. DULI CHAND*, 5 L. L. J. 97; (1923) A. I. R. (L.) 259 817

Appeal, second—Inference from facts—Question of law.

Although a decision by an Appellate Court as to the effect of the evidence produced in a case is final as to the facts, the soundness of conclusions may involve matters of law and may be questioned in second appeal. The proper legal effect of a proved fact is essentially a question of law. *L. PURAN v. LALA*, (1923) A. I. R. (L.) 216 795

Appeal, second—Question of fact—Wagering contract.

The question whether a contract is of a wagering nature is a pure question of fact, that is to say, the party disputing that he is liable under the contract has to show that, at the time the contract was entered into, the parties did not intend to carry out the contract, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received. *B. GANGADAS NARAYANDAS v. JERISONDAS MANCHARAM*, 25 Bom. L. R. 520 1032

construction of. See CUSTOM-SUCCESSION 808

Pleadings and proof—Custom set up not proved—
Court, whether can find portion of custom set up proved.

Semble:—Enquiries as to the existence of a custom are not on the same footing as those relating to a contract, and yet in modern times, since there has been attached to the form of pleadings less rigid adherence than in former days, a Court would have little hesitation in finding on the evidence in a case that, although an entire custom set up by a defendant does not exist, yet a material part of it does.

Eshenchunder Singh v. Shamchurn Bhutto, 11 M. L. A. 71; 6 W. R. P. C. 37; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3, *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412; 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 474; 9 Ind. Dec. (N. S.) 971 (P. C.) *Ward v. Shepherd*, (1817) 146 E. R. 367; 3 Price 608 and *Desai Ranchhodass Vitoldas v. Rawal Nathubhai Kesabhai*, 21 B. 110; 11 Ind. Dec. (N. S.) 75, distinguished. *Pat NATHUNI RAI v. RAMESHWAR SINGH*, 1 P. L. R. 289

Police Act (V of 1861), s. 4. See CRIMINAL PROCEDURE CODE, 1898, s. 10

Possession, transfer of, effect of. See TRANSFER OF PROPERTY ACT, 1882, ss. 6, 43

Practice—Criminal appeal—Absence of appellant—Procedure.

When once a criminal appeal has been admitted and a date fixed for its hearing, the Appellate Court is bound to peruse the record and to decide the appeal judicially. It cannot dismiss it for default of appearance.

Queen-Empress v. Pohpi, 13 A. 171; A. W. N. (1891) 48; 7 Ind. Dec. (N. S.) 107 (F. B.), followed. *A RAM CHANDAR v. EMPEROR*, 21 A. L. J. 100; (1923) A. I. R. (A.) 175; 24 Cr. L. J. 662

Notes of arguments by Pleaders—Court, duty of.

When a case has been fully argued before a Judge, it ought not to be necessary for the Pleaders to submit notes of their arguments. It is the duty of the Judge to take such notes of the arguments as he thinks fit when they are being submitted to the Court; and, if he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side. If it becomes necessary, as in some exceptional case it may become necessary, for the Judge either to require or to receive notes of the Pleader's arguments, such notes ought not to be submitted to the Judge by the Pleader on one side, without first submitting the notes to the Pleader on the other side. If in any case a Pleader desires to submit to the Court the notes of his arguments or of any further argument, which he thinks in the interest of his clients ought to be put before the Court, he should submit them to the Pleader on the other side, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof. But in no case should the arguments be submitted in the form of a draft judgment. *C AMJAD ALI v. SURESH RANJAN PAL*, 37 C. L. J. 42

Pre-emption—Death of pre-emptor after decree, effect of—Sale of land of value of Rs. 100 by unregistered deed, whether liable to pre-emption—Registration Act (XVI of 1908), ss. 17, 49—Evidence Act (I of 1872), ss. 58, 91.

A pre-emption decree cannot be affected by anything which happens after it is made.

Niaz Ali v. Muhammad Ramzan, 37 Ind. Cas. 227; 130 P. R. 1916; 193 P. W. R. 1916, *Thamman Singh v. Santa*, 53 Ind. Cas. 457; 119 P. R. 1919; 80 P. L. R. 1920 and *Atma Singh v. Hem Raj Shah*, 59 Ind. Cas. 939, followed.

After a decree had been passed in a pre-emption suit the pre-emptor died and the original vendor was his only legal representative:

Held, that this did not affect the decree which had been passed and did not involve the dismissal of the suit on appeal.

In an appeal against a pre-emption decree the Appellate Court has only to see whether the decree was correct when it was passed.

In the Punjab the law does not require a sale of immovable property of the value of Rs. 100 or upwards to be by a registered instrument, but merely prevents an unregistered deed of sale for Rs. 100 or upwards from affecting the property dealt with or from being used as evidence to affect it.

A sale of immovable property of the value of Rs. 100 or upwards effected by means of an unregistered deed of sale is, nevertheless, a sale and is liable to pre-emption.

Janki v. Girjadar, 7 A. 482; A. W. N. (1885) 97; 4 Ind. Dec. (N. S.) 749 (F. B.), relied on.

In a suit to pre-empt a sale of land sold for Rs. 100, the sale was admitted in the pleadings and the vendee subsequently produced an unregistered deed of sale:

Held, that the sale having been admitted in the pleadings no further proof of it was required under section 58 of the Evidence Act, and the provisions of section 91 of the Act could not, therefore, come into play. *L. GANGA SINGH v. BHAN*, (1923) A. I. R. (L.) 310

Decree directing payment of certain sum and costs—Failure to pay costs, effect of—Civil Procedure Code (Act V of 1908), s. 148, applicability of, to pre-emption decrees.

It is the duty of the decree-holder in a pre-emption suit to take all precautions and make sure that the decree passed in his favour is strictly complied with.

Kanhaya Lal v. Mohammad Shafi Khan, 18 Ind. Cas. 600; 141 P. L. R. 1913; 3 P. W. R. 1913, followed.

Section 148 of the Civil Procedure Code is not applicable to decrees in pre-emption suits.

Suranjay Singh v. Rambahal Lal, 21 Ind. Cas. 583; 35 A. 582; 11 A. L. J. 959, relied on.

A decree in a pre-emption suit directed the pre-emptor to pay into Court a certain sum of money together with the costs of the suit within a certain time. The pre-emptor paid in the amount specified in the decree but failed to pay in the costs within the time fixed:

Held, (1) that the decree being perfectly clear, the pre-emptor was not entitled to any extension of time for payments of the costs;

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(2) that, having failed to comply with the decree, his suit must stand dismissed.

Kanhaya Lal v. Mohammad Shafi Khan, 18 Ind. Cas. 600; 141 P. L. R. 1913; 3 P. W. R. 1913, distinguished. *L. KHAN MUHAMMAD v. AHMAN* 891

— *Pre-emptor, title of, whether relates back to date of sale—Civil Procedure Code (Act V of 1908), O. XX, r. 14.*

There is nothing in the Punjab Pre-emption Act, which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction contained in O. XX, r. 14 of the Civil Procedure Code that Courts shall declare the title of the pre-emptor to be deemed to accrue from the date of payment into Court of the purchase-money after decree.

A successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale but from the date on which he enforces his rights, that is, from the date on which he satisfies the conditions of the decree and brings it into operation.

Kehr Singh v. Mahman Singh, 25 P. R. 1908; 128 P. L. R. 1908; 51 P. W. R. 1908, dissented from.

L. Beli Ram v. Hari Chand, 59 Ind. Cas. 744; 128 P. W. R. 1921; 3 L. L. J. 205, *Deonandan Prasad Singh v. Ramdhari Chowdhuri*, 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J. 375; 21 C. W. N. 786; 25 C. L. J. 573; 19 Bom. L. R. 437; 6 L. W. 65; (1917) M. W. N. 470 and 811; 22 M. L. T. 196; 44 I. A. 80 (P. C.), followed. *L. HADAYAT ULLAH v. GHULAM MUHAMMAD BEG*, (1923) A. I. R. (L.) 529. 444

— *Substitution, date of.*

A successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of the sale but from the date when he enforces his rights, that is, from the date on which he satisfies the conditions of his decree and brings it into operation. No doubt he is substituted for the vendee in all the rights that were transferred by the sale, but the process of substitution does not take place on any date prior to the satisfaction by the pre-emptor of the conditions on which his decree has been granted to him.

Hakam Singh v. Indar, 40 P. R. 1902, dissented from.

A suit to pre-empt on the ground of possession of other property is open only to persons who at the time of sale have an established title in that property. *L. MUHAMMAD AKRAM KHAN v. MUHAMMAD AZIM*, 4 L. 13; (1923) A. I. R. (L.) 451. 318

Presidency Small Cause Courts Act (XV of 1882), s. 48—Civil Procedure Code (Act V of 1908), O. XXI, r. 98—Execution of ejectment decree—Removal of obstruction—Small Cause Court, power of.

Under section 48 of the Presidency Small Cause Courts Act, a Small Cause Court has jurisdiction in execution of a decree in ejectment, to act under O. XXI, r. 98 of the Civil Procedure Code and

Presidency Small Cause Courts Act—concl.

remove any improper obstruction to the carrying out of its own order.

Baggiammal v. Appadurai Gramany, 6 Ind. Cas. 722; 7 M. L. T. 385, followed. *M. MUHAMMAD GHOUSE v. MOHIDEEN*, 18 L. W. 135; 45 M. L. J. 66; (1923) M. W. N. 82. 985

Presidency Towns Insolvency Act (III of 1909), s. 56—Dominant motive to avoid bankruptcy—Fraudulent preference—Procedure.

To constitute fraudulent preference under section 56 of the Presidency Towns Insolvency Act, the giving of preference to a particular creditor must have been the dominant view of the debtor. Where the dominant motive of the insolvent was to keep a particular creditor quiet and avoid bankruptcy altogether and the desire to prefer and the giving of preference were incidental only, the obligation incurred by the debtor is lawful and the transaction does not offend against the Laws of Bankruptcy and must be upheld.

Sharp v. Jackson, (1899) App. Cas. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson 264; 15 T. L. R. 418, *Official Assignee of Madras v. T. B. Mehta & Sons*, 49 Ind. Cas. 968; 42 M. 510; 36 M. L. J. 190; 25 M. L. T. 265; (1919) M. W. N. 293, followed.

In a motion by the Official Assignee to set aside a transaction of the debtor as being a fraudulent preference, the onus of proof is on the Official Assignee to make out his case before the Garnishee can be called upon to meet it. *M. SAMU PATTAR v. WILSON*, 18 L. W. 696. 532

Press and Registration of Books Act (XXV of 1867), ss. 4, 14—False statement in making declaration, what constitutes.

A false statement in a declaration which is not made and subscribed before a Magistrate as provided by section 4 of the Press and Registration of Books Act, cannot be said to have been made "in making a declaration" within the meaning of section 14 of the Act.

The mere presentation of a declaration to a Magistrate is not equivalent to making it before him within the meaning of section 4 of the Act. Therefore, it is no offence to merely present a false written statement or declaration to a Magistrate. *L. EMPEROR v. INAYAT*, (1923) A. I. R. (L.) 440; 24 Cr. L. J. 657. 689

Principal and surety—Decree against principal only—Appeal—Execution of decree—Limitation terminus a quo.

Where in a suit against a principal and his surety a decree is passed against the principal only, and the plaintiff appeals against that part of the decree exonerating the surety and the appeal is dismissed, the decree to be executed is the decree of the Trial Court, and limitation, for the purpose of execution, runs from the date that decree was passed. *B. KALYANCHAND LALCHAND v. BHOGILAL JAYACHAND*, 25 Bom. L. R. 371; (1923) A. I. R. (B.) 400. 310

Prior and subsequent purchaser—Prior purchase, notice of—Burden of proof—Registration—Notice.

Where a prior purchaser seeks to dispossess a subsequent purchaser the onus is upon him to

Prior and subsequent purchaser—contd.

prove that the latter had notice of the prior purchase—mere registration by itself is no notice.

Hemlital Motilal v. Vasudeo Ganesh, 16 Ind. Cas. 680; 36 B. & 446; 14 Bom. L. R. 634, distinguished. *B PEERKHA LALKHA v. BAPU KASHIBA MALI*, 25 Bom. L. R. 375; (1923) A. I. R. (B.) 410. 231

Provincial Insolvency Act (III of 1907), ss. 2 (e), 16 (2), (6), 38—Right to receive debt, whether property—Payment of debt to insolvent, before order of adjudication, effect of.

A right to receive a debt is property within the meaning of section 2 (e) of the Provincial Insolvency Act and vests in the Receiver under section 16 (2) of the Act from the date of the application by the insolvent to be adjudged an insolvent.

The provisions of section 16 of the Provincial Insolvency Act as to the vesting in the Receiver of the insolvent's property are controlled by those of section 38 of the Act and by virtue of the provisions of the latter section a debt vested in the Receiver may be discharged by a *bona fide* payment, without notice, made to the insolvent after the date of the application for being adjudged an insolvent and before the date of the adjudication order.

Section 38 of the Provincial Insolvency Act is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency. *N ONKARSA v. BRIDI CHAND*, 19 N. L. R. 144; 6 N. L. J. 213; (1923) A. I. R. (N.) 290. 1037

ss. 16 (2) (b), 45 (2)—Execution of decree against insolvent—Leave of Court, whether essential.

Section 45 (2) of the Provincial Insolvency Act of 1907 gives a release to the insolvent at the time of his discharge, from debts entered in the schedule. But after adjudication and before discharge, section 16 (2) (b) of the Act absolutely prohibits all creditors, whether on the schedule or not, from taking execution proceedings against the person and property of the insolvent except with the leave of the Court. *M NATESA CHETTIAR v. ANNAMALAI CHETTIAR*, 17 L. W. 319; 32 M. L. T. 157; (1923) A. I. R. (M) 487. 213

Provincial Insolvency Act (V of 1920), ss. 10, 24 (1) (a), proviso, 35—Jurisdiction of District Court—Residence, what amounts to—"Unable to pay his debts," meaning of.

A debtor who remains within the limits of the jurisdiction of a District Court is resident therein and is entitled to present an application to that Court to adjudicate him an insolvent although he has no permanent or continuous residence within the District and may have even occasionally gone outside the District and returned.

Where all the properties of a debtor are under attachment to a creditor and his petition for permission to execute a private sale of the properties is negatived, the mere fact that there is an apparent surplus of assets over the gross debts does not prove that the debtor is not unable to pay his debts within the meaning of section 10 of the Provincial Insolvency Act.

Provincial Insolvency Act—contd.

Under the proviso to section 24 (1) (a) of the Provincial Insolvency Act, a debtor is required to furnish only *prima facie* proof of the fact that he is unable to pay his debts for the purpose of being adjudicated insolvent. *M LAKSHMINARAYANA AIYAR v. SUBRAMANIYA AIYAR*, (1923) M. W. N. 328; 45 M. L. J. 119; (1923) A. I. R. (M.) 585. 74

ss. 28 (5), 66 (2)—Civil Procedure Code (Act V of 1908), s. 60 (1) (i) (iii)—Insolvent—Half-salary divisible amongst creditors—Allowance to insolvent.

Where the property of an insolvent which becomes divisible amongst the creditors is his half-salary, the other half being protected by section 28 (5) of the Provincial Insolvency Act and section 60 (1) (i) (iii) of the Civil Procedure Code, read together, it is open to the Insolvency Court under section 66 (2) of the Insolvency Act to make, out of the divisible half of his salary, such an allowance as it may think just to the insolvent for the support of himself and his family.

Debi Prasad v. J. A. H. Lewis, 43 Ind. Cas. 984; 40 A. 213; 16 A. L. J. 107, dissented from. *A. RADHA MOHAN v. M. C. WHITE*, 21 A. L. J. 216; 45 A. 364; (1923) A. I. R. (A) 466. 413

ss. 66, 68—Sale held by Receiver—Court, whether can interfere.

The Court's power to interfere with a sale held by the Official Receiver under the Provincial Insolvency Act is not limited to cases where there has been some *mala fides* on the part of the Receiver, or purchaser. Where the action of the Receiver is irregular and has prejudiced the general interests of creditors, the Court can set aside the Receiver's order.

Thirwenkatachariar v. Thangayi Ammal, 29 Ind. Cas. 294; 39 M. 479; 17 M. T. 432, 29 M. L. J. 755, followed.

Ex parte Lloyd, In re Peters, (1883) 47 L. T. 64, distinguished. *M RAMABHADRA CHETTY v. RAMASAMI CHETTY*, 4 M. L. J. 284; 17 L. W. 622; (1923) A. I. R. (M) 350. 374

s. 68—Application to Court against Receiver, dismissal of—Regular suit, maintainability of.

A person who claims rights to property, taken possession of by the Official Receiver as belonging to an insolvent, and whose claim is disallowed by the Insolvency Court, may bring a regular suit to establish his rights.

Duni Chand v. Muhammad Hussain, 40 Ind. Cas. 220, 22 P. R. 1917; 14 P. W. R. 1917, followed. *L SHANCHI KHAN v. KARAM CHAND*, (1923) A. I. R. (L) 150. 705

ss. 69, 70, 75—Appeal from conviction under s. 69, whether civil or criminal.

An appeal heard by the Judicial Commissioner under section 75 of the Provincial Insolvency Act, against an order passed by a District Judge under section 69 of the Act is a first civil appeal heard in the exercise of the civil jurisdiction of the Court. *Pesh GULAM HAIDAR v. EMPEROR*. 129

Provincial Small Cause Courts Act (IX of 1887), s.

17—*Ex parte decree, application to set aside—Court, power of, to determine nature of security.*

Upon an application made to a Small Cause Court to set aside an *ex parte* decree, it is open to the Court to direct whether the security should be paid in cash, or in property, and if it gives a direction one way or the other, a reasonable time must be allowed for carrying out that direction. **O SITA RAM v. LALTA, 9 O. & A. L. R. 67 219**

s. 25—*Decision on point of fact—Revision.*

Small Cause Courts have been given very wide powers with regard to decisions on questions of fact. But in cases where their findings of fact are based on or involve assumptions or inferences which there is nothing in fact or probability to support, or are not justified by sufficient evidence, or are opposed to the evidence on record or are based on meagre or little evidence or on flagrant misinterpretation or disregard of evidence, or if injustice would otherwise be done, the High Court has power to interfere in revision. **N PADAMSI v. SHESHRAO, 19 N. L. R. 72; (1923) A. I. R. (N) 292 1055**

ss. 27, 32 (2)—*Suit instituted in Court not invested with small cause powers—Trial and decision after Court invested with such powers—Appeal, whether competent.*

In order to bar an appeal against a decree in a suit of the nature of a small cause it is necessary that the Judge trying the case should, before the institution of the suit, have been invested with Small Cause Court jurisdiction entitling him to hear the particular suit.

Sambhu Dhanaji v. Ram Vitlu, 28 B. 244; 5 Bom. L. R. 1008, followed.

A suit of the nature of a small cause was instituted in the Court of a Sub-Judge who was not invested with Small Cause Court powers. Before the suit came on for trial the Sub-Judge was invested with such powers, but he tried the suit as a regular suit and decided it:

Held, that an appeal lay from the decree of the Sub-Judge inasmuch as under clause (2) of section 32 of the Provincial Small Cause Courts Act, the Sub-Judge could not have tried the suit as a small cause, his Small Cause Court powers having been conferred upon him after the suit was instituted. **B VENKATRAMAN RAMA HEGDE KANNI v. BABURAYA VENKATESH PRABHU, 25 Bom. L. R. 516 1020**

Sch. II, Art. 8—*Demand note for rent, suit on—Jurisdiction of Court of Small Causes.*

A suit based on a demand note executed for the satisfaction of rent for a field is triable by a Court of Small Causes. **N PURAN LAL v. CHIRKUTYA, (1923) A. I. R. (N) 285 7**

Art. 13—*Weightment dues, suit for—Jurisdiction of Court of Small Causes.*

A suit to recover weightment charges due under a contract entered into between the parties is not excluded from the jurisdiction of a Court of Small Causes, and if the valuation is below Rs. 500 a second appeal will not lie. **A COLLECTOR OF**

Provincial Small Cause Courts Act—concl'd.

BULANDSHAHR v. RAM SARUP, 21 A. L. J. 312; (1923) A. I. R. (A) 420 217

Sch. II, Art. 15—*Suit to recover balance of purchase-money, whether suit for specific performance of contract.*

A suit by a vendor for recovery of the balance of purchase-money due from the vendee is not a suit for specific performance of a contract within the meaning of Art. 15 of Schedule II of the Provincial Small Cause Courts Act and is not excluded from the cognisance of a Small Cause Court.

Sheik Galim v. Sadarjan Bibi, 29 Ind. Cas. 611; 43 C. 59; 21 C. L. J. 532; 19 C. W. N. 1332; distinguished. L DEUMAN v. RAMJI MAI 125

Art. 35, cls. (i) (ii)—*Wrongful removal of trees—Suit for compensation—Jurisdiction.*

Cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Chapter XVII of the Penal Code and a claim for compensation for trees so cut is not maintainable in a Small Cause Court. **A DUKHI v. DHANNI MISIR, 21 A. L. J. 357; (1923) A. I. R. (A) 543 956**

Art. 35 (II). See LIMITATION ACT, 1908, SCH. I, ARTS. 48, 49 33

Public Gambling Act (III of 1867), ss. 3, 4—

Search warrant, not specifying place to be searched, legality of—Magistrate issuing warrant, whether competent to try case—Evidence Act (I of 1872), s. 32—Co-accused in separate case, whether can be called as defence witness.

A Magistrate signed the printed form of a warrant for the search of a house under the Gambling Act and gave it to a Sub-Inspector of Police. The place to be searched was not specified in the body of the warrant when the Magistrate signed it, but the Sub-Inspector subsequently noted down at the bottom of the warrant the boundaries of the house to be searched:

Held, that as the warrant when signed by the Magistrate was not for the search of any particular place it was illegal.

Hargobind v. Emperor, 17 Ind. Cas. 576; 35 A. 1; 10 A. L. J. 355; 13 Cr. L. J. 832 and Benwari v. Queen-Empress, 11 P. R. 1895 Cr. relied on.

A Magistrate issuing a search warrant under the Gambling Act should not himself try any case which results from the search as the accused persons have the right to examine the Magistrate as a witness as to the circumstances under which the warrant was issued.

Petitioner who was being tried in separate trials for offences under sections 3 and 4 of the Public Gambling Act wished to examine a co-accused in the case under section 4 as his defence witness in the case under section 3. The Magistrate refused to permit this:

Held, that section 132 of the Evidence Act provided sufficient protection for the witness in such a case, and he could not be excused from appearing in the witness-box. **L RAJA RAM v. EMPEROR 24 Cr. L. J. 633 521**

Public Gambling Act—contd.

ss. 5, 6—Warrant under s. 5—Boundaries of house not given—Warrant not addressed to definite Police Officer—Warrant, whether legal.

A warrant issued under section 5 of the Public Gambling Act, which omits to describe the boundaries of the house to be searched and which is not addressed to any definite Police Officer, is not a legal warrant, and the presumption authorised by section 6 of that Act cannot be raised. *A. JAMNA PRASAD v. EMPEROR*, 21 A. L. J. 602; 9 O. & A. L. R. (A) 611; 24 Cr. L. J. 630. **518**

Punjab Courts Act (VI of 1918), s. 41 (3)—Error of law or procedure in deciding question of custom—Burden of proof, wrong allocation of—Appeal, second—Certificate whether necessary.

The words "notwithstanding anything in sub-section (1) of this section," with which sub-section (3) of section 41 of the Punjab Courts Act commences, preclude a Court of second appeal, in the absence of a certificate, from going into the question whether the first Appellate Court has erred in law or procedure in deciding a question of custom.

Nur Ali v. Bahawal, 31 Ind. Cas. 386; 34 P. R. 1916; 54 P. W. R. 1916, distinguished.

A second appeal on a question of custom cannot be entertained in the absence of a certificate, on the ground that the *onus probandi* was wrongly placed by the lower Appellate Court.

Arora v. Imam Baksh, 23 Ind. Cas. 352; 4 P. W. R. 1914; 28 P. L. R. 1914, followed. *L. LEHNA SINGH v. JAGAT RAM*, (1923) A. I. R. (L) 377. **524**

s. 41 (3)—Pre-emption suit—Appeal, second—Certificate, when not necessary—**Punjab Pre-emption Act (I of 1913), s. 7.**

Where a Court of first appeal fails to go into the question of custom and a second appeal is preferred with the object of having the question of custom tried, no certificate under section 41 (3) of the Punjab Courts Act is necessary for the validity of the appeal. *L. PARMESHWARI DAS v. PARAS RAM*. **I**

Punjab Excise Act (I of 1914), s. 24 (3)—Excise Manual, Vol. I, s. 407—Possession of country liquor outside licensed premises—Licenseholder, right of.

Section 407 of Vol. I of the Excise Manual does not override the provisions of section 24 (3) of the Excise Act. It empowers a licenseholder to possess country liquor to any extent on the licensed premises, but does not entitle him to possess more than the ordinary prescribed amount of one seer elsewhere. *L. EMPEROR v. PURAN SINGH*, 4 L. 10; 4 P. W. R. 1923; 24 Cr. L. J. 667. **699**

Punjab Excise Manual, r. 37 (d)—"Preparation" and "admixture," meaning of. See OPTUM ACT, 1878, s. 9 **700**

Punjab Land Revenue Act (XVII of 1887), s. 121. See ADVERSE POSSESSION **685**

s. 158 (2) (vi). See PUNJAB TENANCY ACT, 1887, s. 77 (3) **673**

Punjab Municipal Act (III of 1911), ss. 3 (13) (a), 189, 193—Street—"Accessible to the public," meaning of—Sanction to build—Condition regulating line of frontage, when can be imposed.

The expression "accessible to the public" in section 3 (13) (a) of the Punjab Municipal Act, means open to all the public in fact, whether by right or permission.

The power to restrict the right of free building by private owners upon private land is conferred upon Municipalities by section 189 of the Punjab Municipal Act.

Under that section a Municipal Committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street.

Under section 193 of the Punjab Municipal Act, a Municipal Committee may refuse permission to build at all; but if permission is granted it can only impose such conditions as are provided for in sub-section (3) of section 189 of the Act. *L. ABUL HASAN KHAN v. MUNICIPAL COMMITTEE OF DELHI*, (1923) A. I. R. (L) 417. **725**

ss. 169, 170, 173—Public street—Lease of portion—Municipality, right of.

When a street has vested in a Municipal Committee, it only has the power to exercise rights over it in order to maintain it as a street and for purposes of public use as such. It has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose.

Sundaram Ayyar v. Municipal Council of Madurai, 25 M. 635; 12 M. L. J. 37, relied on. *L. MUNICIPAL COMMITTEE OF MULTAN v. TAHIL RAM*, 5 L. L. J. 26; (1923) A. I. R. (L) 272. **592**

s. 175—Notice to remove structure—Failure to tender compensation, effect of.

The language of section 175 of the Punjab Municipal Act indicates that the requisition open to the Municipality is subject to the payment of compensation, that is, the tender of compensation must accompany the notice. This procedure affords the person concerned an opportunity of appealing to the Deputy Commissioner on the subject of the reasonableness of the tender and also for securing an assessment of the value of the obstruction before it ceases to exist.

A notice under section 175 of the Punjab Municipal Act calling upon a person to remove a structure unaccompanied with the tender of compensation is bad. *L. GHASITA v. EMPEROR*, 4 L. 158. **813**

s. 242 (1) (a). Notification under—Profession Tax—Naib Tahsildar, whether follows profession.

A public servant, such as a Tahsildar or a Naib Tahsildar, is appointed to, and holds, an office, and does not carry on a profession or calling such as would bring him within the purview of the Notification of the Punjab Government under section 242 (1) (a) of the Punjab Municipal Act imposing a Profession Tax. *L. PALA RAM v. NOTIFIED AREA COMMITTEE, KOT ADDU, DISTRICT MUZAFFARGARH*, 4 L. 256. **785**

Punjab Pre-emption Act (II of 1905), s. 3 (2) (3)—Town—Rural area included within

Punjab Pre-emption Act—1905—contd.

Municipality, whether town—Presumption—Bhanamari village, whether part of Peshawar Town.

- An administrative act including a rural area within the limits of a Municipality does not necessarily operate to destroy the pre-existing character of the area and such administrative action is not in itself sufficient to make the area so included a sub-division of a town for the purposes of pre-emption.

At the same time, the inclusion of a rural area within the Municipal limits of a town is strong evidence of the urban character of that area.

Any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town, and a suburb of this nature is to be regarded as a sub-division of a town for purposes of pre-emption.

Umar Bakhsh v. Abdul Karim, 70 P. R. 1898, *Abdulla v. Punnu Ram*, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906 and *Allah Ditta v. Muhammad Nazir*, 7 Ind. Cas. 716; 84 P. R. 1910, 102 P. W. R. 1910, relied on.

The village of Bhanamari is a sub-division of the town of Peshawar for the purposes of the Punjab Pre-emption Act. *Pesh SHER ALI v. KALANDAR KHAN* 200

— s. 3 (2) (3)—*Urban immovable property and village immovable property—Town, what is—Pre-emption, origin of.*

In order to determine whether property in dispute in a pre-emption suit is village or urban immovable property, the Court has to deal not with the mauza or revenue area as a whole unit, but with the character of the particular land in suit.

Muhammad Din v. Shah Din, 90 P. R. 1907; 151 P. W. R. 1907, relied on.

Areas which were formerly agricultural may be absorbed in towns and losing all their former characteristics become suburbs indistinguishable in character from the town itself.

It is not necessary to have a gradual development in order to make an area become part of a town; an entirely new suburb may suddenly spring up by the constitution of a block of buildings.

Allah Ditta v. Muhammad Nazir, 7 Ind. Cas. 716; 84 P. R. 1910; 102 P. W. R. 1910, relied on.

The inclusion of an area within Municipal limits is a highly important factor to be taken into account in determining whether that area is within a town or within a village.

The law of pre-emption is derived from three sources, Muhammadan Law, the necessities of the existence of racial communities and public and private convenience. One of the main reasons for the acceptance of a pre-emptive right is the vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To allow landed estate to pass into the hands of strangers is not only to deprive the community of a valuable asset into which its communal right has not been entirely abandoned, but also to entail the dissolution of its internal organisation by the engrafting of strangers upon the common body. For these reasons the first right of pre-emption in the

Punjab Pre-emption Act—1905—contd.

case of agricultural land or of the sites of agricultural villages accrues primarily to the relatives of the original owner and after them to other members of the proprietary body.

On the other hand, pre-emption in towns, though the principle may have originally been evolved from Muhammadan Law, depends at the present time purely on the consideration of public and private decency and convenience; here it is not relationship but contiguity which is of prime importance.

In order to determine whether any specified area is to be considered as part of a town or part of a village, the test to be applied is whether such an area has retained any of its original characteristics which would be consistent with the organisation of a society to whom the principles of pre-emption among agricultural communities would apply, or whether, on the other hand, it is one to which the principles of town pre-emption are applicable. *Pesh MUHAMMAD ALI KHAN v. MAKHAN SINGH* 855

— s. 4—*Pre-emption right, nature of—Qualification for pre-emption whether must be retained till date of suit.*

The right of pre-emption in the Punjab is given by the Punjab Pre-emption Act, which provides that on a sale being effected a right of pre-emption arises in favour of certain classes of persons.

Dictum of Shah Din, J. in Dhanna Singh v. Gurbakhsh Singh, 4 Ind. Cas. 337; 91 P. R. 1909 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.) followed.

A person, therefore, who is entitled to pre-empt a sale on the date of the sale is entitled to enforce his right notwithstanding the fact that on the date on which he brings the pre-emption suit he has lost the qualification which gave him his right.

Sanwal Das v. Gur Parshad, 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909, *Dhanna Singh v. Gurbakhsh Singh*, 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.) and *Hira v. Bansilal*, 52 Ind. Cas. 557; 90 P. R. 1919; 27 P. W. R. 1919, followed.

Fateh Singh v. Sant Singh, 27 Ind. Cas. 29; 43 P. R. 1915; 47 P. W. R. 1915; 125 P. L. R. 1915, dissented from.

Janki Prasad v. Ishar Das, 21 A. 374; A. W. N. (1899) 126; 9 Ind. Dec. (N. S.) 947, distinguished. *L. AZIM KHAN v. SEWA RAM*, (1923) A. I. R. (L) 458 797

— s. 12 (a), as amended by N.-W. F. P. Regulation (I of 1906)—“By right of blood relationship,” “in order of succession,” meaning of—*Persons entitled to pre-empt.*

The law of pre-emption obtaining in the North-West Frontier Province is one which deprives a person claiming to succeed by Will or other form of artificially regulated succession from putting forward pre-emption rights under section 12 (a) of the Punjab Pre-emption Act as amended by the North-West Frontier Province Regulation, I of 1906, but it includes all cases where the pre-

Punjab Pre-emption Act—1905—concld.

emptor would be entitled to succeed to the property sold by right of blood relationship, whether such relationship is with the vendor himself, or with the natural heirs of the vendor.

Clause (a) of section 12 of the Punjab Pre-emption Act assumes by its concluding words "in order of succession", that any person who would be entitled ultimately to inherit, however remote such inheritance might be, and however many preferential heirs might be in existence, has a right of pre-emption under the clause.

Pesh HABIB GUL v. SHAHDAD KHAN

594

Punjab Pre-emption Act (1 of 1913)—Building mainly used as residence and part as workshop—"Shop," meaning of.

The mere fact that a part of a building, which is mainly used as a residence, is used as a tailor's workshop, would not convert the whole of it into a shop.

The word "shop" denotes a building primarily used for the retail sale of goods. *L. SANT SINGH v. GOBIND RAM*, (1923) A. I. R. (L.) 209

454

s. 3 (5) (a)—Guardians and Wards Act (VIII of 1890), s. 29—Sale by guardian of minor with sanction of Court, whether liable to pre-emption.

Section 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. The Court, under this section, makes no order for sale, but merely authorises a transaction which would otherwise not be binding upon the minor. The sale is in fact a transaction *inter partes* approved of by the Court, and the Court, having approved of the contemplated sale, has no further say in the matter.

Such a sale cannot be described as one made in execution of an order of a Civil Court within the meaning of section 3 (5) (a) of the Punjab Pre-emption Act, and is not, therefore, exempted from liability to the exercise of the right of pre-emption. *L. SALIG RAM v. BARKAT ALI*, 4 L. 164

442

s. 7. See PUNJAB COURTS ACT, 1918, s. 41. (3).**s. 7—Pre-emption—Custom—Mohalla Bagrian, of Katthal in Karnal District—Proof of custom.**

Where a town is divided into sub-divisions the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property in dispute is situate and the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions.

Mela Ram v. Bando, 12 Ind. Cas. 859; 59 P. R. 1911; 198 P. W. R. 1911; 48 P. L. R. 1912; *Prabh Dial v. Bhikhoo Mal*, 61 Ind. Cas. 822; 3 L. L. J. 387, followed.

A judgment based upon a compromise or confession though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negatived.

Imperial Oil Soap and General Mills Co., Limited, Delhi v. M. Masbah-ud-din, 61 Ind. Cas. 325; 2 L. 83, followed.

Punjab Pre-emption Act—1913—concld.

The custom of pre-emption* does not exist in Mohalla Bagrian of the town of Katthal in the Karnal District. *L. LEKH RAY v. INDER MAL*, 4 L. 176

658

s. 16—"Owner," meaning of.

The word "owner" as used in section 16 of the Punjab Pre-emption Act does not mean a person who is not in danger of losing his ownership right at the instance of a pre-emptor. *L. HADAYAT ULLAH v. GHULAM MUHAMMAD BEG*, (1923) A. I. R. (L.) 529

444

s. 16 (secondly)—"Structure," meaning of.

The owner of a "building or other structure" on a site, within the meaning of section 16 (secondly) of the Punjab Pre-emption Act, is like a co-owner in the property sold and, therefore, his right of pre-emption is inferior only to a co-sharer therein.

The word "building" or "structure" is not defined in the Punjab Pre-emption Act, but, for the purposes of section 16 (secondly) of the Act, the word structure can be applied to a wall or a shed or any other unsubstantial erection, for which the word "building" cannot be used. Therefore, not only the owner of a building on a site, but also of an erection of a less substantial kind has a right of pre-emption in respect of it. *L. MUHAMMAD UMAR v. FAYAZ-UD-DIN*

911

s. 16 (sixthly)—Pre-emption—Sale of different shares in house—Owner of house contiguous to some shares, whether can pre-empt.

Three co-owners of a house sold the respective portions of the house owned by them to the same person on different dates by separate sale-deed and for varying considerations. Plaintiff, who owned a house which was contiguous to two of the portions sold, brought a suit to pre-empt the sale of all the portions sold.

Held, that the mere fact that all three portions sold were at one time parts of a single house, was not sufficient in law to enable the plaintiff to claim pre-emption in respect of that portion which was not independently subject to his right of pre-emption. *L. GENDA RAM v. RAM CHANDER* 1013

Punjab Tenancy Act (XVI of 1887), ss. 53, 76 (i), (e), (f)—Purchase of occupancy rights by landlord—Tenant, whether can withdraw—Suit by heir of tenant to recover occupancy lands, whether maintainable—Jurisdiction of Civil Courts.

It was not the intention of the Legislature to render the action of an occupancy tenant irrevocable once he had made an application under clause (2) of section 53 of the Punjab Tenancy Act, and he has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer. An occupancy tenant has a right to withdraw his offer made under section 53 (2) of the Punjab Tenancy Act up to such time as the landlord makes the payment contemplated by sub-section (5) of the section.

Labhu v. Hamira, 38 Ind. Cas. 944; 1 P. R. 1917 Rev., approved of.

Punjab Tenancy Act—contd.

A suit by the heir of an occupancy tenant to recover the occupancy lands from the landlord on the ground that an alleged purchase of the occupancy right by the landlord is null and void is not barred by the provisions of section 76 (i) (e), or (f) of the Punjab Tenancy Act. *L GHULAM QUTAB-UD-DIN v. SARDARA*, 4 L. J. 73; (1923) A. I. R. (L.) 521; 5 L. L. J. 338 209

—s. 59—Occupancy tenancy—Joint tenants—Survivorship—Separation of shares—Partition.

The principle to be followed in cases of succession to an occupancy holding, as against the landlord, is that joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as a single tenant, and as long as any of them, or the descendants of any of them, survive, the landlord cannot claim in the share of any tenant whose line has died out.

Mohru v. Mutsaddi, 109 P. R. 1894 (F. B.), relied on.

The division of a joint occupancy holding for purposes of cultivation or in order to enable the co-sharers to raise money by mortgaging their shares in the holding does not indicate that the holding has, as a matter of fact, been finally partitioned. *L AMIR KHAN v. MINH MAL*, 370

—ss. 77 (3), (1), 98—Jurisdiction of Civil and Revenue Courts—Suit by superior proprietor for declaration of right to recover dues in kind from inferior proprietor, nature of—Suit, whether cognisable by Civil or Revenue Court—Direction under s. 98, whether confers jurisdiction on Civil Court—Jurisdiction, whether can be conferred by consent.

Parties to a suit cannot confer jurisdiction upon any Court by mutual agreement.

A suit for a declaration of the right of a superior proprietor to recover dues in kind from an inferior proprietor is essentially one arising out of the conditions of a tenancy and is excluded from the cognisance of a Civil Court by section 77 (3), (i) of the Punjab Tenancy Act.

Section 98 of the Punjab Tenancy Act refers solely to the action of a Revenue Court. It confers upon the Revenue Court a certain power of making a direction to the parties before it. That direction may bind the parties, but it does not necessarily bind a Civil Court, or confer upon that Court a jurisdiction which it would not otherwise possess. Where a Revenue Court refers the parties to a civil suit under the provisions of section 98 of the Punjab Tenancy Act, the Civil Court does not thereby acquire jurisdiction to hear a suit which it would otherwise be incompetent to entertain under the other provisions of the law. *Pesh. PUNNU LAL v. BHOJA RAM*, 760

—s. 77 (3) (i)—Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (vi)—Jurisdiction of Civil and Revenue Courts—Suit by landlord for declaration of right to recover *batai*—Suit for correction of revenue entry.

There is no foundation for the idea that suits brought under the Specific Relief Act are *ipso facto* entertainable only by Civil Courts. Where a suit falls within the purview of any clause of

Punjab Tenancy Act—concld.

section 77 (3) of the Punjab Tenancy Act, that suit must be heard by a Revenue Court, whether or not so far as the form of the suit or the particular remedy prayed for is concerned the suit also falls within the purview of any section of the Specific Relief Act.

Ibrahim v. Akbar, 34 Ind. Cas. 209; 58 P. L. R. 1917; 104 P. W. R. 1916, followed.

Rahmun v. Hasham, 7 Ind. Cas. 77; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910, dissented from.

A suit by a landlord against a tenant for declaration that he is entitled to take *batai* instead of a cash *malikand* from the tenant falls under section 77 (3) (i) of the Punjab Tenancy Act and is exclusively triable by a Revenue Court.

Gamu v. Karim Khan, 33 P. R. 1908 (F. B.); 83 P. W. R. 1908; 171 P. L. R. 1908 and *Sawan Singh v. Rahman*, 55 Ind. Cas. 739, relied on.

Obiter dictum.—A suit for the correction of a revenue entry is triable by a Revenue Court alone and the jurisdiction of a Civil Court to try such a suit is barred under section 158 (2) (vi) of the Punjab Land Revenue Act. *L DASONDHI v. BADAR BAKHSI*, (1923) A. I. R. (L) 405; 4 L. J. 335 673

Putni Regulation (VIII of 1819), s. 8 (2)—Proceedings for realization of arrears of rent, nature of—Service of notice on defaulter.

Proceedings under the Putni Regulation, taken for the realisation of arrears of *putni* rent, are not taken against persons at all, but against the tenure; and the Zemindar is quite right in setting out in his petition and notices the name of the *putni* and the name of the *putnidar* as recorded in his books. The Regulation does not contemplate service of notice upon the defaulters personally. The proceeding is thus throughout against the tenure, and the mere fact that in the application to the Collector, the Zemindar mentions the names of one or two of the parties in possession, though not registered in his books, and omits to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid.

It is incumbent on persons who acquire an interest in a *putni* tenure by succession to get themselves registered in the books of the landlord. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Putni Regulation on the ground that their names were not mentioned in the application to the Collector. *G BEHARI LAL v. NASIMANNESSA BIRI*, 37 C. L. J. 222; (1923) A. I. R. (C) 527 482

Railways Act (IX of 1890), ss. 72, 77—Carriage of goods—Goods consigned under Risk Note, Form B—Non-delivery—Suit for damages—Notice, whether necessary—Authority to sign Risk Note—Wilful neglect, proof of.

The provisions of section 77 of the Railways Act apply to a suit to recover compensation for the non-delivery of goods consigned to a Railway Company for carriage.

Railways Act—contd.

East Indian Railway Company v. Kali Charan Ram Prashad, 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106, dissented from.

Great Indian Peninsula Railway Company v. Jitan Ram-Nirmal Ram, 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442, followed.

Under section 72 of the Railways Act a consignor of goods is bound by the provisions of a Risk Note signed by a person who actually delivered the goods to the Railway Company.

Where goods are consigned to a Railway Company for carriage under Risk Note, Form B, and the Company is sued for compensation for non-delivery of the goods, if the Company proves loss of the goods, the burden is on the plaintiff to establish that the loss was due either to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants. Pat E. I. R. Co. LTD. v. GOPRAM-GOURISHANKAR 642

s. 74.—Risk-note—Exemption—Proof of loss or destruction.

A Railway Company in order that it may claim an exemption from a liability to pay damages by virtue of a Risk-note executed in their favour by a consignee must prove that the goods consigned have been lost or destroyed, that is to say, that they are no longer in the possession of the Company and that they are not lying about in their premises or that some kind of search for them was made by the Company. It is not sufficient merely to prove that the goods were not found at an intermediate station and that they are untraceable, in the absence of any evidence that they were loaded at the station of consignment. N. DAUBHAI v. G. I. P. RAILWAY, 6 N. L. J. 97 375

s. 77, applicability of—Claim based on non-delivery—Notice to Railway Company.

The provisions of section 77 of the Railways Act apply not only to claims for compensation arising out of loss, destruction or deterioration of goods, but also to claims arising out of non-delivery or wilful mis-delivery.

Madras and Southern Maharashtra Railway Company v. Haridoss Banmali Doss, 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 35; 24 M. L. T. 38; 8 L. W. 340 and *Deorao v. Great Indian Peninsular Railway Co.*, 14 Ind. Cas. 684; 8 N. L. R. 34, relied on.

East Indian Railway Company v. Kali Charan Ram Prashad, 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106, dissented from.

In the matter of requiring a notice of a claim to a Railway Company in order to enable the latter to make enquiries and, if possible, to recover the goods, there is no reason for making a distinction between cases of loss and cases of non-delivery.

Courts ought not to import distinctions such as the above into the Railways Act unless they rest upon some basis of sound reason which would be likely to have commended itself to the Legislature.

Railways Act—concl'd

The provisions of the Railways Act as to notice must be strictly observed, and a person who is desirous of serving an effective notice of claim must direct it to the Manager or the Agent, as the case may be. N. JIWANDAS v. AGENT E. I. R. COMPANY, 19 N. L. R. 139. 1033

Railway Company—Goods consigned under Risk Note, Form B—Loss of goods—Wilful neglect or theft—Onus of proof.

In an action for the price of goods short delivered by a Railway Company to whom they were consigned for carriage under a Railway Risk Note, Form B, the onus lies upon the plaintiff to prove that loss was due to theft by, or to wilful neglect of, the Railway Company's servants.

Although in equity a Railway Company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent, under the law, upon them to do so. Still the Company should produce before the Court for examination those of its servants who are in a position to be acquainted with the facts relating to the disappearance of the goods. Where this is done, the absence of any explanation by the Company as to what had happened to the goods, is not evidence that the short delivery was due to wilful misconduct of the Company's servants.

Smith, Ltd. v. Great Western Railway Co. (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, followed. B. G. I. P. RAILWAY v. HIMATLAL JAGJIVANDAS, 25 Bom. L. R. 350; (1923) A. I. R. (B.) 389 606

Risk Note, Form B—Suit for damages for short delivery—"Loss" meaning of—Burden of proving loss—"Robbery" and "theft," meaning of.

In a suit for damages for non-delivery of goods against a Railway Company where the plaintiff has not alleged loss of the consignment, it is for the Railway Company to prove the loss before seeking protection under the Risk Note, Form B; and it is only after it has proved this that the plaintiff can be required to prove that the loss was due to a cause for which the Railway Company was liable.

Ghelabhai Pansi v. East Indian Railway Company, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525 and *Secretary of State for India in Council v. Firm Jiwan and Abdullah*, 71 Ind. Cas. 609; 21 A. L. J. 220, relied on.

East Indian Railway Co. v. Nathmal, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321 and *Smith, Limited v. Great Western Railway Co.*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, distinguished.

The word "loss" in Risk Note, Form B, means loss to the Railway Company and not loss to the plaintiff.

Secretary of State for India in Council v. Firm Jiwan and Abdullah, 71 Ind. Cas. 609; 21 A. L. J. 220, followed.

Railway Company—concl'd.

Hill, Sawyres & Co. v. Secretary of State, 61 Ind. Cas. 926; 2 L. J. 133; 3 L. J. 297, dissented from.

The terms "robbery" and "theft" in Risk Note, Form B, have the same meaning in the case of theft from a running train.

Great Indian Peninsular Railway Co. v. Bhola Nath-Debi Das, 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79, relied on. *A. E. I. RAILWAY COMPANY v. KISHEN LAL*, 21 A. L. J. 438; 9 O. & A. L. R. 531; 45 A. 530 986

Registration—Mortgage-deed—Fraud—Presumption—Burden of proof.

Where the party attacking a mortgage-deed relating to several properties on the ground of fraud in registration, shows that the property in virtue of which registration was effected either did not exist or that the mortgagor never had any title thereto, the burden of showing that no fraud had been committed is thrown on the other side. The fact that such property was entered in the deed is in itself sufficient to raise a presumption that a fraud was intended.

Harendra Lal Roy v. Hari Dast Debi, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 1 A. L. J. 774; 16 M. L. T. 9; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 18 Bom. L. R. 490; 41 I. A. 110 (P. C.) and *Jadunath Kunwar v. Dharam Narain*, 55 Ind. Cas. 511; 23 O. C. 38; 7 O. L. J. 36; 2 U. P. L. R. (O.) 37, followed.

Biswanath Prasad v. Chandra Narayan Chowdhury, 63 Ind. Cas. 170; 48 I. A. 127; 43 C. 509 (P. C.), explained.

Pahladi Lal v. Liraiti, 48 Ind. Cas. 200; 41 A. 22; 10 A. L. J. 371 and *Ram Dai v. Ram Chandrabai Debi*, 32 Ind. Cas. 440; 4 P. L. J. 433, distinguished. *O SURJA v. BIJAI BAHADUR SINGH*, 9 O. & A. L. R. 107 18

Registration Act (Act of 1908), ss. 2 (7), 17 (1) (d).—Construction of document—Agreement to lease—Registration.

Defendant executed a document in plaintiffs' favour whereby he acknowledged the receipt of a certain sum as earnest-money and agreed to lease to the plaintiff a certain area of land for five years on an annual rental of Rs. 180 :

Held, that the document was an agreement to lease and required registration under section 17 (1) (d), read with section 2 (7), of the Registration Act. *L. NANAK CHAND v. MUHAMMAD ZAHUR-UD-DIN*, 4 L. 44; 5 L. L. J. 257 927

ss. 17—Agreement conferring pre-emption right—Registration.

An agreement conferring a right of pre-emption does not create any right in immoveable property, and is enforceable without being registered.

Kashi Kunbi v. Sumer Kunbi, 5 Ind. Cas. 231; 32 A. 206; 7 A. L. J. 206, followed.

Ramasami Pattar v. Chinman Asari 24 M. 449 at p. 401, dissented from. *B. UTTAMRAM v. BAL KUSUM*, 45 Bom. L. R. 79, (1923) A. I. R. (B.) 226; 47 B. 283 866

Registration Act—cont'd.

ss. 17—Memorandum of terms of mortgage—Registration.

An entry in a *bahi* which recites the terms of a mortgage but is not signed by any of the parties to the alleged mortgage, is not an instrument creating any right within the meaning of section 17 of the Registration Act and does not require registration. *L. TIRKHA v. SOLHU* 642

ss. 17, 28, 29—Place of registration—Mortgage-deed—Property not mortgaged included to give jurisdiction to particular Registrar—Registration, validity of—Personal covenant, suit on, whether maintainable—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 116.

Where certain property which is not intended to be mortgaged is included in a mortgage-deed merely to give jurisdiction to a particular Sub-Registrar to register the deed, the properties really intended to be mortgaged being situate outside the jurisdiction of the Sub-Registrar, the registration of the deed as a mortgage-deed is invalid as being in fraud of the Registration Law.

Harendra Lal Roy Chowdhuri v. Hari Dasi, Debi, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.), *Biswanath Prasad v. Chandra Narayan Chowdhury*, 63 Ind. Cas. 170; 48 C. 509; 48 I. A. 127 (P. C.), relied on.

Notwithstanding the invalidity of the deed as a mortgage, however, a personal covenant to pay contained in such deed, is valid and enforceable inasmuch as under section 29 of the Registration Act a deed containing such a covenant can be validly registered at any place where the parties to it desire and a claim based on such a covenant is governed by Art. 116 of Schedule I to the Limitation Act.

Joginnee Mohan Chatterjee v. Bhoot Nath Ghosal, 29 C. 654; 6 C. W. N. 856, *Biswanath Prasad v. Chandra Narayan Chowdhury*, 63 Ind. Cas. 170; 48 C. 509; 48 I. A. 127 (P. C.), followed.

Per Devadoss, J.—Where a document consists of two or more parts or where there are two or more covenants in a document, the mere fact that one part or one covenant becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act, does not necessarily make the other parts or covenants of the document invalid or inoperative.

Kalka v. Mathura Das, 50 Ind. Cas. 220; 21 O. C. 341, dissented from. *M. DRONAMRAJU RAMA RAO v. KISSAPRAGADA VEDAYYA*, (1923) M. W. N. 166; 44 M. L. J. 373; 32 M. L. T. 222; 17 L. W. 695; (1923) A. I. R. (M) 447; 46 M. 435 188

ss. 17, 47, 49—Execution of deed of gift—Adoption of son—Registration subsequent to adoption, effect of.

The effect of sections 17, 47 and 49 of the Registration Act is that if a title under a deed is complete except for registration, no subsequent alienation of or dealing with the property by the vendor or donor, as the

Registration Act—contd.

case may be, can defeat the title, which, on registration, becomes an absolute title dating from the date of the execution of the document. Nor does the subsequent birth or adoption of a child or death of the donor or vendor have any effect in defeating a title obtained under an instrument executed before the happening of these events but registered thereafter.

Venkat Rama Reddi v. Pillai Rama Reddi, 38 Ind. Cas. 70; 40 M. L. J. 690; 4 L. W. 465; (1917) M. W. N. 112; 20 M. L. T. 450; followed.

Where a deed of gift was executed and handed over to the donee and the next day the donor adopted a son and thereafter the deed was registered.

Held, that the deed of gift was perfectly valid and the subsequent adoption did not affect its validity. *M. KALIANASUNDARAM PILLAI v. KARUPPA MUPPANA*, 17 L. W. 23; (1923) A. I. R. (M.) 282. 206

ss. 17, 49—Petition to Revenue Court in mutation proceedings—Admission of title—Registration; whether necessary.

An application in the mutation proceedings in the Revenue Court, by the defendant admitting plaintiffs' claim to a portion of a holding is not a document of title and does not require registration.

Jagran Misra v. Bisheshwar Dubé, 35 Ind. Cas. 701; 38 A. 336; 14 A. L. J. 449 (F. B.), distinguished. *A. RAM KISHEN RAI v. SHERO SAGAR*, 402

s. 17 (2) (b)—Agreement to effect mortgage—Agreement creating charge—Registration.

An agreement to merely effect a mortgage is admissible in evidence without registration; but if it is relied on as justifying a declaration to a charge as distinguished from a mortgage, it ceases to be a document, merely creating a right to obtain another document but becomes in effect a document operating to create a charge in future, when the declaration sought is made, and requires registration to render it admissible in evidence.

Bengal Banking Corporation v. Mackertich, 10 C. 315; 8 Ind. Jur. 436; 5 Ind. Dec. (N. S.) 211, followed; *B. TIRTHDAS GHANSHAMDAS v. SADHUSINGH UDHASINGH*, 25 Bom. L. R. 313; (1923) A. I. R. (B.) 287. 296

s. 17 (2) (v)—Sale of immoveable property—Receipt for earnest-money, whether compulsorily registrable.

A document which merely evidences the receipt of earnest-money in respect of a sale of immoveable property of the value of more than Rs. 100 and does not in any way create or declare any rights in the property, but recites that another document would subsequently be executed which would serve as a document of title in respect of the property agreed to be sold falls within the purview of section 17 (2) (v) of the Registration Act and is not compulsorily registrable. *GANDA RAM v. RAM CHANDER*, 1013

Registration Act—concl'd.

s. 49—Unregistered document—Admission for collateral purpose. See ADVERSE POSSESSION 889

ss. 72, 76, 77—Refusal to register; refusal to admit for registration, and refusal to accept for registration, distinction between—Refusal to register—Appeal to Registrar—Suit to enforce registration, when maintainable.

For a suit to lie under section 77 of the Registration Act the following requisites are necessary:—

- (1) The presentation of the document required to be registered by a person authorised to present it to the Sub-Registrar;
- (2) A refusal to register by the Sub-Registrar;
- (3) An appeal within time to the Registrar;
- (4) A refusal to register by the Registrar; and
- (5) The institution of the suit within time.

The expression "refusing to admit a document for registration" in section 72 of the Registration Act refers to cases where registration has been refused rather than to cases where a Sub-Registrar has declined to accept a document at all at the first stage of his proceedings. In other words, refusal to admit to registration and refusal to register are the same thing. There is, however, a distinction between the expressions "refusal to accept for registration" and "refusal to register."

Gangadara Mudali v. Sambastva Mudali, 34 Ind. Cas. 769; 19 M. L. T. 397; (1916) 2 M. W. N. 38, distinguished.

Therefore, in order to validate a suit under section 77 of the Registration Act there must be a refusal to register and not merely a refusal to accept for registration.

Section 72 of the Registration Act must, however, be read widely as giving a general power of appeal in all cases where registration is refused and where refusal is not on the ground of non-execution.

Shama Charan Das v. Joyemoolah, 11 C. 750; 5 Ind. Dec. (N. S.) 1259, relied on.

There is no authority for the proposition that where the Sub-Registrar refuses registration on a number of different grounds, there is no appeal to the Registrar under section 72 of the Registration Act, merely by reason of the fact that one of those grounds refers to a question of limitation. *Pesh Bibi Ainna v. Mohammad Rukan Alam*, 182

Riparian owners—Sudden change in course of river—Land belonging to one owner joined with that of another—Ownership, transfer of—Principle applicable—Identity of lands not lost, effect of—Dhardhura, custom of—meaning of—Wajib-ul-arz, construction of—Bengal Alluvion and Diluvion Regulation (X I of 1825), s. 4 cl. (2).

Where by a sudden change in the course of a river, a piece of land belonging to one riparian owner is cut off and placed in contiguity to that of another riparian owner, the ownership in it is not changed so long as its identity is not destroyed.

The principle of law stated above is one not merely of English Law, nor a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice, and

Riparian owners—concl.

has been embodied in clause (2) of section 4 of the Bengal Alluvion and Diluvion Regulation.

Where a person sets up a custom in derogation of the aforesaid principle he must prove the same by clear, definite and specific evidence.

It is wholly against all principles to uphold a custom by means of possible inferences or even by probable implications.

The word *dhardhura* is not a term of art signifying necessarily always and under all conditions that the deep stream constitutes a permanent boundary between two estates on the opposite bank of a river.

The *wajib-ul-arz* of a village on one side of a river contained the following entry: "As between our village and the opposite village D, there is an old boundary formed by the main stream of the river, and as up till now the main stream flows below our village the land of the *katr* appertains to village D, but when the main stream shall flow below D, we shall be entitled to the land of the *katr*." The *wajib-ul-arz* of the village on the opposite bank stated, "The river passes by the extremity of this village and, therefore, when any land on this side of the river is washed away to the other side, the same is taken possession of by the Zemindar on whose side the land falls, i.e., the custom of *dhardhura* prevails."

Held, (1) that though the usage of *dhardhura* was expressly mentioned in the *wajib-ul-arz*, yet the condition of things to which it was applicable was stated in words which may merely connote the acquisition of land by gradual accretion, and if that were so the entry would amount to nothing more than a mere recital of the general law.

(2) that there was nothing to show that the entries in the *wajib-ul-arz* were explicitly applicable to a case of a transfer of land from one side of the river to the other by a sudden change of the course of the river. *O. BALBHADDAR PRASAD v. HAR NARAIN DAS*, 9 O. L. J. 518; (1923) A. I. R. (O.) 102

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Riway-i-am, entry in, value of.

An entry in the *riway-i-am* which is not opposed to general custom is a strong piece of evidence in support of the custom mentioned in it.

Beg v. Allah Ditta, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), followed. *L. SANT KATU v. SHER SINGH*, (1923) A. I. R. (L.) 476

786

Sajjada nashin, appointment of, effect of.

In the absence of a *wakf* the appointment of a person as a *sajjada nashin* must be regarded as a courtesy title only.

Zinat Bibi v. Emma, 40 Ind. Cas. 240; 107 P. R. 1917; 111 P. L. R. 1917; 92 P. W. R. 1917, followed. *L. ALI MAHOMED KHAN v. ALI AKBAR KHAN*, 4 L. 133

618

Sea Customs Act (VIII of 1878)—Customs duty.—G. I. P. Railway Company—Stores imported into British India—Line owned by Government but worked by Company—Liability of Company to pay customs duty.

Sea Customs Act—concl.

As the G. I. P. Railway is owned by the Government and has been made over to the Company simply for management under contract, the stores purchased and imported by the G. I. P. Railway Company into India for the use of the undertaking are, at the time of importation, goods belonging to the Government for the purpose of the payment of customs duty. *B. SECRETARY OF STATE FOR INDIA v. G. I. P. RAILWAY*, 25 Bom. L. R. 470; (1923) A. I. R. (B.) 423

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Specific Relief Act (I of 1877), s. 22.—Specific performance—Discretion of Court.

Courts have an absolute discretion to decree specific performance or not.

Specific performance should be refused where it is likely to prove a source of constant trouble and friction between the parties and would not result in an appreciable advantage to the plaintiff, or where the decree for specific performance is likely to prove nugatory owing to the exercise by a subsequent vendee of a superior right of pre-emption. *L. GENDA RAM v. RAM CHANDER* 1013

s. 27.—Specific performance—Constructive notice, doctrine of, applicability of—Third person in possession—Duty of purchaser to make enquiry.

Defendant purchased a piece of land knowing that the superstructure on the land belonged to another person than his vendor. He made no inquiry as to the nature of that person's possession or that of his sub-tenants who were actually in occupation under him, and it ultimately appeared that there was a prior contract to sell in favour of that person. In a suit by the latter for specific performance of the agreement to sell in his favour:

Held, that defendant must be taken in law to have had constructive notice of the prior agreement to sell and of all the equities in favour of the plaintiff, since he had wilfully abstained from or grossly neglected to make an inquiry which would have informed him of the prior agreement and he was, therefore, not entitled to resist plaintiff's suit for specific performance.

The general principle of constructive notice in such cases as the above is that notice of the occupation of the properties purchased by a person other than the vendor which indicates that the vendor is not entitled to present possession, at once puts the purchaser on inquiry as to the interest that occupier holds in the property. Where nothing more is known to the purchaser, or would be known to him, on reasonable enquiry, than the fact that certain tenants are in occupation under a tenant right he is not affected with notice of more than the facts as to those tenants' rights.

But when, beyond this, the purchaser is directly informed and, therefore, knows of the occupation of the property by another whether by himself or by his sub-tenant he is equally put upon notice to inquire into the interest of that other. The absence of such inquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor.

Daniels v. Davison, (1809) 16 Ves. (Jun.) 249; 33 E. R. 978; 10 R. R. 171, *Hunt v. Luck*, (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479

Specific Relief Act—contd.

49 S. R. 155; 17 T. L. R. 3 and *Faki Ibrahim v. Faki Gulam Mohidin*, 60 Ind. Cas. 986; 45 R. 910; 23 Bom. L. R. 335, followed. *M BABA SHAH v. MOHAMMED AKBAR*, (1923) M. W. N. 280; 17 L. W. 541; 32 M. L. J. 301; 45 M. L. J. 1571 (1923) A. I. R. (M.) 563 297

— s. 42—Declaration as to right of succession—Suff. maintainability of.

[A suit does not lie for a declaration, not of an existing right but of a *spes successionis*, that is, the chance or possibility of acquiring a right in the future. The Courts will not grant a declaration that plaintiff is entitled to succeed to certain property on the happening of a certain event. *Sririmathoo Moothoo Vija Ragoonadah Kollandupuree Natchiar v. Dorasinga Tevar*, 2 I. A. 169; 15 B. L. R. 83; 23 W. R. 314; 3 Sar. P. C. J. 456 (P. C.), *Greeman Singh v. Wahari Lali Singh*, 8 C. 12; 9 C. L. R. 249; 6 Ind. Jur. 101; 4 Ind. Dec. (N. S.) 8 (P. C.) and *Pirhi Pal Kunwar v. Guman Kunwar*, 17 I. A. 107; 17 C. 933; 5 Sar. P. C. J. 569; *Rafique & Jackson's P. C. No. 118*; 8 Ind. Dec. (N. S.) 1167 (P. C.), relied on. *L. LALU v. FAZAL DIN*, (1923) A. I. R. (L.) 403; 4 L. 106 893

— s. 42—Hindu manager, alienation by—Declaratory suit by co-parceners, whether competent—Decree for possession on payment of Court-fees.

A Hindu co-parcener is not competent to sue for a mere declaration, that a sale of the family property by the manager is not binding on the family. He must sue for possession as well. Nevertheless even if he has asked for a mere declaratory decree, he can be given a decree for possession on his payment of the necessary Court-fees. *L. AMIR v. KAHAN CHAND*, (1923) A. I. R. (L.) 255 818

— ss. 53, 56—Temporary injunction—Injunction, whether limited to subordinate Courts.

Section 56 of the Specific Relief Act, which occurs in the Chapter relating to perpetual injunctions, has no application to temporary injunctions which are by the express words of section 53 left to be regulated by the Code of Civil Procedure.

A Court can issue a temporary injunction staying proceedings in a Court not subordinate to it.

The Code of Civil Procedure is not exhaustive and the Courts have inherent jurisdiction to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which alone they exist.

Manohar Lal Mahabir Pershad v. Jai Narain-Babu Lal, 55 Ind. Cas. 403; 2 L. L. J. 283, relied on. *L. KANSHI RAM v. SHARAF DIN*, (1923) A. I. R. (L.) 144 909

Stamp Act (II of 1899), s. 2 (22), Sch. I, Art. 5—

Promissory-note—Instrument undertaking to deliver grain on demand, nature of—Stamp-duty leviable.

An instrument which contains an undertaking to deliver a certain quantity of grain on demand, is not a promissory-note as defined in section 2 (22).

Stamp Act—contd.

of the Stamp Act. It is an agreement requiring a stamp of eight annas under Art. 5 of the Stamp Act. *O. ABHAIRAJ KAUR v. DATA DIN, 9 O. & A. L. R. 163* 485

— s. 36—Document held to be admissible in appeal—Decision, whether can be questioned in Letters Patent Appeal.

A suit was brought to recover a certain sum of money on the basis of a document which was held by the Trial Court to be a promissory-note, but which was not, as such, properly stamped. On appeal to the High Court it was held by a Single Judge that the document was not a promissory-note and was admissible in evidence on payment of the necessary stamp-duty and penalty. On an appeal being preferred against this decision under the Letters Patent:

Held, that the order of the Single Judge amounted to an admission of the document in evidence within the meaning of section 36 of the Stamp Act, and, consequently, could not be questioned in appeal.

Mongal Sain v. Gobind Das, 139 P. R. 1890, followed.

An appeal under the Letters Patent is a stage of the suit for the purposes of section 36 of the Stamp Act. *L. BRIJ RAJ SARAN v. JOTI PRASHAD*, (1923) A. I. R. (L.) 657 799

— s. 36—Document insufficiently stamped—Admission in Trial Court—Revision, interference in, whether competent.

If a deed has been admitted in evidence before the Trial Court, even though insufficiently stamped, its admissibility cannot be questioned by a Court exercising revisional jurisdiction. *N. KRISHNAJI v. SUKHEDEO*, (1923) A. I. R. (N.) 284 85

— s. 36—Document insufficiently stamped, admitted in evidence—Admission, whether can be subsequently questioned.

Once a document has been admitted in evidence in the Trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped.

Devachand v. Hirachand, 13 B. 449; 7 Ind. Dec. (N. S.) 299 (F. B.), *Shiddappa v. Irava*, 18 B. 737; 9 Ind. Dec. (N. S.) 1000, followed. *B. BALA v. BHIRU*, 25 Bom. L. R. 450; (1923) A. I. R. (P.) 412 125

— s. 62 (2)—Award directing partition—Stamp, liability to—Arbitrator, signature by—Arbitrator, prosecution of.

Where an arbitrator signs, otherwise than as a witness, an award directing partition on an unstamped paper, he is liable to prosecution under section 62 (2) of the Stamp Act, if the instrument is chargeable with duty. *O. EMPEROR v. PUTROO LAL*, 9 O. & A. L. R. 378; 24 Cr. L. J. 592 336

— Sch. I, Art. 45—Hindu joint family—Oral partition—Deed transferring shares—Stamp chargeable.

At the time of an oral partition between three brothers who formed a joint Hindu family, certain shares in a Company, which stood in the name

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of the eldest brother, were not thrown into the hotch-pot. Subsequently, the eldest brother executed two deeds transferring to each of his younger brothers, the number of shares which fell to each, and the question was as to the Stamp duty leviable on the deeds:

Held, that the deeds were chargeable under Art. 45, Schedule I to the Stamp Act, as instruments of partition. **B SUPERINTENDENT OF STAMPS v. CHIMANLAL LALBHAI**, 25 Bom. L. R. 112; (1923) A. I. R. (B.) 237; 47 B. 321 **718**

Succession—*Pagwand*—*Presumption*—*Whole blood*, *whether excludes half blood*—*Gagiani tribe of Peshawar District*.

Where it is found that the parties to a suit follow the *pagwand* rule of succession the onus of proving that the whole blood excludes the half lies on the party alleging it.

Gholam Muhammad v. Muhammad Bakhsh, 4 P. R. 1891 (F. B.), relied on.

The rule prevailing in the *Gagiani* tribe of the Peshawar District is that in succession to a brother's estate the whole blood excludes the half. **Pesh SAFDAR KHAN v. MUHAMMAD ZAMAN KHAN** 577

Suits Valuation Act (VII of 1887), s. 11—Objection as to valuation—Trial Court exceeding jurisdiction—Change of forum of appeal, effect of—“Appellate Court,” what is.

Under section 11 of the Suits Valuation Act, the disposal of a suit cannot be deemed to have been prejudicially affected on the merits, merely because of a change of the forum of appeal consequent upon the under-valuation.

Raghava Chariar v. Raghava Chariar, 8 Ind. Cas. 545; 20 M. L. J. 726; 8 M. L. T. 404, **Narayani Ammal v. Secretary of State**, 41 Ind. Cas. 167, **Ammalu Ammal v. Krishnan Nair**, 62 Ind. Cas. 711; 30 M. L. T. 38, followed.

Mohini Mohan Misser v. Gour Chandra Rai, 56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123; (1921) Pat. 105, dissented from.

Section 11 of the Suits Valuation Act when referring to an under-valuation or over-valuation “prejudicially affecting the disposal of a suit or appeal on its merits” is not considering at all the different rules of procedure that there may be an appeal from one Court to another.

The mere fact of under-valuation of a suit by the plaintiff involving a trial by a District Munsif instead of by a Sub-Judge's Court cannot be deemed to be “prejudice” within the meaning of section 11 of the Suits Valuation Act to the unsuccessful party on account of the party being restricted to a right of second appeal to the High Court on questions of law only instead of a regular appeal on questions of facts also.

Per Courts Trotter, J.—The object of section 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction. The expression “Court of first instance” in sub-section (1) (a) of section 11 means not the Court in which the suit ought to have been started but the Court in which it was in fact started. Similarly, the expression “Appellate Court” in sub-section 1 (b)

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of the section means not the Court in which the appeals should have been started in the first instance, but the Court to which it did in fact go and ought to have gone, if the lack of jurisdiction were to be condoned. **M NADUVIL EDM KARNAYAN v. CHERIYA PARVATHI NETHIVAR**, 18 L. W. R. 45 M. L. J. 135; (1923) M. W. N. 489; 46 M. 63 **87**

Tort-feasors—Knowledge of illegality—Contribution.

The rule that there can be no right of contributions *inter se* between two wrong-doers applies where the wrong-doers knew or ought to have known that they were doing an illegal or wrongful act; but if they acted under a *bona fide* claim of right and had reason to suppose that they had a right to do what they did, then the right of contribution *inter se* exists.

Subut Singh v. Imrit Tewari, 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N.S.) 1066, **Sreeputty Roy v. Loharan Roy**, 7 W. R. 384, **Merryweather v. Nixan**, (1799) 2 Sm. L. C. (5th Ed.) 546; 8 T. R. 186; 16 R. R. 810; 1 Sm. L. C. (10th Ed.); 383, 101 E. R. 1337, **Farebrother v. Ansley**, (1808) 1 Camp. 342 and **Adamson v. Jarvis**, (1827) 4 Bing. 66; 12 Moore 241; 4 L. J. (O.S.) C. P. 68; 29 R. R. 503; 130 E. R. 693, relied on. **N JHIBU v. BALAJI**, 19 N. L. R. 75; (1923) A. I. R. (N.) 255 **228**

Tort—Report by Municipal Sub-Committee—Privileged communication—Defamation.

A report made to the Chairman by members of a Sub-Committee of a Municipality in discharge of their duty and on a subject in which they are interested as members, is privileged and no action for damages for defamation would lie unless malice was proved against the members. **N SHRIRAM MOTI RAM v. SHAIKH AHMAD**, (1923) A. I. R. (N.) 226 **39**

Transfer of Property Act (IV of 1882), s. 6 (d)—Right to future maintenance—Alienability—Test.

The right under a contract to a defined amount in cash or kind for future maintenance is “property” under section 6 of the Transfer of Property Act. But whether it is an interest in property restricted in its enjoyment to the owner personally so as to render it inalienable under clause (d) must depend on the facts of each case and must be ascertained by the ordinary rules of interpretation of the contract, the question being whether the intention of the parties was that the right should be personal and, therefore, inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution, considered as a contract to come into operation at once without reference to what has in fact since happened.

A widow by a deed surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and maintain her during her lifetime and the document also provided in the alternative that if it was not convenient for her to live

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jointly with him, she should remain in the building in which she resided and be then entitled for separate provision for food, clothing and a certain quantity of rice, which were charged upon certain immovable properties:

Held, that the intention of the parties to be derived from the document was that the rights of the widow under the contract should be personal and inalienable under section 6 (d) of the Transfer of Property Act. **M. SUBRAYA SAMPIGETHAYA v. KRISHNA BAI PADITHAYA**, 46 M. 659; 45 M. L. J. 533. 584

— ss. 8, 43, application of—Transfer of reversionary rights, validity of—Possession, transfer of, effect of.

Although the general principles contained in the Transfer of Property Act are binding upon the Courts in the Punjab and the N. W. F. Province the Act itself with its technicalities has no force as such in these Provinces.

Bhagwati v. Chaoli, 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79, relied on.

In the Punjab and the N. W. F. Province a transferor of reversionary rights is bound by his act when succession opens to him. Even if section 6 of the Transfer of Property Act is to be regarded as making such a transfer illegal and, therefore, a nullity from which no equity can arise, as the Act itself is not in force in these Provinces, the section constitutes no statutory bar to a contract which would otherwise be enforceable in equity.

Bhagwati v. Chaoli, 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79; 2 L. L. J. 689, relied on.

There is no necessary parallel between what a Court can do in execution against a person having merely a *spes successionis* and the equity which such a person can create against himself by binding himself to do something if a certain contingency happens.

A person in possession holding a lien in equity is in a far stronger position than one who is seeking to enforce his equity against a person who holds possession against him. **Pesh KABAL SHAH v. MOHAMMAD BAQA**, 120

— s. 6 (e)—Damages, right to claim whether transferable.

A right to claim damages for an alleged breach of contract is not transferable under section 6 (e) of the Transfer of Property Act. **B. HIRACHAND v. NEMCHAND**, 25 Bom. L. R. 445; (1923) A. I. R. (B.) 403; 47 B. 719. 465

— s. 10—Civil Procedure Code (Act V of 1908), s. 60—Property retained under compromise, whether amounts to transfer—Restraint on alienation, validity of—Life-interest—Attachment under decree.

A Hindu widow, who claimed the widow's estate in certain property which she alleged belonged to her husband, was offered maintenance only on the ground that the property belonged to the joint family. A compromise was arrived at by which she was given a restricted life-interest without power of alienation and the joint family

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was to have the reversion. A decree-holder against the widow urged that the restriction against alienation was void, and in the alternative that the interest of the widow as it was could be attached in execution:

Held, (1) that the compromise was a family arrangement under which the widow was to remain in the personal enjoyment of certain lands for the term of her life, and that it did not amount to a "transfer of property" within the meaning of section 10 of the Transfer of Property Act to attract the provisions of that section as to restraints on alienation;

(2) that the interest of the widow as it was not liable to attachment, as the restriction on alienation prevented the widow from having a "disposing power" within the meaning of section 60 of the Civil Procedure Code. **B. BASANGOWDA VIRUPAXGOWDA v. IRGOWDATI KALLANGOWDA**, 25 Bom. L. R. 293; (1923) A. I. R. (B.) 276; 47 B. 597. 196

— s. 41, applicability of, to manager of religious endowment. See TRUSTS ACT (II OF 1882), ss. 1, 64. 711

— s. 53—Fraudulent transfer, setting aside of—Creditor, who is not judgment-creditor, whether can sue.

There is no warrant for the proposition that a creditor cannot maintain a suit to set aside a deed which is obnoxious to the provisions of section 53 of the Transfer of Property Act, until he establishes his debt by obtaining a decree from a Court of Law.

As soon as a person who complains of a transfer coming within the purview of section 53 of the Transfer of Property Act proves his debt either by producing a decree in his favour or by any other evidence, oral or documentary, he is entitled to sue, and it is not necessary that he must be a judgment-creditor or should have obtained a lien or charging order on the property transferred by his debtor.

Reese River Silver Mining Company v. Atwell, (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601 and **Ishwar Timappa Hegde v. Devar Venkappa Shanbog**, 27 B. 146; 5 Bom. L. R. 19, relied on.

The only distinction between a judgment-creditor and an ordinary creditor who seeks to set aside a transfer as fraudulent under section 53 of the Transfer of Property Act, is that while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor, the latter should bring an action on behalf of the general body of the creditors. **L. CHINA MAL v. GUL AHMAD**, (1923) A. I. R. (L.) 478. 719

— s. 54—Sale, verbal—Consideration, payment of—Possession, delivery of—Registration not effected by vendor—Vendor, right of—Equity, rule of.

A person sold a plot of land to the defendant and agreed to execute a deed of sale in respect of it. The latter paid the consideration and possession was delivered to him. The vendor failed to perform his agreement and the sale was declared

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invalid for want of a registered deed. In appeal the vendee contended that the vendor could not oust him, as he had paid the consideration and obtained possession:

Held, that if the sale could not take effect as a sale for want of formality, it would have the effect of an agreement for sale with consequences in equity, and that, therefore, the vendee obtained a good title in equity to the land in suit.

Puchha Lal v. Kunj Behari Lal, 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213; *Jnan Chandra Das v. Rajani Kanta Pal*, 41 Ind. Cas. 850; 22 C. W. N. 522; *Maung Shwe Goh v. Maung Inn*, 38 Ind. Cas. 938; 44 C. 542; 21 C. W. N. 500; 21 M. L. T. 18; 15 A. L. J. 82; (1917). *M. W. N.* 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 5 L. W. 532; 10 Bur. L. 1. 69; 44 I. A. 15 (P. C.), relied on. *Pat RAM KISHUN MAHTO v. HARIHAR MAHTON* 30

s. 68—Compromise in execution of decree—Mortgage, usufructuary, created—Registration, absence of—Long recognition of mortgage by parties—Estoppel—Hindu Law—Mortgage—Destruction of security—Substitution—Government revenue paid by mortgagee—Recovery from mortgagor—Covenant, implied.

In 1869, the parties to a money-decree came to an agreement in execution of the decree, which was embodied in an application made to the Court. According to the agreement it was acknowledged that a certain sum was due to the plaintiff, and he was put in possession of certain plots of land belonging to the defendant, it being agreed that he should take the usufruct in lieu of the interest due on the debt, and that the defendant could redeem the land on payment of the amount of the debt. It was further agreed that if the plaintiff was dispossessed he should then proceed with the execution of the decree. The Court accepted the compromise and plaintiff obtained possession of the land. In 1920 the land was submerged by the action of a river and the plaintiff sued under section 68 of the Transfer of Property Act, requiring the defendant to give at equivalent security to the plaintiff for the land or to pay up the amount of the debt together with a certain sum paid by the plaintiff as Government revenue:

Held, (1) that even though the due formalities had not been complied with no objection to the validity of the mortgage could be taken after it had been acted upon by the parties for fifty years; *Abid Husain v. Asghar Husain*, 19 Ind. Cas. 445; 11 A. L. J. 506; *Salamat-uz-zamani Begam v. Masha Allah Khan*, 43 Ind. Cas. 645; 40 A. 187; 15 A. L. J. 98, followed.

(2) that, even if section 68 of the Transfer of Property Act was not applicable to the case owing to the fact that the mortgage had been created before the passing of that Act, the principles of Hindu Law, by which the parties were governed, applicable to such a case were exactly the same as those embodied in section 68.

(3) that the plaintiff having been compelled to pay the Government revenue owing to the in-

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ability of the defendant to do so, and in order to avoid being dispossessed from the land, the defendant was liable to pay the amount to the plaintiff.

(4) that the condition contained in the compromise that in the event of dispossession the remedy of the plaintiff was to execute his decree could not apply to a case of dilavion;

(5) that, therefore, the plaintiff's suit must be decreed.

In every contract of usufructuary mortgage there is at least an implied contract for quiet possession and this implies a contract to pay the Government revenue in order to avoid dispossession for non-payment. *A RAM SEWAK RAI v. SHEO NAIK RAI*, 21 A. L. J. 294; 45 A. 388; (1923) A. I. R. (A.) 433 945

s. 68—Mortgage security—Diminution in value.

A mortgage security will be considered diminished in value within the meaning of section 68 of the Transfer of Property Act, if its letting value has decreased, even though the property itself has undergone no change.

Where a person who mortgaged his *str* plots with possession stipulated to pay Rs. 75 as interest on the mortgage money and executed a simultaneous *kabuliyat* to rent the plots from the mortgagee at the amount but at the time of the fixation of rent by the Revenue Court as ex-proprietory tenant, objected to the amount, and the Rent Court fixed the rent at Rs. 27:

Held, that the value of the security had diminished within the meaning of section 68 of the Transfer of Property Act and the mortgagee could sue for the mortgage money. *A FARUK DIN v. KISHEN LAL*, (1923) A. I. R. (A.) 584 902

s. 72—Repairs by mortgagee—Improvements to suit particular tenant.

Putting iron bars into a window of a house usufructuarly mortgaged, in order to suit a particular tenant, for doing which the mortgagee has received increased rent, is not repairs within the meaning of section 72 of the Transfer of Property Act; and no compensation can be claimed for the same at the time of redemption.

Rupan Singh v. Champa Lal, 26 Ind. Cas. 521; 37 A. 81 at p. 86; 13 A. L. J. 14, followed. *A CHHAMMU LAL v. BHAJAN LAL* 985

s. 83—Deposit by mortgagor—Non-acceptance by mortgagee—Disposal of case—Subsequent payment to mortgagee—Jurisdiction of Court—Security bond; legality of.

Where a mortgagee refuses to accept a tender made by a mortgagor in Court and the Court disposes of the matter by passing an order that the mortgagor is entitled to withdraw the money, it is not open to the Court afterwards to direct payment of the money to the mortgagee.

Section 83 of the Transfer of Property Act does not authorise the Court to take any security bond from any party when disposing of the money tendered by the mortgagor in respect of the mortgage. *Pat RATNA KOER v. NANHAKI*, (1923) Pat. 256 1053

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s. 89, construction of—Priority.

An order made under section 89 of the Transfer of Property Act for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. Therefore there can be no right of priority in respect of a payment made after the passing of such an order.

Het Ram v. Shadi Ram, 45 Ind. Cas. 798; 48 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 L. A. 130 (P. C.); and *Maru Mal v. Durga Kunwar*, 55 Ind. Cas. 969; 47 L. A. 71; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; (1920) M. W. N. 323; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.), followed.

Bibijan Bibi v. Sachi Bewah, 31 C. 863; 8 C. W. N. 684, discussed. *O LUTAR RAM v. LAL RANJIT SINGH*, 9 O. & A. L. R. 677 113

s. 91 (f)—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Attaching creditor, whether necessary party—Omission to implead—Right of redemption whether affected.

A creditor, attaching mortgaged property in execution of his money-decree who is given a right to redeem by section 91(f) of the Transfer of Property Act is a person having an interest in the right of redemption and is thereby entitled under O. XXXIV, r. 1 of the Civil Procedure Code to be joined as a defendant in a suit on the mortgage. If he is not so impleaded, his right to redeem cannot be affected by a decree in that suit. *N MEGHRAJ v. KESHEO RAO*, 6 N. L. J. 181; (1923) A. I. R. (N.) 311 8

s. 101—Merger—Mortgagee acquiring equity of redemption.

The latter portion of section 101 of the Transfer of Property Act does not apply where no intervening incumbrances exist and where a merger of a less estate takes place in a greater estate which is to be distinguished from the merger of a lower in a higher security. Where a mortgagee also becomes the absolute owner of the equity of redemption, the mortgage is extinguished by merger, unless there are any puisne or mesne incumbrances against which the equity of redemption is required to be kept alive.

Bhawani Kumar v. Mathura Prasad Singh, 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 39 L. A. 228 (P. C.); *Arunugasundara Maharaja Pillai v. Narasimha Iyer*, 20 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 39; 14 L. W. 542; 18 M. L. T. 110, *Rajah of Kalahasti v. Prayag Dassjee Varu*, 35 Ind. Cas. 223; 30 M. L. J. 391; (1916) 2 M. W. N. 92, and *Sri Ram v. Ramji Das*, 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909, followed on.

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Chiali Ram v. Gulab Khan, 11 Ind. Cas. 392; 37 P. R. 1911; 190 P. L. R. 1911 and *Bur Singh v. Hazara Singh*, 63 Ind. Cas. 760; 3 L. 99; (1922) A. I. R. (L.) 275, distinguished. *L GOBIND SARUP v. KULDIP SINGH* 764

Trespass—Building on land belonging to another—Knowledge of builder, effect of—Building without permission—Building, removal of—Acquiescence, doctrine of.

If a person begins to build on land supposing it to be his own and the real owner, perceiving the mistake, abstains from setting him right and leaves him to persevere in his error, he will be allowed, in equity, to assert his title to the land. But if he builds, knowing it to be the property of another, nothing will prevent the real owner from afterwards claiming the land, with the full benefit of the expenditure upon it.

Ramsden v. Dyson, (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926 and *Bemi Ram v. Kundan Lal*, 26 I. A. 58; 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.), relied on.

When a person writes a letter to another asking permission to construct a building upon his land and makes the construction in the expectation that permission will be granted but without waiting for it, he does so at his own risk.

Where a person builds on another's land the acquiescence of the owner will deprive the latter of his legal rights, only when the acquiescence amounts to fraud. There are several requisites necessary to constitute fraud. In the first place, the person making the building must have made a mistake as to his legal rights. Secondly, he must have expended some money or must have done some act, not necessarily upon another's land on the faith or mistaken belief. Thirdly, the owner, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the person making the building. Fourthly, the owner must know of the latter's mistaken belief of his rights. Lastly, the owner must have encouraged the person making the building in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. When all these elements exist, there is fraud of such a nature as will entitle a Court to restrain the owner from exercising his legal rights.

Willmoti v. Barber, (1880) 15 Ch. D. 96 at p. 105; 43 L. T. 95; 28 W. R. 911, relied on. *HEMANGINI DEVI v. BEJOY SINGH* 223

Trust—Fraudulent introduction of stranger—Breach of trust.

The fraudulent introduction by some of the trustees of a stranger into the body of trustees amounts in law to a breach of the trust. *M SANKARAN NABI v. DEVAKI ANTHEERJENAM*, 16 L. W. 26; (1922) M. W. N. 428; (1922) A. I. R. (M.) 259; 43 M. L. J. 572 491

Trusts Act (II of 1832), s. 1, 64—Transfer of Property Act (IV of 1882), s. 41, applicability to manager of religious endowment—Mahant